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DISTRICT COURTS OF THE
UNITED STATES

OCTOBER—NOVEMBER, 1915

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[2] Recess appointment August 16, 1915. [3] Recess appointment November 2, 1915.

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†

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

In re STEARNS SALT & LUMBER CO.

In re HANDY THINGS CO.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1915.)

No. 2767.

1. BANKRUPTCY ⊂=482—PREFERENCES—SUITS TO SET ASIDE—ACTIONS—EMPLOYMENT OF COUNSEL.

The referee in bankruptcy, on petition of an unsecured creditor, directed the trustee to sue to set aside a preference by the bankrupt, on condition that the petitioning creditor should indemnify the trustee. The indemnity was given, and in reply to a letter by counsel selected by the creditor, and who claimed compensation from the estate, the trustee informed them that it would be all right to bring suit, and that he desired any action taken by such counsel should be referred to his attorney; it being the trustee's understanding that he was not responsible for any expense of the suit. The trustee's attorney informed counsel that he saw no defects in their declaration, and that the trustee merely desired some one to keep track of the progress of the suit and advise him. The suit was successful. *Held* that, in view of the correspondence and the trustee's acquiescence, counsel must be held to have been employed under sanction of the court and with consent of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂=482.]

2. BANKRUPTCY ⊂=446—PROCEEDINGS TO REVISE—FINDINGS.

On a proceeding to revise in a matter of law an order of the District Court, findings of fact cannot be questioned.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂=446.]

3. BANKRUPTCY ⊂=482—PREFERENCES—ATTORNEY'S FEES.

An unsecured creditor filed a petition to compel the trustee to sue to set aside a preference by the bankrupt. On a suit instituted by attorneys selected by the unsecured creditor with the consent of the trustee, the preference was set aside and a large sum was made available for payment of the general creditors. *Held*, that the expenses of the suit, as well as the attorney's fees, could be paid out of such general fund, notwithstanding the preferred creditor owned a large majority of the unsecured claims; the suit being for the benefit of the preferred creditor in its capacity as a general creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec Dig. ⊂=482.]

Petition to Revise Order of the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

In the matter of the petition of the Stearns Salt & Lumber Company to revise an order of the District Court in the case of the Handy Things Company, bankrupt, whereby Cleland & Heald were allowed a claim for legal services and expenses. Order affirmed.

L. W. Harrington, of Grand Rapids, Mich., for petitioner.

H. T. Heald and R. J. Cleland, both of Grand Rapids, Mich., for respondent.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. On December 19, 1914, Cleland & Heald, lawyers, filed a petition in the court below, asking allowance of a claim for fees and expenses in the sum of $5,900.43. The services were rendered and the expenses incurred in a suit of the trustee of the Handy Things Company, bankrupt, against the Stearns Salt & Lumber Company, to recover the proceeds of a preference alleged to have been given by the bankrupt. After a hearing upon the merits of the claim, the referee entered an order allowing $5,000 for the services and $205.43 for expenses; and this amount, less $474.66 paid by the trustee, or a net balance of $4,730.77, was directed to be paid from the bankrupt estate. Upon petition of the Stearns Salt & Lumber Company for review in the District Court, the order of the referee was affirmed, and the petition for review dismissed. The case is pending here upon a petition of that company to revise in matter of law.

The preference suit mentioned was brought to this court, and is reported as Stearns Salt & Lumber Co. v. Hammond, 217 Fed. 559, 133 C. C. A. 411. The controlling facts of the case appear there and need not be repeated. The Lumber Company, as we shall call it, holds about 71 per cent. of the unsecured liabilities of the bankrupt, and the remaining 29 per cent. is held by other creditors. The recovery in the preference suit amounted, with costs and interest, to $21,895.02. As we understand the argument of counsel for the Lumber Company, their claims in substance are these: (1) The estate has no funds out of which the claim could be paid, except such as were derived through the judgment in the preference suit; (2) the attorneys were not employed at the instance of either the trustee or the Lumber Company, and, since the suit and recovery were against that company, it cannot rightfully be said to have derived any benefit from the litigation, and so cannot be compelled as a general creditor to contribute anything for the services rendered or expenses incurred in the case; and (3) the compensation allowed is so great as to absorb the benefits received by the minority general creditors. We think the first of these claims is true; and it may be conceded that the last one is also true, if the claims secondly mentioned are sustainable. The controversy is thus reducible to a consideration of the claims secondly stated.

[1, 2] Were the present claimants authorized by the trustee to commence and conduct the preference suit? True, it is said by the claim-

ants that the trustee was, throughout, hostile to the suit; and a special proceeding seems to have been necessary to compel him to take action. The referee, after hearing testimony under a petition of an unsecured creditor and the answer of the trustee, authorized and directed the trustee to begin and prosecute the action, on condition that the petitioning creditor should indemnify the trustee against damage and costs; and the indemnity was given. The present claimants represented the petitioning creditor, and what took place between them and the trustee respecting the right of the former to take part in the preference suit appears in correspondence. The trustee desired to have additional counsel engaged in the suit as his attorney; and we think the following letters of February 12 and 24, 1912, fairly represent the ultimate arrangement made between the trustee and the claimants:

Hammond, trustee, to Cleland & Heald:

"I have received a letter from the referee regarding the suit against the Stearns Salt & Lumber Company to recover the $15,000 paid them from the Handy Things Company insurance. It will be all right to bring suit there in the courts at Grand Rapids, as you suggest, also for you to prepare the papers. I have notified my attorney, Mr. M. B. Danaher, to this effect, and you can correspond with him. My expectation is that any action taken by you will first be referred to him, so that he will be in touch with it all; also that the suit will be pushed through as rapidly as possible. I understand, also, that I am not to be responsible for any expense by reason of your conducting the suit."

Danaher to Cleland & Heald:

"* * * I think the petitioning creditors should have the privilege of employing the attorneys of record, who should have the general management of the case. What Mr. Hammond wants is some one to be connected with the case who will keep track of its progress and advise him in case he needs advice. * * * I see no defects in your declaration."

It does not appear that Danaher took active part either in the preparation or the trials of the preference suit; on the contrary, the proofs show that Cleland & Heald actively and laboriously prepared and conducted the litigation throughout. Upon consideration of the entire correspondence, and of the trustee's acquiescence in the claimants' conduct of the suit, we agree with the District Judge in his finding:

"The petitioners were employed under the sanction of the court and with the consent of the trustee to conduct this litigation."

And, under the petition to revise in matter of law, it would have been sufficient to rest this feature of the case upon this finding alone.

[3] The Lumber Company claims, as we have seen, that the attorneys were not employed at its instance. It is hardly necessary to say that the Lumber Company did not take part in securing counsel to conduct the preference suit, any more than it did to procure commencement of the suit; indeed, the company was insisting that it was absolutely entitled to the subject of the preference. The preference consisted of certain insurance money, and specific chattel property accepted at a stated price, all of which the Lumber Company received and applied upon its unsecured claim against the bankrupt company. Stearns Salt & Lumber Company v. Hammond, supra, 217 Fed. at

page 560, 133 C. C. A. 411. The title to this money and property was in the bankrupt company at the time the preference was given, and not in the Lumber Company. The title therefore passed to the trustee at the time of the bankruptcy; and it was in part upon this theory that the trustee's recovery was allowed in the suit. 217 Fed. 561, 562, 563, 564, 133 C. C. A. 411. It is a mistake to suppose that the Lumber Company was compelled to surrender either money or the value of chattel property which it had ever owned. It was required to restore something that already belonged to the bankrupt estate. The effect of the judgment in the suit was to fix the relation of the Lumber Company to the funds now in dispute as simply that of an ordinary general creditor of the bankrupt estate. Page v. Rogers, 211 U. S. 575, 581, 29 Sup. Ct. 159, 53 L. Ed. 332. It is therefore not easy to see why the company's wrong in respect of the preference should of itself amount to a right to escape the ordinary obligation of a general creditor. Although, as the referee in substance found, the unsecured claim of the Lumber Company, which equals 71 per cent. of the total unsecured liabilities of the estate, was proved and allowed (in part as secured by the preference and in part as an unsecured claim) before the preference suit was commenced, still a portion of the language of Mr. Justice Moody in Page v. Rogers forcibly applies (211 U. S. 581, 29 Sup. Ct. 159, 53 L. Ed. 332):

"Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors."

Again, in answer to questions certified by this court touching the right of a preferred creditor, who had compulsorily surrendered his preference, to prove his claim as a general creditor, Mr. Justice (now Chief Justice) White said, in Keppel v. Tiffin Savings Bank, 197 U. S. 356, 361, 25 Sup. Ct. 443, 445 (49 L. Ed. 790):

"We think it clear that the fundamental purpose of the provision in question (section 57g of the Bankruptcy Act [section 9641, Comp. St. 1913]) was to secure an equality of distribution of the assets of a bankrupt estate. This must be the case, since, if a creditor, having a preference, retained the preference, and at the same time proved his debt and participated in the distribution of the estate, an advantage would be secured not contemplated by the law. Equality of distribution being the purpose intended to be effected by the provision, to interpret it as forbidding a creditor from proving his claim after a surrender of his preference, because such surrender was not voluntary, would frustrate the object of the provision, since it would give the bankrupt estate the benefit of the surrender or cancellation of the preference, and yet deprive the creditor of any right to participate, thus creating an inequality."

We do not see how liability of the minority general creditors to contribution, and nonliability of the Lumber Company in that behalf, can be reconciled with the principle of equality thus declared in these decisions. However, as we have in effect already stated, a further feature of the contention is that, before a creditor can be compelled to contribute to the expense of a preference suit to the bringing of which he has not assented, it must be shown that he has been benefited, and that the Lumber Company has derived no benefit from the suit. It is said that this question did not arise, for

instance, in the case of Page v. Rogers. The question appears to have been made by counsel in the case, and, though neither this court nor the Supreme Court discussed the question, it seems clear enough that the effect of their conclusions was to compel the creditor losing his preference, to contribute ratably as a general creditor toward payment of counsel fees for services rendered in the preference suit. Page v. Rogers, 149 Fed. 194, 195, 79 C. C. A. 153; Id., 211 U. S. at page 581 near bottom, 29 Sup. Ct. 159, 53 L. Ed. 332. Further, we think the Lumber Company has in fact, as well as in theory, derived benefit from the litigation. This benefit is to be measured by the company's proportionate share (according to its entire 71 per cent. unsecured creditor-interest) in the estate of the bankrupt as it has been augmented by the recovery. Such a benefit is not to be tested by comparing it with the loss practically incurred through inability to hold the preference. This would be to allow the preferred creditor to take advantage of his own wrong; and yet this is the only perceivable theory upon which the preferred creditor, who has been compelled to surrender his preference, can differentiate his situation from that of any of the other unsecured creditors.

These views are not answered by counsel's insistence that the preference suit was adverse to the interest of the Lumber Company. The suit was adverse to the company's asserted interest as absolute owner of the subject of the preference, but not to its interest as a general creditor of the bankrupt estate. Since the company saw fit to claim ownership in property which in truth belonged to the bankrupt estate, it ought not to be heard to say that a suit brought to put an end to this untenable claim was adverse to another and distinct, though undivided, interest which the company could rightfully claim as a general creditor of the estate. It is, of course, not meant by this to decide that a litigant may be required, in a suit brought to deprive him of his own property or other rightful interests, to contribute to the payment of adversary counsel fees.

We may illustrate the distinction intended to be pointed out, by reference to Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940, relied on by counsel for the Lumber Company. The case involved a number of issues; one concerned an alleged partnership fund, which had come into the possession of Hobbs, as assignee in bankruptcy of one of the partners. In a suit brought against the assignee by the other partners (570), it was held that the fund belonged to them (581). The assignee's position in the suit was wholly adversary to the claim of ownership in the plaintiff partners; and, upon the establishment of their title to the fund, the assignee claimed compensation for his services, expenses and attorney's fees, in recovering the fund in the Court of Claims. After finding that he had rendered no services and stating the rule of proportional contribution laid down in Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157, it was said in Hobbs v. McLean, 117 U. S. 582, 6 Sup. Ct. 877, 29 L. Ed. 940:

"But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reim-

bursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate."

If the principle thus announced is not applicable to the facts of the present case, and we think it plainly is not, it is safe to say that all the cases upon which counsel for the Lumber Company base the portion of their argument relating to the claimed adversary nature of the preference suit are irrelevant. Indeed, the adversary feature of that suit is more nearly analogous to that of Page v. Rogers than it is to the adversary character of any decision that has come to our notice; and we are disposed to rest our decision upon the effect of the ruling of this court and of the Supreme Court in that case. We cannot believe that where a defendant has been held, as here, to have rested his defense upon an unlawful claim of ownership, he can subsequently and rightfully insist that his incidental and lawful interest in the subject of the original suit was adversely involved. This would be but a contradiction of the admitted purpose in the original suit to conserve such lawful and incidental interest for the benefit of its real owners; and the circumstance that the defendant in the original suit happens to be one of the class of beneficiaries in whose interest the suit was maintained does not render the benefit he receives any the less obvious.

We have a case, then, in which compensation is sought by claimants for services rendered by them in the commencement and prosecution of the preference suit in the name of the trustee and with his consent. The services so performed resulted in bringing a fund into the court, which is the only source of dividends open to the general creditors of the bankrupt estate. Apart from the matters which have already been considered, there is practically no issue between counsel as to the rule of distribution that should be applied. There is no escape from the rule laid down in Page v. Rogers. We may therefore content ourselves with adding the expression of Mr. Justice Bradley in Trustees v. Greenough, supra, 105 U. S. at page 534, 26 L. Ed. 1157:

"The rule that a party who recovers a fund for the common benefit of creditors is entitled to have his costs and expenses paid out of the fund prevails in bankruptcy cases."

True, it is said that the allowance in the instant case is opposed to the rule laid down by this court in Re Roadarmour, 177 Fed. 379, 100 C. C. A. 611; but the failure of recovery in that case was due to a very different reason from anything existing here, and the recognition there given to the effect of section 64b2 of the Bankruptcy Act is in entire harmony with recovery here.

Another instance of failure of recovery to which allusion is made by counsel, is found in Re Medina Quarry Co., 191 Fed. 815, 816, 112 C. C. A. 329 (C. C. A. 2d Cir.), where again the failure was due to reasons not applicable here; and as indicating that court's views of the scope of the section just alluded to, we may refer to a clause of the opinion:

"And, in our opinion, if the allowances in question cannot be sustained under this statute, they cannot be sustained under any other provision or general power. None is broader."

We cannot think it necessary to analyze the testimony which the claimants offered below in support of their view of the value of the services. The testimony is unusual in its detailed description of the work performed. The value of the work is shown by the opinions of a number of experienced and distinguished lawyers. No opposing testimony was offered. The opinion of the referee discloses a careful consideration of the entire subject, and was approved and adopted by the court below; and since the allowance was satisfactory to a conservative trial judge, it cannot be reasonably questioned.

After examination of the record and assignments, we are convinced that the order should be affirmed, with costs.

THURLOW et al. v. WRANGEL et al.

CENTRAL AGUIRRE CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. June 25, 1915.)

No. 253.

COLLISION ⊂=125—SUIT FOR DAMAGES—DEFENSE.

Evidence considered, and *held* insufficient to sustain the allegations of the answer, in suits against a steamer for collision with a schooner at sea, that after the master and crew of the schooner had abandoned her, and come on board the steamer, the master caused her to be set on fire, and thus prevented the steamer from saving her, but rather to show that the schooner was so injured that she could not be saved, and that all parties acquiesced in burning her as a derelict dangerous to navigation.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266–279; Dec. Dig. ⊂=125.]

Appeals from the District Court of the United States for the Southern District of New York.

Haight, Sandford & Smith, of New York City (C. B. Smith, of New York City, of counsel), for appellants.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (E. E. Blodgett, of Boston, Mass., of counsel), for appellees Thurlow and others.

Harrington, Bigham & Englar and T. C. Jones, all of New York City (D. Roger Englar, of New York City, of counsel), for the appellee Central Aguirre Co.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. November 19, 1912, at about 2 a. m., the Norwegian steamer Fram on a voyage from England to Mobile, while in charge of the second officer, came into collision with the American schooner James Pierce on a voyage from Philadelphia to Porto Rico. The schooner was laden with a cargo of soft coal, was on her port tack, and was cut down below the water line on her port side forward. She was then about 500 miles from the nearest land. The steamer stood by until the following morning, when at 7:30 the master and crew

of the schooner came aboard. The master said that she was making water so fast that the pumps could not control the leak, that the injuries below the water line were such that she could not be towed to port, and he had therefore determined to abandon her. The master of the steamer, doubting this to be the real condition, continued to stand by, and at 10:30 sent over his second officer and one of his men with the mate of the schooner and one of her men to see whether anything could be done. The second officer and first mate went aboard the schooner, the two seamen remaining in the boat, and while the officers were aboard, the schooner was set on fire forward and aft and abandoned. The owners of the schooner and of her cargo filed libels against the steamer to recover for a total loss, charging her with negligent navigation. The owners of the steamer answered, waiving any contest as to their liability, but asking that the libels be dismissed on the ground that the schooner had been unnecessarily burned by her first mate pursuant to secret orders given him by her master, whereby they were deprived of any opportunity to save her. The mate of the schooner testified that before he left for the schooner the master of the steamer told him to put a hole in her or to do something because he could not afford to hang around waiting for her to sink. On the other hand, the master of the steamer testified that after the schooner was seen to be burning her master admitted that he had instructed his mate to set her afire. The commissioner in a very careful report came to the conclusion that the schooner could not have been saved, and that therefore it made no difference who set her afire. This relieved him from the necessity of determining whether her witnesses or the witnesses from the steamer were guilty of perjury. The witnesses from the schooner testified in his presence, and he said of them:

"Nothing in the appearance or demeanor of Capt. Vail and the members of his crew who testified before me indicated that they were not testifying with sincerity."

The witnesses for the steamer on the other hand testified by deposition. Judge Hough confirmed the report, saying in addition that the second officer who was responsible for the collision should not have been sent to inspect the schooner because he was interested to minimize her injuries. This, however, we think is just why he would have been the last person in the world to set her on fire, or to allow the mate of the schooner to do so, unless either he had received such orders, or the matter had been left to his own discretion and he thought she could not be saved. Counsel for the steamer insist that we should determine which party is telling the truth about this matter, and we shall do so. The weight to be given to the testimony depends largely upon the reasonable probabilities of the situation. The mate of the schooner testified:

"By the Commissioner: Q. When you left the steamer with the steamer's mate to board the schooner, did you intend to set fire to the schooner? A. Did I intend to? Q. Yes. A. Yes; I did. Q. Before you left the steamer? A. Yes; before I left the steamer. Q. Did you communicate that to anybody aboard the steamer? A. Did I? Q. Yes. A. No. Q. You didn't talk with anybody at all? A. No, sir. Q. Did you talk with the mate about it on the way over to the schooner? A. I won't be sure whether we did on the way

over or not. Q. I understood you saturated some things with oil in the bow and stern before you applied the match? A. Yes. Q. What was it, kerosene oil? A. Yes, sir. Q. Did you say anything to the mate of the steamer before you did that? A. We were together; I thought he understood just what we were doing. Q. Was anything said? A. There was not anything said. Q. Where did you get the oil? A. It was in the engine room, right on the work bench. Q. Did he go with you to the engine room? A. He was with me all the time. Q. Did you tell him what you were going to the engine room for? A. He seemed to know what I was going for. Q. What did you say to him? A. I said, 'I am after the oil can.' Q. Did he make any comment on that? A. No, sir. Q. Was he with you when you brought the oil and the different things? A. Yes. Q. Did he make any comment why you were doing that? A. He only thought I didn't have enough in the can; I had a little can of oil; he looked at it and said, 'That is not enough for anything.' Q. That is when you got the can from the engine room? A. Yes. Q. When you got aboard the steamer again could you see that the schooner was afire? A. Yes. Q. Smoke coming out? A. Yes. Q. Did you see the captain when you got on deck, the captain of the steamer? A. Yes. Q. Did he say anything? A. No, sir. Q. Did he look towards the schooner, or don't you know? A. I don't know whether he did or not; he took charge of taking the boat up. Q. Do you know the captain saw the fire? A. He seen she was afire long before we got back. Q. You had no conversation with him when you got back on the steamer about her being afire? A. No. Q. Did you hear him make any remark of any kind about it? A. No, sir. * * * Q. You were asked certain questions by the commissioner about talking with the second mate, and you said he was with you when you got the oil can, etc.; did you ask him for the match which you said he gave you, to set fire in the after cabin? A. He gave it to me; I said, 'I have no dry matches,' and he said, 'I have some,' and he gave me a match. Q. You said you intended to set her fire when you left the steamer; what had caused you to have that intention? A. I thought he wanted the houses destroyed, and I can't say whether he told me to set her afire or not, but that is what I supposed he was wanting. Q. Who told you that? A. The captain of the steamer; that is what I supposed we were going for, to set her afire; he said the houses were just as bad as the vessel itself."

The master of the schooner testified:

"Q. Did he [the master of the steamer] say anything after you first got on board about going back to the vessel? A. Not until after; some time after. Q. Do you know what time it was? A. No, sir. Q. What led up to the boat going back? A. Nothing more than to satisfy himself; in the first place he said the wreck should be destroyed. Q. When did he say that? A. After I had been on board a few minutes; I told him she would sink; he said her houses would blow off, and it would be almost as much of a menace as the hull, and he said it is the proper thing to do to destroy the wreck. Q. Did you say anything to him as to whether he was at liberty to do anything he wanted with the wreck? A. Yes. Q. What did you say? A. I told him we were through. Q. What did he say? A. He didn't say anything; I don't know that he gave me any answer. Q. Did he ask you at any time for the right to put anybody on board and man her and tow her in? A. No, sir. Q. Did you ever refuse him such a right? A. No, sir; he had nobody to put on board to tow her. Q. What did the captain of the steamer say to you in reference to having some one go over? A. He said he would like to have a look at her. * * * Q. When you saw the smoke first where were you standing? A. On the lower bridge of the steamer. Q. Who was there? Was the captain of the steamer there? A. Yes, sir. Then we went— Q. Was anything said when the smoke was first seen rising from the schooner; if so, what was it? A. I said they have set her afire, or spoke of her being on fire; he didn't say anything; 'Um-um,' or something of that sort. Q. Did he say anything at all? A. Nothing particularly. Q. Did he say anything about why they would have set her on fire? A. No, sir. Q. Did you tell him anything to the effect you had ordered your mate to set her afire? A. No, sir. Q. Did the captain at any time ever express any surprise or any objection to her

being set afire? A. No, sir; none whatever. Q. Did anybody else on the ship? A. No, sir. Q. After the mate came back was anything said as to why he set her on fire? A. I don't think so. Q. Did you hear anything said by the captain or anybody? A. No, sir. Q. Did you hear anything said while you were on the ship before you got into Mobile by any officer or member of the crew of the steamer expressing surprise at the vessel being set on fire? A. No, sir; not a word. * * * Q. You say you didn't know your mate was going to set fire to the boat? A. No, sir. Q. Isn't it true that when the smoke first came out of the schooner's companionway, or came from wherever it was, the captain of the steamer turned around and said, 'What does that mean?' A. No, sir. Q. Nothing of that kind happened? A. No, sir; didn't show any surprise at all. Q. Although you didn't know your mate was going to set fire to the boat and your mate testified nobody told him to, still not a word was said to show surprise when the smoke first appeared? A. The captain had been talking about setting fire to it; suggested it to me. Q. Not a word was said by the captain or by you to indicate any surprise when the smoke was first seen? A. Not surprise particularly; we mentioned it, of course; we said, 'There goes the smoke,' or 'They have set her afire.' Something of that sort. Q. Although you hadn't ordered it done it didn't surprise you? A. Not much; I don't say at that time the captain of the Fram had told them to set it afire; he had mentioned the matter of setting it afire; he said her deck-house would blow off if she sank. Q. That was when you first got aboard? A. No, sir; after we had been there a little time talking of this wreck lying there. Q. Five or 10 minutes? A. I can't say as to that. Q. Not much more than that, was it? A. I don't remember; it was after we were around there, after I had been on board some little time; I can't tell that; he spoke of it two or three times, of destroying the thing, getting it out of the way."

The master of the steamer testified:

"Q. Was there any discussion shortly after the captain came aboard about the destruction of the schooner? A. Destruction? Q. Burning or sinking her? A. When he came aboard he said, 'If she is sinking, I should just as well fire her;' that was just after he came on board before this last conversation about sinking, after I brought him in his room, I said, 'When is she sinking so fast?' and he said, 'Two feet in that time.' I said, 'You had just as well destroyed her.' He said, 'I am not going to do that; you can do it.' I said, 'I am not.' That was all the conversation there was; then we come to the other. Q. After the captain came aboard about 8:30, how long did you stand by the schooner before you sent a boat over to him? A. The boat was sent off about half past 10. Q. Why did you send the boat off at 10:30? A. She seems to me not to sink, and I thought he was so anxious to let me get away, and it made me a little suspicious about it; I thought all must not be right, and I had better go over and see what I can do with the vessel. * * * Q. Did you see the second mate and the mate of the schooner when they got up on the schooner? A. I saw them come alongside. Q. About how long were they aboard the schooner? A. Something like 20 or 25 minutes, I should say—20 minutes. Q. And what was the next thing that called your attention particularly after they got aboard? A. I was on the bridge talking with my mate, and the captain of the schooner was also up there, and the mate turned around and said to me, 'There is smoke coming out from her.' Q. Your chief officer? A. My first mate. Q. He called your attention to how the smoke was coming out of the schooner? A. Yes, sir; I turned around and saw it myself, so I said: 'What is the meaning of this; what are you doing that for?' Q. To the captain of the schooner? A. Yes, and also to the mate; my first mate was there also. Q. What did the captain of the schooner say? A. He said he told his mate to fire the ship. Q. What reply did you make? A. I didn't make any reply, I was so surprised. Q. Did you speak to your mate and wheelman when the captain of the schooner said he had ordered the fire? A. Yes, sir. Q. What did you say to the mate? A. 'Did you hear that?' I said; and also to the man at the wheel, but the man at the wheel said he couldn't understand it. Q. Why did you ask your mate if he heard the captain of the schooner say that? A. I did it only to know that he had ordered it to be done; ordered

the people to do that business. Q. Up to the time that the captain of the schooner told you that he had ordered his mate to set fire to the ship, had you the slightest idea that the mate of the schooner had gone over for that purpose, and with those orders? A. No, sir. Q. How rapidly did the fire spread on the schooner? A. First forward and aft, and the fire was soon in full flame; before the boat came alongside, she was in flame. Q. After you first saw the smoke, was there a time in which you could have done anything to put out the fire? A. Not that I could see. Q. When the second mate of the Fram and the mate of the schooner came back onto the steamer, did they come up to the bridge? A. Yes, sir. Q. What happened then? A. The second mate brought the two sounding rods from the schooner and showed me them. Q. With knots in the ropes? A. Yes, sir; and he said, 'There is only about the same water what they reported before.' We had no ruler, so that mate he hold it up like that. Q. The first mate of the schooner? A. Yes, sir. Q. He held it up? A. Yes, sir. Q. How high did the knots come on him? A. Just about the same height he was, I should say. Q. Was one longer than the other? A. Yes, sir. Q. Did the longest go about his height? A. Yes, sir. Q. When you saw that, what did you say? A. I was really surprised about it all; I didn't know what to say. As the ship was on fire, and I saw it hadn't gained any water, I didn't know what to say; I was surprised about the whole thing. Q. Did you say anything to the captain of the schooner about the amount of water your mate found? A. I said, 'It is only the same amount.' I didn't say it to him; I said it to all of us that were up there; I said, 'It seems to me the same water you reported.' Q. Did the captain make any reply? A. He didn't answer. Q. What did he do? A. He left the bridge soon. Q. After that scene on the bridge did you discuss the destruction of the schooner further with the captain—talk it over with him? A. The condition of the schooner? Q. The destruction of the schooner—the burning? A. Not after that. Q. You didn't bring up the subject any further? A. No; not after that. Q. Was there any particular reason why you didn't talk to him about it any more? A. I thought that he tell me story before; I couldn't hardly believe what he said; I lost faith in him—lost belief in him. * * * Q. When the second mate came back he told you how much water was in her? A. Yes, sir. Q. Did he tell you anything else? A. He told me a little about the damage on the side. Q. What did he tell you? A. He said it looked to him like a stripe on the side and a small hole just below the water—bent in—not all through. Q. Did he tell you anything more? A. He told me about the soundings. Q. Did he tell you anything more about the condition of the vessel? A. My second mate? Q. Yes. A. Not as I remember. Q. You say he told you the planks were bent in below the water lines? A. Yes, sir; and also cut up. Q. And also cut up? A. Like a stripe. Q. Did he tell you there was a cut about 2 feet wide? A. He said it was just below the water line, about 2 feet wide, dent in it. Q. About 2 feet wide? A. Something like that; a foot and a half or 2 feet. Q. Did you think then that the vessel could be saved? A. Yes, I did. Q. Why didn't you say so to the captain? A. After all that happened, I was surprised about it; I didn't believe what he said; I didn't like to speak more about it; I was surprised about the whole thing. Q. Did you say to the captain or mate of the schooner that they ought not to set the vessel on fire; that you would have towed her in? A. I can't remember if I said anything of that sort; I can't remember it. * * * Q. Mr. Blodgett has asked you why you didn't say anything to Capt. Vail about his having ordered his mate to set the schooner afire, and about your thinking that that was the wrong thing to do; you said that after your mate came back and reported to you, you didn't talk much more to Capt. Vail about it? A. No, sir. Q. Up to the time your second mate came back and reported, you have stated that you were becoming suspicious; but did you up to that time feel that Capt. Vail had been lying to you? A. That he didn't tell me the truth. Q. Before the mate came back did you think that Capt. Vail was probably telling you the truth or not? A. When the mate came back? Q. Before he came back. A. If he was telling me the truth? Q. Before the mate came back, did you think that you had the right to consider that Capt. Vail had been lying to you? A. Yes, sir. Q. Even before the mate came back? A. Yes, sir. Q. Before the mate came back, you felt that

he had not told the truth? A. Yes, sir. Q. And when the mate came back and told you the amount of water in her you felt satisfied? A. Then I was most sure of what I thought before. Q. You didn't care then to discuss the matter with him further? A. No, sir. Q. After the boat was afire could you have done anything by talking about it? A. She was in flame all over there; I didn't see any way to do anything. Q. You were asked by Mr. Blodgett whether it would not be right to sink a boat or to burn her, rather than to leave her a derelict for somebody to run into; you testified that you would have waited to see the last of her; that you wouldn't have fired her? A. I would have. Q. Did you consider, under any circumstances, that the captain of the schooner had the right to set fire to the schooner without letting you know that he proposed to do so? A. I don't think."

The first officer testified:

"Q. Who was the first one on the Fram to see the smoke? A. Me. Q. Where were you? A. On the bridge. Q. Who was with you? A. My captain and the captain of the schooner. Q. When you first saw the smoke what did you say? A. I told my captain there was smoke coming up from the schooner. Q. Did you hear your captain say anything to the schooner captain about the fire? A. Yes, sir. Q. What did he say, please? A. My captain asked the schooner captain what it all meant, the smoke, and the schooner captain said he had ordered his mate to put fire to the ship. Q. Did you stay on the bridge until your second mate came back from the schooner? A. Yes, sir. Q. (through interpreter) By the time he got back, how was the fire on the schooner? A. Fore and aft. Q. (through interpreter) Was there any chance to put it out? A. No; big fire. Q. Could you see the blaze? A. Yes, sir."

The second officer testified:

"Q. Did the mate of the schooner, at any time while you were examining the damage over the side, come up and look at the damage with you? A. He went to the place with me once, and I said, 'It doesn't look bad.' Q. Did he say anything to you then about the butts being started and the deck cut? A. No, sir. Q. After you left the schooner, how soon was it before she was well afire? A. Immediately after we had left it. Q. Did you hear an explosion? A. Yes, sir. Q. Were they forward or aft? A. I saw it at the same time I heard it; I saw smoke come out of the cabin. Q. Was there any puff? A. Yes, sir. Q. Did you ask the mate what he had done to set fire to it? A. I asked him what he had done in the cabin, but he didn't answer me; we were pulling in the boat there; I didn't hear what his answer was. Q. Did he answer you? A. I don't think so. Q. As you saw the schooner wher you went aboard, would you have been willing to take a crew and sail the boat into some neighboring port? A. Yes, sir. Q. In your judgment was there any reason why the hole couldn't have been patched and the schooner sailed to Nassau or any nearby port? A. I think the hole could be patched up and could sail it or tow it. * * * Q. Did you make any objection to having the boat set on fire? A. Yes, sir. Q. What did you say (interpreter repeats question just before to the witness, 'Did you make any objection to having the boat set on fire')? A. No, sir; I didn't say anything. Q. You didn't say a word to the mate? A. No; I didn't say anything to him. Q. You simply went and got into the boat? A. Yes, sir. Q. You didn't say that the boat ought not to be set afire? A. No, sir; I didn't say that."

Some time after the event the master of the Fram made a long entry in her log which contains the following on this point:

"As the schooner, however, appeared to sink very slowly we decided at 10:30 a. m to send a boat on board to investigate matters. The Fram's boat was then launched, manned by the first mate and an A. B. of the schooner and by the second mate and the boatswain of the Fram, who were ordered to sound the wells, examine the damage, and see whether anything could be done to save the vessel. Some time after the men had got on board smoke and fire were seen to be emitting both forward and aft on the schooner. The master of the schooner, who was on the bridge, was asked in the presence of the first

mate of the Fram what this meant, when he replied that he had given his mate instructions to set fire to the vessel. On the return of the men the second mate was asked by the master of the Fram how much water there was in the vessel, they had taken with them two sounding rods, and it proved to be 4 feet, 9 inches aft, and 5 feet, 11 inches forward. They were then asked why the vessel had been set on fire, when the second mate replied that the mate of the schooner had done so without his knowledge while he was engaged in sounding the holds and examining the damage."

There was no motive to induce either the master of the steamer, the master of the schooner, the second officer of the steamer, or the mate of the schooner to abandon and burn the schooner unnecessarily. To do so would increase the loss and liability of the owners respectively, and would be a crime. On the other hand, if the schooner had to be abandoned it would be good judgment to burn her as a derelict dangerous to navigation. Our conclusion is that each master preferred to put the responsibility for deciding what should be done on the other, and that the master of the steamer finally determined to send his second officer over to inspect the schooner and act upon his own judgment.

If the mate of the schooner had fired her without consultation with the second officer who was responsible for the collision and who was only to inspect her condition, the latter would certainly be expected to exhibit indignation. And upon their return the master of the steamer would certainly be expected to hold the second officer grossly at fault for either setting her afire or permitting her to be set afire without consulting him. And if the master of the schooner had admitted to the master of the steamer when the schooner was seen to be on fire that he had secretly ordered his mate to do so, some show of anger or reproach would certainly be expected of him. But nothing of the kind appears. On the contrary every one connected with the steamer endured this gross fraud and treacherous breach of hospitality with the calmness of a New England Sabbath morning. After careful reflection the master of the steamer made the tepid entry in his log, placing the responsibility on the master and mate of the schooner. Such are not the manners of the sea. With such a situation in mind counsel for the steamer could not write a brief or make an argument free from heat, and the court could not hear or read it without the same feeling.

The decree is affirmed.

In re W. R. KUHN CO. KUHN v. FELL. BESSEMER INV. CO v. SAME.

(Circuit Court of Appeals, Third Circuit. June 14, 1915.)

Nos. 1959, 1960.

1. BANKRUPTCY ⟸191—LIENS—LIEN OF LANDLORD ON PROPERTY SUBJECT TO DISTRESS.

Within Act Pa. June 16, 1836, § 83 (P. L. 777), providing that goods and chattels on demised premises taken by virtue of an execution and liable to distress shall be liable for the payment of any rent due at the time of the taking thereof, the filing of a petition in bankruptcy is equivalent to the issuing of an execution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. ⟸191.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. LANDLORD AND TENANT ⊂=267—DISTRESS—PERSONS ENTITLED TO DISTRAIN.

An assignment of rent due or to become due under a lease did not, without a transfer of the lease or the reversion, make the assignee the landlord, so as to be entitled to distrain for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1080, 1081; Dec. Dig. ⊂=267.]

3. LANDLORD AND TENANT ⊂=267—DISTRESS—PERSONS ENTITLED TO DISTRAIN —"MORTGAGE."

An assignment of rent due or to become due under a lease to a mortgagee of the leased premises, together with notice thereof to the lessee and the lessee's acceptance of notice and subsequent payment of rent to the mortgagee, did not make the mortgagee the landlord, so as to be entitled to distrain for the rent under the law of Pennsylvania, since, while a mortgage is a conveyance of the fee, or has many of the incidents of such a conveyance, its essential object is to secure a debt, and nothing but actual possession will clothe the mortgagee with a qualified ownership of the fee, so as to give him a landlord's rights.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1080, 1081; Dec. Dig. ⊂=267.

For other definitions, see Words and Phrases, First and Second Series, Mortgage.]

4. BANKRUPTCY ⊂=191—CLAIMS—PRIORITY—PERSONS ENTITLED TO ASSERT.

W., one of the tenants in common of leased premises, was largely indebted to the lessee, and had so drawn against his individual share of the arrears of rent under the lease that he had no further interest therein, and, moreover, had assigned to H., his cotenant, all his interest in the lease until the happening of a contingency, which had not happened. *Held*, that H. alone and in his own right was entitled to make a claim for priority of payment of the rent out of property subject to distress and sold by the lessee's receiver in bankruptcy, even though he would have been obliged to issue a warrant of distress in the names of both cotenants.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. ⊂=191.]

5. LANDLORD AND TENANT ⊂=265—DISTRESS—RIGHT TO DISTRAIN AFTER TERMINATION OF LEASE.

Under Act Pa. 1772 (1 Smith's Laws, p. 375), requiring that distraint shall be made during the continuance of the lessor's title or interest, but containing no limitation of time, where, after the termination of a lease, and after a new lessee was in possession, goods and chattels of the former lessee remained upon the leased premises, they were subject to distress for rent due from such former lessee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1062–1074; Dec. Dig. ⊂=265.]

Petitions to Revise from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, District Judge.

In the matter of the W. R. Kuhn Company, bankrupt; W. B. Fell, trustee. To review a decree denying their claim of priority in payment, Harry P. Kuhn and the Bessemer Investment Company each bring petitions to revise. Decree affirmed on the Investment Company's petition, and reversed on Kuhn's petition.

Albert B. Schultz, of Pittsburgh, Pa., for petitioner Kuhn.

J. E. MacCloskey, Jr., of Pittsburgh, Pa., for petitioner Bessemer Inv. Co.

H. J. McAllister, of Pittsburgh, Pa., for trustee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Each of these petitions asserts error in determining the ownership of a fund amounting to $3,550, which was produced by a receiver's sale of furniture and other personal property that belonged to the bankrupt, the W. R. Kuhn Company. An involuntary petition was filed on September 30, 1914, and the sale took place in November. The property was on the premises of the Hotel Rittenhouse in the city of Pittsburgh, and, although the bankrupt had not been the tenant since the 1st of May, its personal property was nevertheless subject to a lawful distraint; that is, a distraint that might properly be levied upon these goods by a person enjoying the rights of a landlord. Two claimants appeared—Harry P. Kuhn and the Bessemer Investment Company—each claiming to have such rights, and each claiming priority out of the fund, although not for the same arrears of rent.

[1] In Pennsylvania, a landlord is given a limited priority by section 83 of the act of 1836:

"The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years, or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent, at the time of taking such goods in execution: Provided, that such rent shall not exceed one year's rent."

As the filing of a petition in bankruptcy is equivalent to the issuing of an execution (Longstreth v. Pennock, 87 U. S. [20 Wall.] 575, 22 L. Ed. 451; Re Gerson, 8 Pa. Dist. Rep. 277; Re Keith-Gara Co. [D. C.] 203 Fed. 585, 29 Am. Bankr. Rep. 466; Ludlow v. Pugh (C. C. A. 3d Cir.) 213 Fed. 450, 130 C. C. A. 96, 32 Am. Bankr. Rep. 435), it became necessary to decide which of the claimants occupied the superior position, each asserting that on September 30, he had a landlord's right to distraint. The referee and the District Court rejected both claims, although not on the same ground, and each claimant has presented a petition to revise. The facts are not in dispute, and apply in part to both claims, but we will separate them as far as necessary.

Claim of Bessemer Investment Company.

[2, 3] On June 29, 1908, Harry P. Kuhn and W. R. Kuhn were the owners of the hotel as individuals and tenants in common, and on that day they mortgaged the property to Henry Phipps, who assigned the mortgage to the Investment Company. Two days afterwards, on July 1, the owners leased the property to the W. R. Kuhn Company, the bankrupt corporation, who took possession and furnished the hotel. On the expiration of this lease Victor E. Hebert became the tenant and went into possession on May 1, 1914, at a monthly rent

of $2,000, payable on the 1st day of the month. The bankrupt's furniture, with some other personal property, remained on the premises, and continued to belong to the bankrupt until it was sold by the receiver. On May 29 the owners, who were both mortgagors and landlords, assigned to the Investment Company—

"all the rents and moneys due or to become due to the said H. P. Kuhn and W. R. Kuhn under and by the terms of the aforesaid lease, for the purpose of applying any sums of money that may be actually paid to the said Bessemer Investment Company towards the liquidation of the debt for interest, insurance, taxes, principal, and other charges, due or to become due on account of a certain bond and mortgage executed by William R. Kuhn and Harry P. Kuhn to Henry Phipps, dated the 29th day of June, 1908," etc.

Hebert accepted "notice of the assignment of the said rents due under the said lease to the Bessemer Investment Company," and afterwards paid the rent for June and July to the Investment Company, defaulting on the August and September installments. On September 14, bankruptcy proceedings were begun against Hebert, and a receiver was appointed, who went into possession of the hotel and continued the business for a short time, using the Kuhn Company's furniture, etc., on the premises. The business proved unprofitable, however, and Hebert's receiver permitted the Investment Company to take actual possession on October 1. It was agreed, however, that the Kuhn Company's receiver might leave the personal property of the Kuhn Company on the premises without being charged for rental or storage thereof. In November the Kuhn Company's receiver (who had been appointed on October 1) sold the personal property referred to, and thus produced the fund now in controversy.

The Investment Company's claim to priority must rest upon the ground that on September 30, the day before it took actual possession of the building, it was in legal contemplation the landlord of the premises, and was therefore entitled to distrain. This position can only be maintained if the Investment Company acquired a landlord's rights by the assignment of the rents on May 29, coupled with Hebert's acceptance of notice and his subsequent payment of rent for two months. In our opinion no such effect was produced thereby. In the first place, it is clear that the Investment Company did not become the landlord merely by virtue of the assignment. This was nothing more than a transfer of a chose in action, and did not carry with it the lease itself or the owners' reversion. Without a transfer of the lease or the reversion, the Investment Company would not become the landlord, and none but a landlord can distrain for rent. Helser v. Pott, 3 Pa. 179; Slocum v. Clark, 2 Hill (N. Y.) 475; 24 Cyc. 1291. This position is not controverted by the Investment Company; the brief of counsel (page 23) expressly declares that his client—

"does not rely on the mere assignment of rents; it contends that it had the legal title as mortgagee, and by the assignment of rents *and attornment* [of Hebert] the relation of landlord and tenant was created, and it became entitled to priority in distribution under the Act of Assembly of June 16, 1836," etc.

Now, whatever support the decisions in England and in several states of the Union may afford to this contention, the Pennsylvania

decisions do not accept it, and of course we must turn to these for the determination of this dispute. It is true that some looseness of expression may be found in the Pennsylvania cases, often due, no doubt, to the particular point of view on which the court may then have been laying stress; and it is easy, therefore, to quote statements that seem at first sight to go the full length of saying that a mortgage is a conveyance of the fee, with some, or with many, incidents of such a conveyance. And, indeed, such a statement is true enough, but it must always be taken with the qualification that the essential object of the conveyance is to secure a debt; and we may say also that this object, while it has always been prominent, has for many years been so conspicuous as to push very much into the background the fact that a mortgage is still a conveyance, and not merely a lien. But the theory that a mortgagee holds the legal title is still maintained, and therefore a mortgagee may (and in rare instances does) bring ejectment to recover possession, although he may only occupy the land until the rents and profits have paid his debt. And on the same theory, if he is able to enter peaceably, he may take possession of the premises for the same limited purpose without the aid of legal proceedings at all. But we have been referred to no decision, and we are aware of none, that extends the doctrine of constructive possession to a Pennsylvania mortgagee; before he can be treated even as the temporary owner of the fee with a consequent right to rents and profits, he himself, or his agent, must go into actual possession. We need not cite cases at any length to establish these propositions; it is sufficient to quote from one or two. In Myers v. White, 1 Rawle (Pa.) 353, it is said:

"There has been an essential departure from the law of England in Pennsylvania, for the mortgagee has no estate, property, or interest in the land, until he takes possession of the property. Vide Rickert and Reed v. Madeira, ruled at this term. Nor has it, as I believe, ever been understood that such a privity exists as that a mortgagee can compel the tenant of the mortgagor to pay him the rent, whether the lease was executed either before or after the mortgage. Nor has it heretofore been considered that as to the mortgagee the tenants under leases from the mortgagor, fairly and bona fide made, can be treated as trespassers. In Pennsylvania, a mortgage, as has been held in repeated decisions, although in form an absolute conveyance, is in substance but the security for a debt. The mortgagor is the owner of the land, with the same power over it as any other tenant in fee, with incumbrances or liens upon the property."

And in Corporation for Relief of Poor Ministers v. Wallace, 3 Rawle (Pa.) 109, a mortgage is described as a security for money:

"As between the mortgagee and mortgagor, the mortgage was in form a conveyance of the land. In England it was so in a court of law for some purposes, to wit, for giving right to possession; but the mortgagee in possession had * * * to account for the rents and profits, and when they had paid his debt, his estate was gone. * * * The Legislature here transfer the power over to the courts of law; they treat it as a debt; the plea to it is payment; they treat the lands as the property of the mortgagor; they are to be levied on, advertised, and sold as his; * * * and to him the residue of the purchase money after payment of the debts is to be returned."

There is no authority for saying that in Pennsylvania a mortgagee is allowed to convert a tenant of the mortgagor into his own tenant

merely by giving notice that he will hereafter require the rent to be paid to himself; and the tenant would not strengthen such a notice by agreeing to obey it, or even by actual obedience. Nothing but possession in fact will clothe the mortgagee with the qualified ownership of the fee, so as to give him a landlord's rights; as long as he remains out of actual possession, the mortgagor continues to be the landlord, and is entitled to distrain for the rent. Re Sweeney (C. C. A. 3d Cir.) 212 Fed. 1, 128 C. C. A. 483; Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; Freedman's Co. v. Shepherd, 127 U. S. 494, 8 Sup. Ct. 1250, 32 L. Ed. 163.

It should not be forgotten that, although the Investment Company was entitled to receive the rents from Hebert under the assignment of May 29, it had no relation whatever with the Kuhn Company, and had no possible claim, legal or equitable, against the personal property in question, unless upon the ground that, as the property was on the premises, it was subject to a landlord's distraint, although it belonged to a stranger. Without prolonging the discussion, therefore, we conclude by saying that we agree with the referee and the District Court in holding that the Investment Company's claim cannot be maintained.

Claim of Harry P. Kuhn.

[4, 5] In order to be understood, this claim requires the statement of several other facts in addition to some of those already set forth. Harry P. Kuhn and W. R. Kuhn, owning the hotel as tenants in common, leased it to the Kuhn Company in 1908, and on May 1, 1914, when the term came to an end, the bankrupt owed arrears of rent amounting to much more than the fund now in dispute. Hebert then became the tenant, and took possession of the building and also of the personal property that was still owned by the Kuhn Company, but was left on the premises. This property was used by Hebert, and afterwards by his receiver, until October 1, 1914, when the Investment Company took actual possession of the building. The property may have been used by the Investment Company also, but at all events it was allowed to remain on the premises without charge for rental or storage, until it was sold in November by the Kuhn Company's receiver. We have previously stated that the Investment Company claimed priority out of the fund for the rent due from Hebert for August and September; and it should now be noted that Harry P. Kuhn is claiming priority for the arrears due on May 1, not from Hebert, but from the Kuhn Company, the preceding tenant. The claim in question was disallowed on the ground that on September 30 Kuhn had no longer the right to distrain these goods, and therefore was not entitled to priority under the act of 1836. Accordingly the question for decision is whether he had the right to distrain these particular goods on that date.

That a tenant in common may distrain for his share of the rent is in strictness a dictum in De Coursey v. Guarantee Co., 81 Pa. 217; but we have no doubt it was intended to recognize Rivis v. Watson, 5 M. & W. 266, which appears to be an express authority for this proposition. In any event, we may lay the De Coursey Case aside,

although it has not been disapproved; for under the facts before us we have no hesitation in sustaining the claim of Harry P. Kuhn, although made in his separate right. It appears that the other tenant in common, Wm. R. Kuhn, was largely indebted to the Kuhn Company and had so drawn against his individual share of the arrears of rent that he had no further interest therein. Moreover, on February 1, 1914, he had assigned to Harry P. Kuhn all his interest in the lease until the rents collected should amount to $20,000, a contingency that did not happen. Therefore, as Harry P. Kuhn alone was entitled to receive whatever was still due, we see no reason why he might not make the claim in his own right, even (and we need not decide the point) if he might have been obliged to issue a warrant of distress in the names of his brother and himself.

But when may a distraint be levied? At common law the right was gone when the lease came to an end, and in order to enlarge the right the statute of 8 Anne was enacted in 1710, by which a landlord was permitted to distrain after the expiration of the term, but with the proviso:

"That such distraint be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and the possession of the tenant from whom such arrears are due."

In Pennsylvania much of this statute was adopted by the act of 1772 (1 Smith's Laws, p. 375); but the act goes further than the English statute, for it contains no limitation of time, and only requires:

"That such distress be made during the continuance of the lessor's title or interest."

In other words, although the tenant may have gone out of possession, if his goods remain upon the premises, they are liable to distraint, and as long as the landlord's title or interest continues he may distrain without other limitation of time.

In Moss' Appeal, 35 Pa. 162, although the lessee had abandoned the premises and had forfeited the lease in 1855, nevertheless the landlord was allowed priority out of the proceeds of an execution that was not levied until 1858. The lessee had left goods on the premises, and these were held to be still subject to the landlord's distress. In Lewis' Appeal, 66 Pa. 312, a lease expiring in April, 1869, had been made, and the landlord had died in September, 1868, devising the property to his widow. Under this lease arrears of rent were due, and the widow was allowed priority therefor, although she had made a new lease from April, 1869, to the same tenant, and although he had gone into possession by virtue of this new agreement. But she owned the title and the reversion, and this was enough. The court, referring to the act of 1772, held as follows:

"There can be no doubt of the [widow's] right, under the provisions of this act, to distrain the goods of the tenant on the demised premises, at the time of the sheriff's sale, for the arrears of rent which accrued under the original lease, after her husband's death, notwithstanding the expiration of the term and the subsisting tenancy under the new lease. * * * [A landlord's] right to distrain, after the termination of the term, is without limita-

tion as to time; the statute gives him this right whenever the rent is in arrear, and he retains the title."

And Whiting v. Lake, 91 Pa. 349, is also in point. There the tenant had left the premises, the rent being in arrears, and another person had gone in without a lease. The landlord distrained on this person's goods for the arrears due from the tenant, and the distress was supported on the express ground that the act of 1772 authorized the landlord to distrain, the court saying:

"The statute of Anne, from which ours is copied, limited the landlord's right of distress to six months after the determination of the lease; but our act authorizes it whenever there is rent in arrear and the landlord retains the title."

It seems clear, therefore, that, as the Kuhn Company's goods were still on the premises, Harry P. Kuhn might have lawfully distrained them for the arrears due May 1, although the Kuhn Company's lease had expired, and although Hebert had taken possession of the building. That is, Harry P. Kuhn had the right to distrain them if he still retained title; and this brings us to the point on which the trustee seems to lay most stress. We do not understand the argument to be that the landlords were no longer the owners of the reversion on September 30, 1914. There are no facts to support this position, for, as already stated, the assignment of May 29, to the Investment Company merely transferred a chose in action, the right to future rents. But the reasoning appears to be that because the landlords had made a new lease to Hebert on May 1, they had somehow parted with the right to distrain the goods of the Kuhn Company still on the premises for the arrears still due by that company. In our opinion the Pennsylvania cases cited to support this proposition—Clifford v. Beems, 3 Watts (Pa.) 246; Beltzhoover v. Waltham, 1 Watts & S. (Pa.) 416; Greider's Appeal, 5 Pa. 422; Walbridge v. Pruden, 102 Pa. 1—are not in point, and we shall not take time to distinguish them. It is no doubt true that in some situations (although not in all) a landlord has been denied the right to distrain the goods of one tenant for arrears of rent due from a preceding tenant; but we have been referred to no decision that denies the right to distrain the goods of a tenant for his own debt, although his tenancy may have expired, and although a new tenant may have gone into possession, provided, of course, the goods of the first tenant are still on the premises. There are no equities in the present case to take it out of the general rule, and we think, therefore, that the claim now under consideration should have been allowed.

Upon the petition of the Bessemer Investment Company the decree is affirmed; but upon the petition of Harry P. Kuhn the decree is reversed.

CITY OF ASTORIA v. AMERICAN LA FRANCE FIRE ENGINE CO.

(Circuit Court of Appeals, Ninth Circuit. May 17, 1915.)

No. 2579.

1. MUNICIPAL CORPORATIONS ⟸244—CONTRACTS—VALIDITY—MANNER OF MAKING CONTRACT.

The charter of the city of Astoria, Or., section 38, confers on the city council power to establish and maintain a fire department, to provide engines and other apparatus therefor, and to appoint fire commissioners. Section 39 provides that the power given the council by section 38 can only be exercised by ordinance, and section 124 provides that the city "is not bound by any contract or in any way liable thereon unless the same is authorized by city ordinance and made in writing and by order of the council," with the exception of contracts for the payment of a sum not exceeding $100. The council by ordinance created a fire department and appointed a committee on fire and water, who should be ex officio fire commissioners and should purchase all supplies for the fire department, subject to the ordinances of the city. Such committee entered into a contract for the purchase of a fire engine under authority of a vote of the council adopting their report recommending the same, but a subsequent ordinance providing for payment of the purchase price was vetoed and never became effective, and the city refused to accept the engine. *Held*, that the contract, not being authorized by ordinance as specifically required by the charter, did not bind the city, but was void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 678–681, 683; Dec. Dig. ⟸244.]

2. MUNICIPAL CORPORATIONS ⟸61—POWER TO MAKE CONTRACTS—MANNER OF EXERCISE.

Where a city charter, prescribes the mode in which a power conferred on the city shall be exercised, that mode is exclusive, and must be followed whether the power be deemed governmental or proprietary.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 152; Dec. Dig. ⟸61.]

3. MUNICIPAL CORPORATIONS ⟸248—CONTRACTS—RATIFICATION OF UNAUTHORIZED CONTRACT.

Where a city has power to enter into a contract only in a particular form, or mode, it can ratify an unauthorized contract only by following the same form or mode.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 684–686; Dec. Dig. ⟸248.]

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action at law by the American La France Fire Engine Company against the City of Astoria, Or. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion below, see 218 Fed. 480.

A. W. Norblad, of Astoria, Or. (F. C. Hesse and J. T. Jeffries, both of Astoria, Or., of counsel), for plaintiff in error.

Fulton & Bowerman and Bernstein & Cohen, all of Portland, Or., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

RUDKIN, District Judge. [1] This is an action on a written contract to recover the purchase price of certain fire apparatus for the use of the fire department of the city of Astoria. The contract was entered into on behalf of the city by the committee on fire and water of the common council, and, inasmuch as the validity of that contract is the only question presented for our consideration, a brief reference to the provisions of the city charter and the facts leading up to the execution of the contract becomes necessary. The powers of the city council are largely defined by section 38 of the charter, which contains 57 subdivisions or paragraphs. By paragraph 42 of this section the council has power and authority within the city of Astoria—

"to make regulations for the prevention of accident by fire; to organize, establish and maintain a fire department, whether paid or volunteer; to appoint three competent persons as fire commissioners, and to make and ordain rules for the government of the fire department; to provide engines and other apparatus for the department."

Section 39 provides that the power and authority given to the council by section 38 can only be exercised or enforced by ordinance, unless otherwise provided. Section 124 provides as follows:

"The city of Astoria is not bound by any contract or in any way liable thereon, unless the same is authorized by city ordinance, and made in writing, and by order of the council, signed by the auditor and police judge, or some other person duly authorized, on behalf of the city. But an ordinance may authorize any officer or agent of the city, naming him, to bind the city, without a contract in writing, for the payment of any sum of money not exceeding one hundred dollars."

Section 1 of an ordinance approved June 15, 1897, organized a paid fire department for the city with powers and duties to be exercised by and through the committee on fire and water of the common council. Section 3 of the ordinance provides:

"The committee on fire and water and their successors in office shall constitute and be ex officio fire commissioners of the fire department of the city of Astoria."

Section 11 provides:

"The committee on fire and water, the ex officio fire commissioners, shall purchase all supplies for the fire department and order all necessary repairs subject to the ordinances of the city of Astoria."

Section 15 provides:

"The committee on fire and water, the ex officio fire commissioners, shall report to the common council at least once in each month the expenditures of the department and other matter pertaining thereto, of public interest; and shall in the month of January of each year report in detail to the common council, the annual receipts and expenditures of the department, including a complete inventory of all property in their charge."

On the 21st day of July, 1913, the committee on fire and water filed a communication with the city council, recommending that the committee be authorized to obtain prices on another auto fire apparatus, and submit the same with recommendations at the next meeting of the council. At a meeting of the city council held on the 21st day of July, 1913, this communication and recommendation was adopted by unanimous vote. On the 4th day of August, 1913, a further communica-

tion was presented to the council submitting a price of $9,500 f. o. b. Astoria, for the triple combination pump hose and chemical now in controversy, and recommending that the committee be authorized by the adoption of the report to enter into a contract with A. G. Long, agent of the American La France Fire Engine Company for one type 12, six cylinder combination pump hose and chemical car for the sum of $9,500. This report and recommendation was later adopted by the council by unanimous vote. On the 6th day of August, 1913, the committee on fire and water entered into the contract now in suit with the defendant in error, by the terms of which the defendant in error agreed to sell the fire apparatus in question for the sum of $9,500, delivery to be made at Astoria, Or., within 60 days from approval of contract, and the city agreed to pay therefor the sum of $9,500 within 15 days after delivery and acceptance. Upon the execution of this contract a copy was forwarded by mail to the defendant in error, and the fire apparatus was manufactured and shipped to Astoria, Or., where it arrived during the month of January, 1914. On the 31st day of January, 1914, the committee on fire and water made a written report to the council, stating that the apparatus was acceptable in every way, and recommending the passage of an ordinance providing for the payment of the purchase price. This report was adopted on the 31st day of January, 1914, six members of the council voting in the affirmative, and three in the negative. An ordinance was thereupon introduced and passed the council on the 2d day of February, 1914, authorizing the auditor and police judge to draw a warrant in the sum of $9,500 in favor of the defendant in error in payment of the purchase price as theretofore recommended. This ordinance was submitted to the mayor for his approval, but was by him vetoed, and so far as the record discloses, no further action was taken in regard thereto; at least the ordinance never became operative. On the arrival of the fire apparatus at Astoria the same was tendered by the defendant in error to the plaintiff in error, and was delivered at the headquarters of the fire department. The city refused to accept or pay for the apparatus on the ground that the purchase thereof was never authorized by ordinance, and the present suit followed. The foregoing facts appearing on the face of the complaint, a demurrer was interposed on the ground that the complaint did not set forth a cause of action. The demurrer was overruled, and the plaintiff in error answered over, simply denying that the fire apparatus was tendered to the defendant, or was delivered at the fire headquarters of the city, or at any other place, denied that the same was delivered to the city, and averred that the city never had any contract with the plaintiff as alleged in the complaint. A motion for judgment on the pleadings interposed by the defendant in error was granted, and that judgment is now before us for a review.

Municipal corporations are creatures of the law, and, as said by Chief Justice Marshall in Head v. Providence Insurance Co., 2 Cranch, 156, 2 L. Ed. 229:

"The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument, no more creates a contract than if the body had never been incorporated."

See, also, 28 Cyc. 664, and cases cited.

But this rule is elementary, and requires no citation of authorities in its support. If, therefore, the power conferred on the city council of the city of Astoria by section 38 of the city charter to provide engines and other apparatus for the fire department could only be exercised by ordinance, as declared in the succeeding section, or if the contract in suit falls within the provisions of section 124 of the city charter, this action must fail. The power to provide engines and other apparatus for the department can only be exercised by ordinance, unless otherwise provided, and we have been unable to find any provision of the charter providing otherwise. Indeed, this question would seem to be foreclosed by the decision of the Supreme Court of the state of Oregon. Sections 28 and 29 of the charter of the city of Sellwood (Laws of 1889, p. 503), are in all material respects similar to sections 38 and 39 of the charter of the city of Astoria. By paragraph 18 of section 28 of the Sellwood charter the city council was granted power and authority "to provide for the erection of a city jail, house of correction and workhouse, and government and management of the same," and by section 29 the power and authority thus given could only be exercised by ordinance, unless otherwise expressly provided. And in Grafton v. City of Sellwood, 24 Or. 118, 32 Pac. 1026, it was held that the power to provide for the erection of a city jail could only be exercised by ordinance, and that a contract awarded for the construction of a jail building before the ordinance authorizing the same became operative was null and void. In the course of its opinion the court said:

"Subdivision 18 of section 28 of the charter of Sellwood, filed in the office of the secretary of state, February 25, 1889 (Session Laws, 1889, p. 503), gives the council power 'to provide for the erection of a city jail.' Section 29 provides that the power and authority given the council by section 38 can only be enforced and exercised by ordinance, unless otherwise expressly provided. Section 28 contains 41 subdivisions giving power to the council. Section 29 probably refers to section 28 instead of section 38, which relates to the manner of taking an appeal from the action of the council to the circuit court. No jail could be erected without an ordinance for that purpose. When the mode of procedure is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued, or the contract will not bind the corporation. Dillon, Municipal Corporations, § 449. Section 14 provides that within three days after the passage of an ordinance, copies of the same shall be posted in at least three public places in said city, and all such ordinances shall take effect within five days after such notice unless otherwise ordered. 'When ordinances are required to be published before they shall go into effect, this requirement is essential, and the publication must be in the designated mode.' Dillon, Municipal Corporations, § 331. The time when the ordinance of December 28, 1891, took effect was a question of fact. Any contract entered into prior to that time would be void under the charter."

We see no distinction between a contract for the erection of a city jail and a contract for the purchase of an engine or other equipment for the fire department, and if the power in the one case can only be exercised by ordinance, the same rule must apply in the other.

[2] Nor is there any material distinction in this connection between the powers of a municipal corporation when acting in its political and governmental capacity and when acting with reference to its private

property as claimed by the defendant in error. The city charter prescribed the mode in which the power to provide engines and other apparatus for the department should be exercised, and that mode must be followed whether the power be deemed governmental or proprietary.

"The distinction taken between the powers of a municipal corporation when acting in its political and governmental character and when acting with reference to its private property has no application to the questions involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The Legislature could impose such restrictions as it thought proper; and it saw proper to require the formalities of legislation for the disposition of the city property, as it did for the imposition of taxes, the regulation of the fire department, and matters connected with the general welfare of the city." Per Field, C. J., in McCracken v. San Francisco, 16 Cal. 591, 621.

So in this case, if the city could only exercise the power to provide engines and other apparatus for the department by ordinance, it is immaterial whether in the exercise of that power it was acting in a governmental or purely private capacity. Inasmuch, therefore, as the city could only act by ordinance, and did not so act, the contract in suit is void, and it is probably immaterial to inquire whether it also comes within the condemnation of section 124 of the city charter. It seems, however, impossible to avoid the conclusion that the contract is void for that reason also. The section provides in the most positive terms that the city of Astoria is not bound by any contract, or in any way liable thereon, unless the same is authorized by city ordinance, and made in writing, and by order of the council, signed by the auditor and police judge, or some other person duly authorized on behalf of the city. This plain unequivocal language is made plainer still by an exception in favor of certain contracts of minor importance, and it would seem that every contract of the city must fall either within the general prohibition or within the exceptions. Contracts in violation of similar statutory provisions have very generally been declared void. In Arnott v. City of Spokane, 6 Wash. 442, 33 Pac. 1063, the court after quoting a similar provision of the charter of Spokane Falls, said:

"The contention of the appellant is that neither the bridge committee nor the mayor had any right or power to bind the city by any agreement or contract not made in writing, and signed by some person duly authorized to execute it. Upon this point we have no doubt of the correctness of appellant's position. While a municipal corporation would, unless restricted by law, have a right to make contracts in reference to its corporate business in any manner it might deem proper, yet, where the mode of contracting is expressly provided by law, no other mode can be adopted which will bind the corporation. This principle results from the fact that municipal corporations derive all their powers from their charters. * * * In fact, so far as we have observed, the authorities are practically uniform on this question."

See, also, Paul v. Seattle, 40 Wash. 294, 82 Pac. 601.

The only authority cited against this rule is Beers v. Dalles City, 16 Or. 334, 18 Pac. 835. In that case the action was brought on a city warrant given for labor performed on a sewer, and the court held that a provision of the charter of Dalles City similar to section 124, supra, had no application to the case: First, because the provisions of the

city charter under which the labor was performed on the sewer were complete within themselves, and left the mode of doing the work and paying therefor entirely to the discretion of the city council; and, second, because the provision had no application to executed contracts. It was expressly admitted, however, that the provision would apply where an ordinance was required by the city charter, and inasmuch as an ordinance was required in this case, the Beers Case is not controlling.

[3] There is no merit in the claim that the city is estopped. To so hold would, in a large measure, abrogate the city charter. If the contract was void when made, it is still void unless ratified by competent authority, and there has been no such ratification.

"To determine the effect of these acts, as a ratification of the sale, it is necessary to consider the conditions essential to a valid ratification. To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given. It follows, as a consequence, that where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. Thus, if an authority to execute a deed of a private person must be under seal, the ratification of the deed must be also under seal; and where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance."

"It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard. The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do." Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96.

It is only necessary to add that the ordinance creating the fire department and providing that the fire and water committee should purchase all supplies for the fire department and order all necessary repairs, subject to the ordinances of the city, is not a compliance with the charter requirement that the power granted to the city council to provide engines and other apparatus for the department can be exercised only by ordinance. We are therefore of opinion that the contract in suit is void, and there can be no recovery thereon. Had the city accepted the fire apparatus and appropriated the same to its own use, an action in some form might lie against it, but that question is not now before us.

For the reasons stated the judgment is reversed and the cause remanded, with directions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

UNITED STATES v. ST. PAUL, M. & M. RY. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 27, 1915.)

No. 2564.

1. PUBLIC LANDS ⟸120—SUITS FOR CANCELLATION OF PATENTS—STATUTORY LIMITATION.

Act March 2, 1896, c. 39, § 1, 29 Stat. 42 (Comp. St. 1913, § 4901), limits the time within which suits may be brought for the cancellation of patents to lands issued under railroad or wagon road grants, either before or after its enactment, "provided that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry." *Held*, that such proviso is not limited to lands patented prior to the passage of the act, but applies as well to lands patented after that date.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ⟸120.]

2. STATUTES ⟸263—CONSTRUCTION—PROSPECTIVE OPERATION.

Legislative acts are presumed to be prospective in their operation, and courts will not limit them to past acts or past transactions, unless such clearly appears to have been the legislative intent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. ⟸263.]

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit in equity by the United States against the St. Paul, Minneapolis & Manitoba Railway Company and the Great Northern Railway Company. Decree for defendants, and the United States appeals. Affirmed.

Burton K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and Frank Woody, Jr., Asst. U. S. Atty., of Butte, Mont., for the United States.

Veazey & Veazey, of Great Falls, Mont., for appellees.

Before GILBERT and ROSS, Circuit Judges, and RUDKIN, District Judge.

RUDKIN, District Judge. [1] By Act March 3, 1857, c. 99, 11 Stat. 195, and Act March 3, 1865, c. 105, 13 Stat. 526, there was granted to the territory of Minnesota certain public lands for the purpose of aiding in the construction of railroads in that territory. The appellee the St. Paul, Minneapolis & Manitoba Railway Company has succeeded to all the rights and privileges of the territory of Minnesota under the provisions of these acts. At the time the grant was made the Missouri river formed the western boundary of the territory, but soon thereafter the state of Minnesota was admitted into the Union, with its western boundary fixed at a point considerably east of the western boundary of the former territory. In the administration of this land grant the land department held that it was the fixed policy of the government to limit grants in aid of railroads wholly within a

state or territory to lands lying within the same state or territory, and the claim of the railroad company to lands within the limits of the grant, but without the limits of the state of Minnesota, was rejected. In St. Paul, etc., Ry. Co. v. Phelps, 137 U. S. 528, 11 Sup. Ct. 168, 34 L. Ed. 767, it was held that the specific terms of the act of Congress could not be limited or controlled by any general governmental policy, and the title of the railway company to lands within the limits of the grant, but west of the western boundary of the state, was accordingly confirmed. To obviate the hardships to settlers resulting from this decision, Act Aug. 5, 1892, c. 382, 27 Stat. 390, entitled "An act for the relief of settlers upon certain lands in the states of North Dakota and South Dakota," was passed. The preamble to that act recites that:

"Whereas, under the rulings of the General Land Office the extension into Dakota Territory, now states of North Dakota and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroad now owned by the St. Paul, Minneapolis & Manitoba Railway Company was denied, and in consequence of said rulings lands within the limits of the said grants in * * * said states have been claimed, settled upon, occupied, and improved by numerous persons in good faith under color of title or of right to do so derived from the various laws of the United States relating to the public domain, and are now claimed by them, their heirs, or assigns, and many of said lands have actually been patented to such occupants or to their grantors; and whereas, under recent construction of said grants the said occupants, improvers, or purchasers, are liable to be evicted from their holdings: Now, therefore, for the purpose of relieving the said occupants, improvers, and purchasers of the said granted lands from the hardship of being now deprived of the same under the circumstances aforesaid, be it enacted," etc.

Section 1 then provides:

"That the Secretary of the Interior shall, as soon as conveniently may be done, cause to be prepared and delivered to the said railway company a list of the several tracts which have been purchased, claimed, occupied, and improved, as stated in section two of this act, and are now claimed by such purchasers or occupants, their heirs or assigns, according to the smallest government subdivisions. Within a reasonable time after the receipt by the said railway company of the said list, it shall execute under its corporate seal and deliver to the Secretary of the Interior its deed of conveyance releasing to the United States all its claims upon the lands described in said list, and shall also procure and cause to be released to the United States all liens and claims to said lands derived through or under said company, whereupon all right, title, and interest of the said railway company to each of such tracts shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railway company. * * *"

Section 2 provides:

"That the said railway company is hereby permitted to select, in lieu of any lands forming odd-numbered sections or parts thereof situated in the state of North Dakota or in the state of South Dakota, within the ten-mile limits of a grant of lands made to the territory of Minnesota * * * opposite to and coterminous with such portion of said railroad as was constructed and completed within the time required by the said grant and the acts amendatory thereof for the construction and completion of the whole of said railroad, which, prior to January first, anno Domini eighteen hundred and ninety-one, any person had purchased or occupied or improved, in good faith, under color of title or right to do so, derived from any law of the United States relating to the public domain, but not including any lands with-

in the limits of the grant, to aid in the construction of the St. Vincent branch of said road, as located under the act of March third, eighteen hundred and seventy-one, upon which any person or persons had, in good faith, settled and made or acquired valuable improvements thereon prior to March, eighteen hundred and seventy-seven, an equal quantity of non mineral public lands, so classified as non mineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any state into or through which the railway owned by said * * * company runs, to the extent of the lands so relinquished and released. * * *"

Section 3 provides:

"That upon the filing by the said railroad company, at the local land office of the land district in which any tract of land selected in pursuance of this act shall lie, a list describing the tract or tracts selected, and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States, conveying to it the lands so selected. * * *"

On the 31st day of March, 1906, the appellee the St. Paul, Minneapolis & Manitoba Railway Company filed in the United States land office at Kalispell, Mont., a certain list of lands, describing, among others, the lands now in controversy, pursuant to the provisions of section 2 of the act of 1892, supra. This list was thereafter approved by the Secretary of the Interior, and on the 24th day of June, 1907, a patent issued therefor. The present suit was instituted by the United States to set aside this patent on the ground of fraud and mistake—fraud on the part of the railway company in representing that the land was nonmineral in character, and mistake on the part of the Land Department in failing to notify the register and receiver of the United States land office at Kalispell, Mont., that the lands had been classified as mineral by the board of mineral land examiners under Act Feb. 26, 1895, c. 131, 28 Stat. 683, and of a decision of the Secretary of the Interior approving and sustaining this classification. Inasmuch as the right of the government to maintain the suit at all is the only question presented for our consideration, a more detailed statement of the allegations of the bill of complaint is deemed unnecessary.

Section 1 of Act March 2, 1896, c. 39, 29 Stat. 42 (Comp. St. 1913, § 4901), provides as follows:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the Acts of the Second Session of the Fifty-First Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, that no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry."

The court below held that the prosecution of the present suit was prohibited by the proviso to the latter section, and from the decree of dismissal this appeal was allowed and prosecuted.

Notwithstanding a suggestion in the government brief to the contrary, we think it clearly appears from the allegations of the bill of complaint that the land in controversy was patented to the railway company "in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry." The patent was applied for and issued under the act of 1892, and the lands granted by that act were in lieu of lands relinquished by the railway company in consequence of the failure of the government and its officers to withdraw the Dakota lands within the limits of the original grant from sale or entry. Does, then, the proviso to the act of 1896 prohibit the maintenance of this suit? Such would seem to be the plain import of the language used, but we will consider briefly the argument of the government in support of the opposite view.

[2] It is first contended that the proviso has no application to this case, because it is by its terms limited to lands patented prior to the passage of the act. We cannot so construe it. In a former part of the section specific reference is made to patents *heretofore* erroneously issued, and to patents *hereafter* issued, and if Congress intended to limit the proviso to lands patented prior to the passage of the act it would have used appropriate and specific language for that purpose. The expression "that were certified or patented" refers to the mode in which the title was acquired rather than to the time of its acquisition. Legislative acts are presumed to be prospective in their operation, and courts will not limit them to past acts or past transactions, unless such clearly appears to have been the legislative intent. Why grants of this particular kind were excepted from the general rule permitting suits to annul land patents we are not advised. The reason suggested by the railway company, namely, that the company had relinquished lands, the title to which had been confirmed by a decision of the Supreme Court of the United States, and was awarded lands with an equally indefeasible title, does not appeal to us. Had the proviso been attached to the lieu land or relief act of 1892, the reason suggested would be a cogent one; but, when we find it attached to an enactment years later in point of time and of general application, the argument loses all its force. But we may only consider the reason for the enactment as an aid to construction, and we see no reason why patents issued prior to the passage of the act should stand upon a different footing from patents issued thereafter. We are far from convinced that Congress so intended.

The contention on the part of the government that the proviso does not apply where patents have been procured through fraud on the part of the grantee, or through mistake on the part of the government or its officers, or where mineral lands have been patented under agricultural land laws, or vice versa, calls for but passing notice. Fraud and mistake are the principal grounds, if not the only grounds, upon

which land patents can be assailed or annulled, and to hold that the act does not apply in such cases would be to repeal it by judicial construction. As said by the Supreme Court of the United States in United States v. Winona, etc., Ry. Co., 165 U. S. 463, 476, 17 Sup. Ct. 368, 371 (41 L. Ed. 145):

"Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department."

This case was approved in United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 450, 28 Sup. Ct. 579, 580 (52 L. Ed. 881), where the court said:

"The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it, or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect. It is said that the instrument was void, and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued,' it describes the purport and source of the document, not its legal effect. If the act were confined to valid patents, it would be almost or quite without use."

If a bill of complaint to annul a patent charged neither fraud nor mistake, the defendant would require the aid of no statute of repose, no statute of confirmation, for his protection. He would find ample defense and protection in the deficiencies of the complaint itself.

We are satisfied, therefore, that the prosecution of this suit is prohibited by law, and the decree of the court below is accordingly affirmed.

LUM KIM v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1915.)

No. 2622.

1. EVIDENCE ⟸333—RECORDS—STATUTORY PROVISIONS.

An instrument, called a birth certificate, which gives the person's name, sex, race, date of birth as August 8, 1880, names of parents, with their place of nativity, occupation of father, residence of parents, and name of midwife, verified by affidavit made 28 years after the birth of the person, and bearing indorsements containing the name of a physician and the recital: "Certificate of Birth [person's name]. Compared. Recorded at request of [physician's name] in book blank of Certificate of Birth," and signed by deputy recorder—is not admissible under Pol. Code Cal. § 3075, enacted in 1872 and remaining in force until 1905, and requiring all physicians and professional midwives to keep a register of the time of each birth in which they assist professionally and section 3077 as amended in 1878 and in force until 1905, requiring all persons registering births to file quarterly with the county recorder a certified copy of the register, or under Act March 18, 1905 (St. 1905, p. 104), replacing the sections, and requiring physicians and midwives assisting at a birth to return in writing

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

within 5 days thereafter to the county recorder a certificate of registry of birth containing enumerated facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247–1257, 1259–1265; Dec. Dig. ⟸333.]

2. ALIENS ⟸32—DEPORTATION OF CHINESE—EVIDENCE—FINDINGS.

A finding of the trial judge who saw the witnesses in a proceeding to deport a Chinese person will not be disturbed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

3. ALIENS ⟸32—DEPORTATION OF CHINESE—BURDEN OF PROOF.

A Chinese person has the burden of showing his right to remain in the United States in proceedings to deport him.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.

What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William R. Day, Judge.

Proceedings by the United States for the deportation of Lum Kim, a Chinese person. From an order affirming an order of deportation, Lum Kim appeals. Affirmed.

J. J. Sullivan, of Cleveland, Ohio, for appellant.

C. R. Alburn, Asst. U. S. Atty., of Cleveland, Ohio, for appellee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

WARRINGTON, Circuit Judge. Lum Kim was arrested in Cleveland, Ohio, March 5, 1913, upon a warrant charging him with being "a Chinese person and of Chinese descent," and "unlawfully in the United States, * * * and not lawfully entitled to remain therein." Upon his appearance with counsel before a United States commissioner, admission was made that defendant is "a Chinaman and of Chinese descent," and, no other evidence being presented by either side, defendant was ordered to be deported to the republic of China. The cause was appealed to the District Court and there tried upon adverse testimony and exhibits, and the order of the commissioner was affirmed. Defendant appeals.

[1] At the trial in the District Court admission was again made that defendant is "a Chinaman," and the defendant then, by way of defense, assumed the burden of showing that he is a native-born citizen of the United States. He testified that he was 33 years old and a laundryman; that he was born at Cortland, Cal., and, at the age of 7 or 8 years, was taken by an uncle to St. Louis, where he remained some 23 years, living with the uncle and working for him in a laundry part of the time; and that 2 years before the trial he removed to Cleveland and worked there in a restaurant. It appears that his parents and the uncle mentioned returned to China and died before the trial. The evidence here is similar in material parts to evidence relied on by defendant in Ng You Nuey v. United States (decided by this court June 8, 1915), and to the extent of such analogy the decision in that case must

rule this one. Indeed, in view of this correspondence in facts, it will be necessary specifically to pass upon only one additional matter here. An instrument, called a birth certificate, was received in evidence in the instant case. It in terms gives defendant's name, sex, race, date of birth, names of parents, with their place of nativity (China), occupation of father, residence of the parents (Cortland, Sacramento), and name of midwife. The paper appears to have been subscribed and sworn to by one Wang Long Bong before a notary public in the city and county of San Francisco. The affiant states that he is a merchant residing in San Francisco, that he knows the contents of the "foregoing certificate," and that he is acquainted with defendant and also was with defendant's parents in their lifetime. The record contains two copies of the instrument, and one of them is accompanied by a photograph, which the affiant states to be that of defendant. The date of defendant's birth as there given is August 8, 1880, but the affidavit was not made until July 10, 1908. The instrument bears indorsements in substance as follows:

"4841.80. Dr. Thos. Y. Kimlan, 649 Kearney St., S. F. Indexed. Certificate of Birth Lum Kim. Compared. Recorded at request of Thos. Y. Kimlan, July 11, 1908 * * * in book blank of Certificate of Birth, page 223, Sacramento county records. C. A. Root, Recorder; C. J. Chenn, Deputy."

Section 3075 of the Political Code of California, enacted in 1872 (1 Deering Ann. Code and Statutes), and continued in force until 1905 (1 Kerr Cyc. of Cal.), provided:

"All physicians and professional midwives must keep a registry of the time of each birth at which they assist professionally, the sex, race, and color of the child, and the names and residence of the parents."

Section 3077, as amended in 1878 (1 Deering, Ann. Code and Statutes), and continued until 1905 (1 Kerr, Cyc. of Cal.), provided among other things:

"All persons registering * * * births * * * must quarterly file with the county recorder a certified copy of their register. * * *"[1]

The instrument in question does not purport to be a certified copy, nor even a copy, of anything theretofore registered and filed, in accordance with the requirements of the statutory provisions which were in existence at the date of defendant's birth and continued in force for almost 25 years thereafter. These provisions, it is true, were re-

[1] It is to be observed that on March 18, 1905, the provisions of these two sections were in effect replaced by amendment of section 3077 (Stat. and Amend'ts of Codes of Cal., Sess. 1905, or 1 Kerr, Cyc.), which provides: "Physicians, midwives * * * assisting at a birth shall return in writing within five days thereafter to the county recorder of the county where such birth takes place in such form as may be prescribed by the state registrar a certificate of registry of such birth which shall contain among other matters, the time and place of such birth, name, sex, race. * * * In case there shall be no physician, midwife, or nurse attending at such birth, then it shall be the duty of the parents of any child born in this state (and if there be no parent alive, then the next of kin of said child) within ten days after such birth to report in writing to the recorder of the county * * * where such birth takes place, * * * the date, place and residence, name, sex, * * *" etc. (St. 1905, p. 104.)

placed in 1905, but by even more drastic requirements, which are still in force, as to registration. According to the instrument defendant was born in Sacramento county, August 8, 1880, and yet this paper was executed in the city and county of San Francisco and filed with the recorder of Sacramento county 28 years after the birth. Defendant testifies that his uncle forwarded the paper to Wang Long Bong "for his signature," and that the paper was obtained when defendant was contemplating a trip to China. It is fairly to be inferred from the record that Wang Long Bong and the defendant had never met, and that neither had ever seen the other; it was therefore impossible for Bong to identify the photograph of defendant. No explanation is given for the presence of the name of the physician, which appears twice among the indorsements upon the paper. The name alone of a midwife is shown in the portion of the certificate where that of the physician should appear, if in truth he was present at the birth of defendant. We agree with the ruling made in Lee Yuen Sue v. United States, 146 Fed. 670, 671, 77 C. C. A. 96, 97 (C. C. A. 9th Cir.), where it was said in passing upon the validity of a similar instrument:

"This paper was not legal evidence. It was not prepared as required by law * * * and was of no force whatever as a legal document."

[2, 3] Counsel for defendant calls attention to the fact that at one stage of the hearing below the learned trial judge thought the defendant had made a prima facie defense. The opinion shows, however, that upon further consideration the judge became convinced that the evidence failed to sustain the defense. He was possessed of experience in this class of cases, he saw and heard the witnesses, and we should hesitate to disturb his conclusion, since it depended largely upon the credibility of defendant. We may add that we have examined the record and briefs attentively and, upon all the considerations mentioned, have become convinced that the defendant has not sustained the burden which rested upon him of showing that he is a native-born citizen of the United States.

The order is accordingly affirmed.

THE JAMES L. MORGAN.

THE NEW BRUNSWICK.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

Nos. 291, 292.

COLLISION ⇐94—OVERTAKING VESSEL—VIOLATION OF RULES—COLLISION WITH THIRD VESSEL.

The steam lighter Morgan, passing down the Hudson river, overtaking and desiring to pass to the starboard side of the ferryboat New Brunswick, gave a one-blast signal, but was answered with two blasts. She persisted, however, and about the same time the New Brunswick changed her course to cross ahead of the Morgan, which then went to starboard and came into collision with the tug Bush, also passing down. *Held*, that both the lighter and ferryboat were in fault for violation of rule 1

of the Inland Navigation Rules (Act June 7, 1897, c. 4, § 1, art. 18, 30 Stat. 100 [Comp. St. 1913, § 7892]), which provides that "under no circumstances shall the vessel astern attempt to pass the vessel ahead until * * * said vessel ahead shall signify her willingness by blowing the proper signals," and that "the vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197–199; Dec. Dig. ⟸94.

Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit for collision by the Bush Terminal Company, owner of the steam tug Eleanor Bush, against the steam lighter James L. Morgan, General Lighterage Company, claimant, and the ferryboat New Brunswick, Pennsylvania Railroad Company, claimant, impleaded. Decree against the New Brunswick alone, and her claimant appeals. Modified.

For opinion below, see 212 Fed. 970.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Chauncey I. Clark, both of New York City, of counsel), for appellant.

Carpenter & Park, of New York City (Samuel Park, of New York City, of counsel), for The James L. Morgan.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for appellee Bush Terminal Co.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. May 6, 1912, the steam lighter James L. Morgan was bound down the Hudson river with the steam tug Eleanor Bush, also bound down ahead on her starboard hand, and the ferryboat New Brunswick, also bound down on her port hand, and ahead of all a tow of sand scows on a hawser bound down.

Certain facts are conceded:

First, an exchange of whistles between the Morgan and the New Brunswick, the former blowing one and the latter two. Each vessel claims to have blown first, the Morgan also alleging that the signal was exchanged twice. These differences are immaterial, the important consideration being that the Morgan and the New Brunswick differed as to the course of navigation to be followed.

Second, that shortly after this exchange of signals the New Brunswick blew an alarm and stopped, and that the Morgan sheered eight to ten points to starboard into the port side of the Bush.

The owners of the Bush filed a libel to recover their damages against the Morgan whose owners brought in the New Brunswick under the fifty-ninth rule in admiralty.

The District Judge treated the case as falling under the starboard hand article 19 of the Inland Regulations of 1897 (Act June 7, 1897, c. 4, § 1, art. 19, 30 Stat. 101 [Comp. St. 1913, § 7893]), the New Brunswick being the burdened and the Morgan the privileged vessel. He accordingly directed a decree for the libelant against the Pennsylvania

Railroad Company, claimant of the New Brunswick, the libelant to pay costs to the claimant of the Morgan.

We are satisfied that the three vessels were proceeding down the river on substantially parallel courses, and that the Morgan, the faster vessel, was overtaking the other two. The danger signal of the New Brunswick followed by the sudden sheer of the Morgan is not so consistent with the steady maintenance of crossing courses as it is with a change of the New Brunswick from a parallel to a crossing course and the insistence of the Morgan to pass on the starboard side of the New Brunswick against her protest.

The overtaking rule (article 18, rule 8) of the Inland Regulations of 1897 is:

"Rule 8. When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vesel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

Both vessels were at fault under this rule; the Morgan for persisting in passing on the starboard side of the New Brunswick without her consent and against her protest, and the New Brunswick for changing her course. The decree is modified, and the court below directed to enter the usual decree for half damages in favor of the libelant against the steam lighter James L. Morgan and the ferryboat New Brunswick, with costs of this court to the claimant of the New Brunswick.

THE MINNIE.

THE VALENTINE.

(Circuit Court of Appeals, Second Circuit. June 25, 1915.)

Nos. 299, 300.

1. COLLISION ⊂⊃125—SUIT FOR DAMAGES—FAILURE OF PROOF.
   A libel for collision *held* properly dismissed on the ground that libelant had not sustained the burden of proof because it could not be determined on the conflicting evidence which vessel was in fault.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 266–279; Dec. Dig. ⊂⊃125.]

2. ADMIRALTY ⊂⊃117—APPELLATE PROCEDURE—AMENDMENTS AND TRIAL OF CAUSE ANEW.
   Although on an appeal in admiralty in the second circuit a cause may be tried de novo, issues not made by the pleadings nor tried in the court

below will not be heard unless the pleadings are amended and notice given within the time prescribed by court rule 7 (208 Fed. xxii, 124 C. C. A. xxii).

[Ed. Note:—For other cases, see Admiralty, Cent. Dig. §§ 748–757; Dec. Dig. ⊂⊃117.

Nature of hearing on appeal, admission of new proof, see note to The Venezuela, 3 C. C. A. 322.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit for collision by the Staples Transportation Company, owner of the coal barge Canton, against the steam tug Minnie and barge Valentine, the Thames Towboat Company, claimant, the steam tug Watuppa, impleaded; and by Henry H. Reed, cargo owner, against the same. Decree dismissing libels, and libelants appeal. Affirmed.

Harrington, Bigham & Englar, of New York City (T. C. Jones, of New York City, of counsel), for Staples Transportation Co.

A. B. A. Bradley, of New York City, for Reed.

Carpenter & Park, of New York City (Samuel Park, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. [1] September 11, 1913, there lay at anchor in a line along the eastern edge of the channel opposite the coal docks of the Pennsylvania Railroad Company at South Amboy, N. J., a schooner, above her the loaded coal barge Canton and above her still other barges. The channel is narrow, runs northwest and southeast, and the tide was ebb. A schooner was coming down on the west side of the channel above the Canton on her port tack, and the tug Minnie was coming up with the light barge Valentine in tow on a hawser 180 feet long bound to an anchorage above the Canton. Between them the tug Watuppa fast to the starboard side of the Canton was rounding her to into the channel to pass down. The Minnie blew a signal of two whistles to the Watuppa, indicating that she would pass up starboard to starboard, which the Watuppa answered with two, indicating her acquiescence. The Minnie passed about 50 feet clear of the bow of the Canton having the schooner just abeam on her port side, but the Valentine came into contact with the port bow of the Canton, then heading across the channel, damaging the Canton and her cargo. The owners of the Canton as well as the owners of her cargo filed libels against the Minnie and the Valentine, whereupon the claimant of the Minnie and the Valentine brought in the Watuppa under the fifty-ninth rule in admiralty.

The witnesses from the Canton say that the collision occurred as the result of the Valentine sheering into the Canton, while the witnesses from the Minnie say that the Watuppa shoved the Canton across the Valentine's bow. Judge Mayer was unable to discredit any of the witnesses or to determine which account was correct. Indeed, it was a situation where the motion of one vessel might very easily be attributed by observers to the other. Therefore under The City of Chester

(D. C.) 18 Fed. 603, 605, he dismissed the libel without costs on the ground that the libelant had not sustained the burden of proof.

[2] At the hearing in this court counsel for the cargo of the Canton contended that the Minnie should be held at fault for crowding into the narrow space between the down-coming schooner and the Canton executing the awkward maneuver of turning around to head down the channel. It was said that the Minnie on an ebb tide ought to have waited until the channel was clear. If this argument is open to the claimant of the Watuppa notwithstanding her acquiescence in the navigation proposed by the Minnie, still we cannot consider it. No such charge of negligence was made in any of the pleadings, nor was any question asked of any witness on the subject. Although an appeal in admiralty is in this circuit a new trial (Munson S. S. Line v. Miramar S. S. Co., 167 Fed. 960, 93 C. C. A. 360), our admiralty rule 7 (208 Fed. xxii, 124 C. C. A. xxii) requires applications to make new allegations or to take new proofs to be made within 15 days after filing of the apostles and upon 4 days' notice to the other side. Upon this record it would be very unfair to the claimant of the Minnie and Valentine to consider a new charge of negligence, and the time within which it could have been pleaded is past.

The decrees are affirmed, with costs of this court to the claimant of the Minnie and Valentine.

In re NEADERTHAL et al.

FREUNDLICH et al. v. EISENBACH.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 208.

BANKRUPTCY ⊂=326—PROVABLE DEBTS—SET-OFFS—"MUTUAL DEBTS."

A debt owing from a bankrupt partnership to a creditor and one owing from the creditor to an individual partner are not "mutual debts," which may be set off against each other, under Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (Comp. St. 1913, § 9652).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. ⊂=326.

For other definitions, see Words and Phrases, First and Second Series, Mutual Debts.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from an order reversing the order of the referee in bankruptcy, allowing a claim of $9,445.58 filed by the appellants against the estate of the bankrupts. Affirmed.

David Steckler, of New York City, for appellants.

Rosenthal & Heermance, of New York City (David Haar, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The referee allowed a claim of $9,445.58 against the bankrupts' estate, filed by the appellants. The District

Court reversed this order and disallowed the claim as filed. The appellants are executors and trustees under the will of Rose Neaderthal, deceased, who was the mother of Samuel and William. These persons and William Plapinger, were the members of the firm of Wm. Neaderthal & Co. of which firm the bankrupts are the surviving partners. William died in April, 1911, and on his death the testatrix received $16,000 insurance upon his life. Of this amount she loaned the bankrupt firm about $12,000, as follows: On April 14, 1911, she made a loan of $8,000; on April 30, 1912, a further loan of $3,000 to the bankrupt firm and on June 27, 1912, another loan to them for $1,000, and received the firm's notes therefor. She died in December, 1912, leaving a will by which she directed that her residuary estate should be divided into five equal parts, one of which, about $2,400, is payable to the bankrupt, Samuel Neaderthal, as residuary legatee. This is the sum which the bankrupts seek to set off against the indebtedness of the bankrupt firm. The trustee objected to this being done, but the referee permitted the claim to stand as filed. The District Judge overruled this decision on the ground that any set-off or counterclaim must come within the provisions of section 68 relating to set-offs and counterclaims. Subdivision "a" of section 68 of the law is as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The executors under Rose's will presented a claim against the bankrupt firm in which they credit $2,400, the interest of the bankrupt Samuel Neaderthal in the estate of Rose Neaderthal. This set-off is disputed because it is not a case of mutual debts and credits. It seems to us that the bankruptcy act does not permit the appellants Freundlich and Samuel Neaderthal to set off the legacy which is due from them to the bankrupt Samuel Neaderthal against the sum owing by the bankrupts as copartners to the executors, for the reason that the debts are not mutual. The appellants, as executors under the will of Rose Neaderthal, owe the individual bankrupt Samuel Neaderthal $2,400 and the partnership owes the executors for moneys loaned to it a sum approximating $12,000. These are not mutual debts and cannot be set off against each other.

If A. owes B. $100 and B. owes A. $100 it is plain that one debt cancels the other and neither owes the other anything. But if A. owes B. $100 and B. owes A. and C. $100, it is manifest that one cannot be offset against the other unless the amount which is due from B. to A. is ascertained and agreed upon between the parties. In the case at bar, the copartnership estate owes the executors $12,000. The fact that the $8,000 note was indorsed by the individual partners does not alter the situation. The copartnership estate is separate and distinct from the individual estates of the partners. The executors owe the partnership nothing.

The decree is affirmed with costs.

WOLCOTT v. UNION FERRY CO. OF NEW YORK AND BROOKLYN.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 301.

COLLISION ⊂⊃93—VESSEL PASSING OUT OF SLIP—NEGLIGENT LOOKOUT.

A collision in East River in the evening between a ferryboat, which had just left its slip, and a steam lighter passing up to a pier above, which had stopped 200 feet in front of the slip to allow other vessels to pass out in front of her, *held* due solely to the fault of the ferryboat in failing to sooner see the lighter by reason of her lookouts not having taken their positions.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. ⊂⊃93.]

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, holding respondent's ferryboat Montauk solely in fault for a collision with the steam lighter Alice. The collision happened about 9 p. m. March 4, 1913, in the East River opposite the Hamilton Ferry slip on the Manhattan side. The night was dark but clear, the tide first of the ebb. The Alice was bound from Staten Island for slip between Piers 5 and 6 East River, Manhattan. The ferryboat was bound out of her slip. The details of what occurred may be found in the opinion of the District Judge. 213 Fed. 529.

James J. Macklin and De Lagnel Berier, both of New York City, for appellant.

Foley & Martin, of New York City (William J. Martin and G. V. A. McCloskey, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The testimony as to vital points is conflicting and cannot be reconciled. To our minds the weight of testimony indicates that, at the time the Montauk, then 25 feet from the bridge, blew the slip whistle, the Alice was lying directly in front of the mouth of the Hamilton Ferry slip, about 200 feet out and at right angles to the course of the ferryboat. That the Alice was then substantially at rest and that she was properly at rest there, because while moving to cross the mouths of these several slips she was interrupted by the coming out of the Thirty-Ninth Street and the Atlantic Avenue boats and had to stop to let them cross her bows. These slips lie immediately beyond the Hamilton Avenue slip out of which the Montauk came. As we understand his opinion, Judge Chatfield reached the same conclusion as to the Alice's position at the time.

The Alice being in this position, we think the Montauk should have seen her and the other two ferryboats, which were stopping her progress, and should not have kept on out of her slip until the Alice had been freed from obstruction and had moved on.

Apparently the situation of the Alice was not seen or was not fully understood by those on the Montauk as soon as it should have been. The two lookouts of the Montauk were not in place until after she had moved on a considerable distance. One of them testified that he unhooked one side, shut the gates, and rung the bell to start her off from the bridge; he then proceeded forward by a course which he described. The other lookout unhooked his side, lifted the rudder pin, put up the chain, and then proceeded forward. The Montauk was moving out all this time. In consequence, one lookout heard the three blasts and alarm whistles "before (he) got to the other end," i. e., forward at his post. The other heard two back bells and alarms and, running through the gangway, reached the starboard bow when the Alice was about 20 feet away.

Decree affirmed with interest and costs.

TURNER v. QUINCY MARKET COLD STORAGE & WAREHOUSE CO.

(Circuit Court of Appeals, First Circuit. June 18, 1915. Rehearing Denied September 9, 1915.)

No. 1098.

1. PATENTS ⟸328—SUBJECTS OF PATENTS—"MANUFACTURE"—CONCRETE BUILDING CONSTRUCTION.

The Turner patent, No. 985,119, for an improvement in steel skeleton concrete construction in structures erected at least in part of reinforced concrete, is for a "manufacture," within the meaning of the patent law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Manufacture.]

2. PATENTS ⟸266—INFRINGEMENT—"USER" OF INVENTION.

A tenant, occupying under lease a building the construction of which embodies such a patented feature, is not necessarily a "user" of the invention, in such sense as to be an infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 410; Dec. Dig. ⟸266.]

Bingham, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by Claude A. P. Turner against the Quincy Market Cold Storage & Warehouse Company. Decree for defendant, and complainant appeals. Affirmed.

Charles J. Williamson, of Washington, D. C., for appellant.

Oliver Mitchell, of Boston, Mass. (William D. Turner, of Boston, Mass., on the brief), for appellee.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. [1] This is an appeal from the judgment of the District Court dismissing a bill in equity, alleging an infringement of letters patent issued on February 21, 1911, No. 985,119, said to be for an "improvement in steel skeleton concrete construc-

tion." The patent contains a number of claims, but one claim, as follows, illustrates all of them for the purpose of this opinion:

"3. In flat slab and column construction of concrete, the combination of column reinforcement composed of connected angle bars extending vertically therethrough, a wide spreading cantilever head extending into the slab beyond the column formed of crossed rods, supplemental vertical slab and column-reinforcing rods ending in outwardly bent portions at the column top; and slab reinforcement formed of rods extending in different directions crosswise of the column heads."

There seems to be some doubt about the meaning of the word "construction" in this claim, because it is queried whether or not it applies to an art or a process. There is no doubt that it applies only to what was in fact constructed and what is said to be "manufacture." Also there is no doubt that the invention covers only parts of the solid mass of the building.

The complaint made against the respondent below is that he had used, and now is using, the structure wherein the invention in question is embodied, as a tenant under lease, and that the structure was completed by the owners and builders prior to August 1, 1909, when the respondent went into occupation; and, not only this, but that the builders of the structure incorporated into it the patented improvements before the issue of the patent, and that the respondent has never practiced the art covered by the patent, but has merely occupied the completed structure as tenant under lease, and that such mere occupation, beginning as it did subsequent to the issue of the patent, was not invading the patentee's rights. Of course, the fact that the patent was not issued until after the tenant took possession bars any possibility of a claim against him for anything transpiring before he took possession, so that the only question is whether under the circumstances mere occupation as a tenant after the issue of the patent renders the respondent liable as an infringer. The learned judge of the District Court, however, expressed the following opinion:

"If the patentee had unequivocally claimed a new kind of building as his invention, I should be obliged to hold the subject-matter of the patent not a 'manufacture' and not within the classes of things patentable by law; following, among the recent decisions dealing with the question here involved, American, etc., Co. v. Arnaelsteen, 182 Fed. 324, 105 C. C. A. 40, in which the Court of Appeals for the Ninth Circuit so held with regard to a patent for an 'apartment house with disappearing bed,' rather than anything to the contrary in Riter-Conly Co. v. Aiken, 203 Fed. 699, 121 C. C. A. 655, or International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 C. C. A. 569. In the first of the two last-mentioned cases, the Court of Appeals in the Third Circuit upheld a patent for a 'roof structure'; in the second, the Court of Appeals for the Sixth Circuit upheld a patent for a 'burial crypt,' and from neither decision does it seem necessarily to follow that a ten-story building may be patented as a 'manufacture.'"

The opinion continued as follows:

"It seems to me entirely clear that invention of what is thus pointed out cannot make the patentee the inventor of a new kind of building, entitled to claim the whole structure wherein it has been employed as covered by the patent, and entitled to treat every occupant as an infringing user of his invention. No one, in my opinion, can be regarded as having infringed such a patent who has had nothing to do with the employment of the patented method in putting up the building."

Of course, the patentee in this case, as against the respondent, must establish an "exclusive right to make, use and vend the invention or discovery," or one of them, within the jurisdiction for the time named in the patent statute. It seems to be the impression of the learned judge in the District Court in this case that a construction like that involved here belongs to the domain of architecture, rather than that of "manufacture." "Manufacture," however, is a very broad word, which it is not safe to attempt to limit in a general way. International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 C. C. A. 569, decided by the Circuit Court of Appeals for the Sixth Circuit, on March 3, 1914, extended the word "manufacture" to the construction of a mausoleum, having all the features of an architectural building, with hallway or lobby, crypt, and a room in the hallway for accommodation in case of stormy weather. At pages 228 and 229 of 213 Fed., at page 569 of 129 C. C. A., the opinion, which was by a strong court, examined the prior decisions, and limited or qualified them, going even so far as to cover in its observations Jacobs v. Baker, 7 Wall. 295, 19 L. Ed. 200, and Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714. This must be accepted as broadening out the prior decisions on this topic, especially demonstrating that no rigid rule can be accepted.

In the present case it must be conceded that the portions of the building in question exhibit marked improvements, which, in the case of mere additions to a building having prior existence, would be clearly of a patentable character.

[2] The invention was said to relate "to buildings or structures erected of reinforced concrete, and its object to provide an arrangement of reinforcement for column and slab or floor construction." It then proceeds with further details showing that the patentee had in mind the construction of a building with the patented features as a part thereof; but what was erected in the present case was an entire building. There is no allegation that the respondent made any special or independent use of any part of the building, or is the owner of any part thereof. For example, it is not stated that he in any way repaired any part of the building, or added thereto, or took therefrom, or that the doors or windows, or any movable part of the building, had any patented feature, or that the tenant made use of any such movable parts, or in any way manipulated any portion of the structure. There was not any use by him of the patented features of the structure in any popular sense of the word. He would ordinarily be said to have occupied the premises, or to have rented them; but never in any ordinary sense would he be said to have used them. This is not, therefore, like the well-known case of a person occupying a house or grounds, who manipulated a patented driven well on the premises, or who in any way manipulated, moved, or otherwise actuated any separate portion thereof. In stating our result of this case, we have all these features in mind, and do not wish to confuse it with any case in which, in the ordinary sense, a person charged with infringement can be said to have constructed, or owned, or manipulated any part of any feature embraced or covered by any patented invention. The respondent merely occupied the building, and, so far as the proofs show,

in no way concerned himself, and in no way interfered, with any of the columns, slabs, or floor constructions, or other details thereof.

Under the circumstances, we find no specific, illustrative authority aiding us in a conclusion of the case, either in Curtis, Walker, or in the English work of Edmunds, or in judicial decisions. All we find from any authoritative source, bearing upon the precise case, is an observation of a general character, made in 3 Robinson on Patents (1890) 55, as follows:

"Thus, when a patented invention is inseparably annexed to other property without permission of the patentee, any one who owns, or uses, or buys, or sells, or leases such property, either as principal or agent, is guilty of infringement. But if the interest of the alleged participant is not dependent on the invention, though casually enhanced by its wrongful use, the enjoyment of such interest is not infringement."

What is thus described by Robinson is precisely the case here. The respondent neither owns, nor uses, nor buys, nor sells the property in question, or any part of it. He only leases in the manner we have described, and in leasing he has no peculiar or special interest in the patented parts, although his occupation is casually enhanced by them. Therefore the case is precisely within the quotation which we have made. The writer, however, cites no authorities sustaining his proposition in the form in which put, or so far as appertains to this case. The authorities he cites are only incidental, and are not one way or the other clearly marked for the purposes to which our opinion relates. We are therefore left to solve the case in a general light, with the practical application of statutes in reference to patents. In applying this, we must be careful to remember that no rule must be laid down of a general character which will unjustly shield unlawful infringements, and that we have no view beyond the precise case with the circumstances to which we have referred, and no intention that our conclusion shall be applied farther than concerns that precise case. On the other hand, it is absurd to lay down a rule which would render one of dozens or hundreds of tenants of these modern great buildings liable for infringement, because some part of the building involved some patented feature; and it is impossible to draw a specific line of distinction between a case of that character and the one at bar.

It is possible that we could find some support for our conclusions in the Circuit Court of Appeals opinion for the Eighth Circuit, in Turner v. Moore, 211 Fed. 466, 128 C. C. A. 138; but, if we should follow that case, the result would not be substantially different than what we have reached. Therefore we have not endeavored to sift it out and apply it.

The judgment of the District Court is affirmed, and the appellee recovers its cost of appeal.

BINGHAM, Circuit Judge (dissenting). I agree with the opinion of the court that the patent in question is for a manufacture or product, and not for a process; but I am unable to agree that the use made by the defendant of the patented structure does not constitute infringement. The defendant is a tenant, under a lease, of a building in the construction of which the structure embodying the patent has been in-

corporated as an integral part. It occupies the entire building as a cold storage warehouse, and not any particular division or part thereof; and the structure of the patent constitutes the columns and floors of the building. In the District Court the contention of the defendant was that the patent was for a process, and that, inasmuch as it had had nothing to do with the erection of the building, but simply occupied it as tenant under a lease, its occupancy could not constitute infringement. It was practically conceded that, if the patent was for a product, the use made of the building by the defendant infringed.

Now, according to the language of the statute, a patented invention may be infringed by either making, using, or selling it without the permission or license of the patentee; but, in the opinion of the court, the meaning of the word "use," as applied to a patent for a product, is limited by restricting its application to products capable of manipulation, and, while it holds that a building, or a structure constituting a substantial part of a building, and which is not capable of manipulation, may be the subject-matter of an invention, it denies that the patentee's right in such a product can be infringed in any way other than by making or selling the patented structure. This results in reading the word "use" out of the statute so far as a patented structure of an immovable character is concerned.

In Robinson on Patents, vol. 3, p. 55, the author states:

"An infringement may be committed either by making, using or selling a patented invention. The words, however, are interpreted as comprehending every method by which an invention can be made available for the benefit of the infringer, and any person who participates in any wrongful appropriation of the invention becomes thereby a violator of the rights protected by the patent. Such participation may be direct or indirect; it is sufficient if it permits in any degree the unauthorized manufacture, use, or sale of the invention."

Here the defendant, by occupying the building in carrying on its business, of necessity makes use of the floors and columns of the patented structure. The use is direct, not indirect, and there is a plain case of infringement.

Entertaining these views, it seems to me the case should be sent back to the District Court for trial on the merits.

LEIBE et al. v. WALKER BIN CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1913.)

No. 2432.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—TILTING BIN.

The Walker patent, No. 614,279, for a tilting bin, designed chiefly for use in grocery stores, *held* valid and infringed.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by the Walker Bin Company against Magdaline Leibe and William Leibe, Jr., trading as the Wm. Leibe Refrigerator Manu-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

factory. Decree for complainant (224 Fed. 516) and defendants appeal. Affirmed.

T. Hart Anderson, of New York City, for appellants.
Ernest Howard Hunter, of Philadelphia, Pa., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. A majority of the judges being of the opinion that there is no error in the record, the decree is affirmed.

BERNARD GLOEKLER CO. v. WALKER BIN CO.

(Circuit Court of Appeals, Third Circuit. May 21, 1915.)

No. 1947.

PATENTS ⟸328—INFRINGEMENT—TILTING BIN.

The Walker patent, No. 614,279, for a tilting bin, designed chiefly for use in grocery stores, *held* infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Walker Bin Company against the Bernard Gloekler Company. Decree for complainant, and defendant appeals. Affirmed.

Ralph C. Powell, of Pittsburgh, Pa., for appellant.
Ernest Howard Hunter, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree holding the patent in suit valid and infringed.

The bill of complaint charges infringement of letters patent No. 614,279, granted November 15, 1898, to Edwin J. Walker, for a tilting bin. Having been many times adjudicated, the validity of the patent is admitted. The one defense is noninfringement, and this involves the scope of the patent as defined by the first claim, which is the only claim in issue.

The complainant's patent is for an improvement in bins of the kind commonly used in grocery stores for keeping commodities in bulk, which permit display without exposure, and facilitate the removal of their contents. Such bins are either encased in the shelves or placed beneath the counter, and are usually pivoted at the bottom within a receptacle or bin chamber with a front flush with the elevation of the shelf or counter. They are adapted to be rocked on a pivot in order easily to withdraw the open top of the bin from beneath the counter and obtain access to its interior. Many, if not all, tilting bins, possess, in greater or lesser degrees, two characteristics, one an axis upon which the bin is tilted, and the other a counter-balance, effected by so con-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

structing the bin that a portion of its contents shall be upon each side of a line extending vertically through the axis of rotation. These characteristics distinguish a tilting bin from an ordinary drawer. Pivoted tilting bins are old in the art. Counterbalancing bins are likewise old. Bins with a counterbalance in front of the axis of oscillation existed before the invention of Walker.

The contribution to the art made by Walker, for which he was granted a patent, consists of—

"the combination with a casing, comprising a bin chamber, of a bin tiltably mounted in said chamber, and of a depth substantially equal thereto, *the axis of oscillation of said bin being at the front edge of said casing, and a counterbalance front for said bin projecting forward of said axis.*"

In other words, the things that distinguish Walker's bin from all other bins, as it is claimed, are the location of the axis of oscillation at the front edge of the casing, and a counterbalancing front forward of the axis, and of necessity projecting beyond the casing, thereby producing a more perfect counterbalance and increasing the capacity of the bin.

The bin of the Walker patent is an open top box of irregular shape, a sectional view of which presents a five-sided figure, no two sides of which are parallel. It is placed within, and is supported upon the horizontal floor of, a rectangular casing. Two of the sides of the bin are built out beyond the casing and form the counterbalancing front. This front, which is termed in the patent a swell front, is inclined from the top downward and outward like the front of a show-case, has a glass face, and is upon a slope that readily enables one standing in front or above it to observe the contents of the bin. The front edge of the under part of the floor of the bin pivots upon the front edge of the upper part of the floor of the casing, the oscillatory movement being controlled and restricted by a lug projecting from the former into a socket sunk into the latter.

Simple as this arrangement is, the considerable litigation that has revolved around it suggests that it is of considerable value. In this litigation, prosecuted in several jurisdictions and covering nearly the life of the patent, the validity of the patent has uniformly been sustained, and the devices designed to escape its claims, have uniformly been found infringements.

The earliest case involving the validity and infringement of the Walker patent, was Walker Patent Pivoted Bin Co. v. Brown (C. C.) 110 Fed. 649, decided by the Circuit Court for the Eastern District of Pennsylvania, in 1901, in which the infringing bin was so like the bin of the patent that the trial judge did not find it necessary to describe it. Therefore, in that case, the important question decided was the validity of the patent.

The next case was Walker Patent Pivoted Bin Company v. Miller and England (C. C.) 132 Fed. 823, decided by the same court in 1904. The defendants in that case endeavored to avoid the location of the axis of oscillation upon the front edge of the casing, as called for by the Walker patent, and to escape infringement, by swinging the bin from joints or hangers, the upper extremities of which were pivoted

on the opposite sides of the bin chamber, and the lower extremities of which were pivoted on the two sides of the bin at points in direct proximity to the front edge of the casing. By suspending the axis of oscillation over the front edge of the casing at relatively the same pivotal point called for by the Walker patent, the court held that the bin of the defendant was within the scope of the Walker patent, although the claim of the Walker patent placed the axis "*at* the front edge," and the specifications contemplated the bin to be "rocked *upon* the edge" of the casing, and found the patent infringed. On appeal to this court, the decree was affirmed. 139 Fed. 134, 71 C. C. A. 398.

The next case was one in which the defendant in this suit first appeared in the Walker patent litigation. It was instituted by Walker Patent Pivoted Bin Company against Bernard Gloekler Company (C. C.) 188 Fed. 435, in the Circuit Court for the Western District of Pennsylvania (not reported). The bin of the defendant was a rectangular box, supported in an inclined position on the slanting floor of the bin chamber. The slant or forward and upward tilt of the floor of the bin chamber caused the front of the bin to project and to expose an angle of the bin beyond the axis of oscillation. The part of the bin thus protruding beyond the chamber formed a counterbalancing front. The axis of oscillation was a round bar across the front of the casing after the means employed, as we are informed, by Brown, the defendant in the case first cited. A preliminary injunction was granted.

In the case of the Walker Bin Co. v. Leibe, brought in the Circuit Court for the Eastern District of Louisiana, and its decree affirmed by the United States Circuit Court of Appeals for the Fifth Circuit (not reported), the bin of the defendant, instead of being suspended by a single joint or hanger, as in the Miller and England bin, was suspended on each side upon three joints or hangers, so arranged, however, that when the bin was pulled forward the result was a tilting of the bin upon an axis established by the elongation of two hangers at a point corresponding precisely to the edge of the casing at which the axis of the Walker bin is located. The patent was found infringed.

In the case of Walker Bin Company v. Cincinnati Butchers' Supply Co., heard in the District Court for the Southern District of Ohio, decided without an opinion and not reported, the bin of the defendant found to be an infringement, approached the rectangular form of the first Bernard Gloekler Company bin, and like it, was located upon the floor of the bin upwardly inclined so as to throw the front of the bin out of the casing at an angle, and in that way obtained a counterbalancing front. On the under part of the floor of the bin, at a point corresponding with the front edge of the floor of the casing, were two wheels, which were elevated and which supported the front part of the floor of the bin, and constituted the axis upon which the bin was tilted. As the point at which the tilt occurred was the "front edge of the casing" at which Walker placed his axis of oscillation, the court held that by using wheels as an axis instead of the pivotal means employed by Walker, the defendant did not escape infringement.

The alleged infringing bin of the defendant in the case under consideration is a box of irregular shape, a sectional view of which presents

a trapezium. It is placed in a bin casing with a floor inclining upward as in the first bin casing of Gloekler and in the imitation casing of the Cincinnati Butchers' Supply Company. When a bin is placed upon such an incline, the effect is to thrust or project its front beyond the front of the casing, and to make of the front of the bin an acute triangle, with the apex above and the base below, thereby giving the bin a swell or counterbalancing front extending beyond the axis of oscillation. There are no pivotal means used upon the front edge of the floor of the casing, but one inch back from the front edge of the floor and on opposite sides of it, are two rollers or inverted casters. These casters are not sunk or morticed into the floor of the casing but stand erect a distance equal to their height, which is about five-eighths of an inch. These constitute the axis of oscillation, but not necessarily the primary axis of oscillation. Three or four inches back from the rollers or casters and attached to the bin is a steel band or check which, by striking the casters, limits the distance which the bin may be pulled out. When access to the interior of the bin is desired, it may be opened in two ways, first, by pulling it down without pulling it out. It is then opened in exactly the same way the Walker bin is opened. When this is done by applying enough pressure, the axis of oscillation is at and upon the front edge of the bin casing precisely as in the Walker patent. But the defendant's bin is not intended to be tilted in that way, for when so tilted, the opening at the top, while sufficiently extended to permit the introduction of a small scoop, is not opened wide enough to make the use of the bin entirely practicable. The theory of the construction of the bin requires it to be pulled out on the rollers or casters until it is stopped in its transit by the steel band or check and then, using the rollers as the axis of oscillation, the bin is pulled down or tilted to its widest extent in precisely the same way in which the glass front of a Globe-Wernicke sectional bookcase is drawn out and then dropped down on the axis maintained in the casing, but unlike the front of a sectional bookcase, the bin is stopped before it is drawn out to its full extent. The difference in the location of the axes of the two bins in controversy is, that the axis in the Walker bin is at the front edge of the floor of the casing, while the axis of the defendant's bin, at first view, is one inch back from the front edge. If the defendant's bin did not have an elevated axis, it would be impossible to tilt it without using the precise front edge of the floor of the casing for an axis, and thereby squarely infringing Walker's patent. To avoid this, the defendant moved the axis of its bin one inch back from the front edge of the casing, and in order to get the precise result that Walker gets, raised the axis by means of casters to an elevation sufficient to permit the bin to tilt and to tilt over the front edge of the floor of the casing at relatively the same point at which Walker's bin tilts. In doing this, the defendant has striven to obtain what every other infringing defendant attempted, namely, the use of the front edge of the bin casing as the real pivot or axis of oscillation, by some means mechanically different from that employed by Walker, and like the others, it has failed because it appropriated the thing which gives to the Walker device its chief value.

In the Walker patent, the counterbalancing front projects immediately forward of the axis, and in size is the same at all times. The defendant's counterbalancing front is likewise in front of its axis of oscillation. If tilted upon the edge without being drawn out, the front and the location of the axis of oscillation are the same as those of the patent in suit. When the bin is drawn out a distance of three inches, the counterbalance of the front is increased by the projection of the bin and is still immediately in front of the secondary axis of oscillation. This increase of counterbalance is but an addition to the counterbalance that may be found in the Walker bin. When the two bins are stationary and in place, the counterbalancing or swell fronts are in all essentials identical. When the bin of the defendant is pulled out, the counterbalance is only increased or added to as the bin is moved, and produces the same result in substantially the same way as intended in the bin of the Walker patent. We are therefore of opinion that the defendant has infringed the patent in suit by embracing the elements of the claim which form its two controlling characteristics, in locating the axis of oscillation in such a relation to the front edge of the casing as to obtain the front edge tilt of the bin of the patent, in combination with a counterbalancing front projecting forward of the axis and beyond the bin casing.

The decree is affirmed.

ROBINSON et al v. TUBULAR WOVEN FABRIC CO.

(District Court, D. Rhode Island. June 29, 1915.)

No. 6.

PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—FLEXIBLE ELECTRICAL CONDUIT.

The Osburn patent, No. 652,806, for a flexible electrical conduit, shows merely mechanical or structural improvements on the conduit of the Herrick patent, No. 456,271, and in view of the disclosures of the latter patent the claims of Osburn can only be sustained on a narrow construction, which limits them to the precise structure shown. As so construed, *held* not infringed.

In Equity. Suit by W. C. Robinson and others against the Tubular Woven Fabric Company. On final hearing. Decree for defendant.

Charles F. Perkins, of Boston, Mass., for complainant.

William Quinby, of Boston, Mass., for respondent.

BROWN, District Judge. The bill charges infringement of letters patent No. 652,806, July 3, 1900, to H. G. Osburn, for flexible electrical conduit.

The patentee states that his object is:

"To provide a form of conduit which, while possessing the necessary rigidity and insulating properties, may be readily flexed or bent laterally to accommodate itself to the conditions of use, and, furthermore, to provide a conduit which can be manufactured at comparatively small cost."

Conducting wires for electric lighting, prior to the invention of the patent in suit, had been run through straight, rigid tubes with suitable

fittings to turn corners. A flexible tube was also in extensive use, and was constructed according to the Herrick patent, No. 456,271, July 21, 1891.

The specification of the Herrick patent sets forth the requirements of a flexible conduit or tube; that it shall protect and insulate the conductor introduced therein; that it shall be flexible to such an extent that it shall be capable of being bent without injury to a desired angle or curve. His conduit was made of three parts—the inner part or lining, formed of a strip of suitable material, spirally wound, with the turns slightly separated; the second part, a protective wrapping constituted by a tape or strip applied to the exterior of the lining in a manner to cover the narrow space left between the turns of the spiral, this protecting strip to be composed of some waterproof flexible material, such as oil paper or rubber-covered cloth (the patentee states that it may be applied in various ways, so as to cover the lining in the line of the separation between the turns of the inner spiral lining); and the third part is shown as "a seamless tube of threads interwoven." This is applied outside the protecting strip, or second part.

Herrick says concerning his outer covering that it is preferably:

"Nonextensible in itself, in order that strain on the conduit in the direction of its length may not operate to separate further the turns of the spiral lining. To this end the said covering preferably is formed by weaving threads together around the lining and protective wrapping in the form of a tube. A braided tubular covering having threads introduced therein in a manner to destroy its extensibility would be the equivalent of the woven covering."

He makes special reference to other means for rendering the conduit nonextensible in the following language:

"When the protecting strip is arranged as in Fig. 4—that is, extending longitudinally of the spiral lining and folded around the same, with its edges overlapping—the said protective strip itself will render the conduit non extensible; and in this case an ordinary braided covering—that is, one without longitudinal threads—may be employed, if desired."

Herrick clearly indicates that the whole conduit should be nonextensible, and in claim 2 of his patent makes express reference to a nonextensible woven or braided covering. He also indicates clearly in the language we have quoted, and as illustrated in Fig. 4, the use of his protective wrapping applied immediately to the spiral strip to render the spiral nonextensible. He thus provides two ways of preventing further separation of the turns of his spiral: First, a nonextensible outer covering; second, a protective strip applied longitudinally directly to the spiral strip.

This patent is a clear disclosure of two specific means for preventing extension of the inner spiral strip, as well as for making the entire tube nonextensible.

After Herrick, therefore, there could be no broad novelty in providing means to prevent the separation of the turns of the spiral, and thus to prevent the extension in length of the conduit as a whole, and the consequent reduction of the interior diameter of the tube.

The plaintiff's brief states that the commercial Herrick device employed paper board or fiber for the spiral strip, which constituted

the main body of the tube and the insulating protection for the conductor; that a rubber-covered, soft tape, spirally or helically wound, furnished the second member, or protective wrapping. No testimony is pointed out to indicate that in commercial practice under the Herrick patent the protective wrapping was applied in the manner indicated in Fig. 4 of the Herrick patent, and described in the foregoing quotation from the specification.

It is conceded that the Herrick conduit, popularly known as "circular loom," or "loom," solved the problem of a flexible conduit, if carefully made and honestly used.

It is alleged that a defect of the Herrick conduit was the separable character of its members, and that the spiral lining, which composed the main body of the conduit, was removable from the jacket, that workmen were tempted to remove it in order to facilitate the insertion of the conductor, and that the jacket then concealed the absence of the spiral member. It is also urged that the removal might be due to accident or careless use.

The Osburn patent in suit discloses a spiral member, described as a semiflexible element, corresponding in substance to the spiral member of Herrick. The convolutions or turns of this member are, in Osburn, bound together or locked in a longitudinal direction by means of flexible material interwoven therewith, to impart longitudinal strength to the tube; i. e., strength to withstand distortion or pull lengthwise of the tube. He describes the convolutions as forming, as it were, the woof threads or element of the fabrics, and the pliable material extending longitudinally as constituting the warp threads or element.

Referring to a covering for the tube thus constructed Osburn says:

"In flexible conduits of the prior art the structure has been such that the covering has been relied upon to impart longitudinal strength to the tube, and it has therefore been necessary to employ for the covering threads woven together, with one series of threads extending circumferentially and another series extending longitudinally. Due to the fact that the tubelike skeleton of my construction possesses in itself longitudinal rigidity and strength, other forms of covering having little or no tensile strength may be employed—as, for instance, a braided covering—and the cost of the conduit may thus be materially decreased."

Osburn's departure from the Herrick patent, therefore, is not in the provision of means for joining or binding the turns of the spiral, but merely in the provision of special means differing from those pointed out by Herrick for that purpose. Instead of using Herrick's longitudinal protective cover, pointed out in Fig. 4 and in the specification, Osburn uses interwoven threads or other pliable material for this purpose. Herrick clearly points out that with the construction shown in Fig. 4 the conduit is rendered nonextensible, and that in this case an ordinary braided covering without longitudinal threads may be employed if desired. Osburn's statement that the tubelike skeleton of his construction possesses longitudinal rigidity, and thus permits the use of a braided covering, is substantially a copy of what is above quoted from the Herrick patent. This emphasizes the fact that Herrick clearly discloses that a conduit having a spiral protective

strip may be rendered nonextensible without the use of a nonextensible outer covering. This is indicated as clearly in the Herrick patent as in the Osburn patent. Osburn shows a difference, however, in that he refers to the feature of the thread or twine passing across the inner and outer faces of alternate convolutions and forming layers upon the interior and exterior, while at the same time serving to effectually fasten the parts of the tube together.

It is conceded that the Osburn two-part structure, without some external protective or insulating means, is not adapted for use as a complete commercial conduit, and that either an outer coating or some substance applied externally is requisite for this purpose.

Assuming that the difference from Herrick in the means of uniting the turns of the spiral strip is an improvement, we have next to consider whether it was a patentable improvement and of such breadth as to justify the very broad claims of the Osburn patent. The patent has 12 claims, all in suit except the seventh and eighth. They need not be distinguished, as they are substantially the same; the elements being a flexible warp and a semiflexible helically arranged weft.

The complainant contends that flexible electric conduits are in a distinct art, since there are special requirements for such conduits. He therefore urges that for all practical purposes the prior art appurtenant to this case is represented by the Herrick patent. He thus seeks to exclude many of the prior patented structures upon which the defendant relies.

These contentions I must regard as unsound. The special requirements for flexible electric conduits were pointed out and met by Herrick. Osburn suggests nothing novel in this regard, but shows merely mechanical or structural improvements.

The Osburn patent must be regarded as disclosing merely an improved structure which functionally is the same as Herrick's. It has no functional advantages over the Herrick structure, when that is used in a way in which it is capable of use. The field covered by Herrick cannot be reoccupied by Osburn.

As Osburn's improvement was merely structural, it becomes pertinent to inquire whether his conduit, considered as a structure, was novel, and, if old, whether invention was involved in applying an old structure to the uses indicated by Herrick in his patent. It is therefore competent for the defendant to rely upon what was well known in the art of constructing flexible tubes, even if such tubes of the prior art had not in fact been applied to use as conduits for electrical conductors.

It seems to me quite clear from the defendant's evidence as to the prior art of tube making that the claims of the patent in suit cannot cover broadly tubular structures, when used for electrical purposes or any other purposes, merely because they use semiflexible, helical elements, the convolutions of which are locked together by interwoven longitudinally extending strands of pliable material.

Seamless woven tubes were old, and semiflexible, helical weft members in seamless woven tubes were old. A seamless woven tube comprising flexible warps interwoven with a semiflexible helical weft was old before Osburn.

Complainant's expert, Mr. Gooding, specifies five prior patents in which the warp and weft are woven and have different characteristics:

No. 57,233, August 14, 1866, White & Bedford.
No. 417,796, December 24, 1889, Taft.
No. 486,620, November 22, 1892, Stowe.
No. 486,621, November 22, 1892, Stowe.
No. 25,343, November 1, 1897, Blodner (British).

See, also, Callahan, 218,661 and 222,770, of 1879.

It is unnecessary to consider the other patents cited by the defendant; neither is it necessary to describe these patents in detail. The prior art in my opinion fully discloses the mode of constructing a flexible woven tube by interweaving a semiflexible weft and a flexible woof, whereby the tube was made suitable to resist both radial compression and longitudinal extension. In my opinion it would not, after the Herrick patent, involve invention to substitute for his tube a tube involving such general features as are claimed, merely for the purpose of preventing the separation of parts.

The defendant's product known as "Duraduct" is a seamless woven tube, single wall, whose warp threads are made of cotton and whose weft threads are round, hard-twisted paper. The weft is stiffer than the warp, but this feature is shown in patents of the prior art. It is the product of a circular loom.

I am of the opinion that the claims of the Osburn patent are entirely too broad; that he is not entitled, in view of the prior art, to prevent the use upon a circular loom of twisted paper for the weft and cotton threads for the warp, nor to control the application of a tube of such construction to the particular purpose of serving as a conduit or protective cover for electrical conductors.

Much of the Osburn specification is a mere statement of what is true generally of the ancient art of weaving fabrics in which warp and weft have different characteristics. If, by any liberality of construction, we could restrict the broad claims of his patent they would be restricted to the specific structures and materials mentioned, and could not include a structure like the defendant's tubular conduits. These seem to be a natural development from the prior art of the manufacture of tubing, and it seems legitimate to manufacture according to the methods and with the materials used by tube makers in order to produce a tube suitable for use as an electric conduit and having those general characteristics not new with Osburn, but which were pointed out by Herrick in his patent No. 456,271.

A weft of twisted paper had been used for a flat fabric produced on a flat loom. See letters patent to Robinson, 36,484, September 16, 1862.

The defendants are at liberty to use it upon a circular loom, even if the resulting woven tube is thereby stiffened, since woven tubes with a weft which serves to stiffen the structure are old. The specific material employed for the weft by the defendants is not suggested by the Osburn patent, but is a material suitable to be woven upon a circular loom, and the defendants cannot be denied its use merely because the complainant has claimed broadly as an element "semiflexible material," or material "having sufficient rigidity of structure to prevent

collapsing." If interpreted to cover the defendant's structure, each and all of the claims would, in my opinion, be void for excessive breadth.

The bill will be dismissed.

UNITED STATES COLUMN CO. v. BENHAM COLUMN CO.

(District Court, E. D. New York. June 19, 1915.)

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—CONCRETE FILLED COLUMNS. The Thorn patents, No. 835,717, No. 844,973, and No. 844,974, for concrete filled iron columns for buildings, and especially relating to the caps for supporting lateral beams, and means for joining the columns where one is set above another, *held* valid and infringed except claim 1 of patent No. 835,717, which is void for indefiniteness of statement.

In Equity. Suit by the United States Column Company against the Benham Column Company. On final hearing. Decree for complainant.

Robert B. Killgore, of New York City, for plaintiff.
Goepel & Goepel, of New York City, for defendant.

CHATFIELD, District Judge. This action charges infringement of three patents issued to George F. Thorn, as follows: 844,973, February 17, 1907, upon an application filed September 6, 1905; 844,974, February 19, 1907, upon an application filed October 17, 1905; and 835,717, November 13, 1906, upon an application filed December 5, 1905.

It appears that the use of fireproof construction in buildings and of reinforced concrete as a material for fireproof arches and walls was, at the time of the applications for these patents, undergoing great development. The prior art shows concrete in many forms of use, and its fireproof qualities were well known. But in the prior art shown by this record, we have very few instances of the application of concrete in the place of other materials, for accomplishing results which are now well recognized. A great reduction in the price of cement has been one of the elements in increasing the use of concrete, and the great growth of fireproof construction, by increasing the demand, has turned the attention of inventors and builders to what before that time had been matter of accidental or casual interest.

At the time when this subject first underwent practical development, the old idea of filling a hollow receptacle or column with concrete and letting it harden had been used, both in reinforcing such structures as pillars in a cellar (under one of the government buildings in Washington) and also in New York City by several concerns who were offering for sale upon the market hollow cast iron columns in which soft concrete had been poured and allowed to harden. A cast iron cap or plate with a flange-like head fitting over the top of these columns, and offering a supporting surface for the tier of beams to be laid thereon was used with columns which were intended to serve more than the

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purpose of a post. The endeavor to bolt together the parts of the structure and to erect more than one story by means of these cast iron columns filled with concrete led to the discovery of certain defects which interfered with the sale of the columns and the recommendation of their use by architects. The extra diameter of the cast iron cap, fitting down over the column, prevented its satisfactory use where the architect wished to inclose the column in a thin partition or floor, and the lack of strength and stability in the cast iron caps, even though the floor beams were bolted together or bolted to the caps, proved a severe handicap to the Thorn Column Company, of which the applicant for the above patents was president.

This company had in its employ one John J. Tresidder, who, according to the testimony, as early as the month of May, 1905, had learned, through his work as draftsman, the difficulties attending the use of the Thorn concrete columns.

It appears from the testimony of one Trillion, an architect, that in the month of July, 1905, he had some conversation with Mr. Tresidder as to the disadvantages caused by the extra diameter of the cast iron cap, above the place where it fitted upon the column. His testimony is to the effect that Tresidder stated to him that he had some ideas about making the size of the cap no greater than that of the column by inserting the cap in the column. But this testimony is not definite, and is not sufficient upon which to base invention, in view of the prior art and matters which will be discussed presently as to the relations between Thorn and Tresidder.

In the month of August of this year, Mr. Thorn, who evidently had in mind the same difficulties which Tresidder had become aware of, and who necessarily, as the president of the company, was seeking some solution, noticed on Broadway, New York, a building in which concrete columns were being used, and conceived the idea of adopting the well-known principles of making the cap equal in diameter with the column, but to telescope it within the column, and also by leaving both hollow, of carrying the concrete in a homogeneous mass up into the space within the cap, while providing brackets or shoulders, as a part of the cap, to which the tier of the floor beams could be fastened. He also thought of providing a recess in the cap or top of the column, by means of which the column of the next tier could be firmly set in the cap of the tier below. He returned to his office and had Mr. Tresidder prepare drawings embodying these ideas. This testimony is not disputed by Tresidder, and it is not disputed that Mr. Thorn took these drawings to his patent attorney, who prepared the necessary specifications and drawings with such promptitude that upon the 6th of September, 1905, Thorn filed his first application in Washington. In the meantime Tresidder had planned to leave the employment of the Thorn Company and to form a column company of his own, as he was familiar with the trade, and apparently felt that Thorn's applications for patents would not prevent his using ideas which he recognized were valuable, and which apparently were following along the lines of the conversations which he had had with Mr. Trillion.

On September 5, 1905, Tresidder showed to a witness by the name of James R. Gray a drawing which the witness signed that day, which

disclosed a column and cap of uniform diameter with the concrete from the column extending up within the recess of the cap. This witness testifies that Tresidder had talked with him at various times at his home prior to the date upon which this drawing was initialed, in order to secure the witness' advice about methods of constructing the iron parts of the column. This witness was a stationary engineer, and subsequently filed an application, on his own part, for a form of column like that of the sketch which he initialed for Tresidder upon the 5th of September, 1905.

It is thus evident that Tresidder did not use Gray's suggestion as to the metal construction, nor did he apply for any patent on his own part until the 23d of October, 1905, when he filed a specification, describing a fireproof column and cap with a solid core or pillar with a flattened upper end and cap, with an interior recess for interlocking with the flattened end of the core or pillar by rotation through 90 degrees, and for concrete filling of this socket and of the interior core of the column after locking them in place.

It is evident that Tresidder knew at this time that Thorn had filed applications in the Patent Office for the columns and caps of which the exterior diameters were the same and in which the concrete extended above the upper end of the column into the hollow of the cap.

Tresidder is shown to have applied to patent attorneys upon the 2d of October, 1905, for the filing of the specifications, which were presented in Washington upon the 23d of that month, but there is no evidence that Tresidder disclosed to his attorneys, or claimed in any way, that he was the inventor of any of the features of the applications then pending before the Patent Office or in the hands of Thorn's patent attorneys.

Subsequently litigation was had between the Thorn Company or Thorn's assigns and the various companies manufacturing columns under Tresidder's guidance. Injunctions were issued upon Tresidder's default, forbidding his infringement of the Thorn patents. The present defendant seems to have acquired by purchase the rights of one of these companies after such injunction. This case is presented, not upon the doctrine of contempt, but on the alleged independent infringement of the patent by the present defendant. Tresidder has been called as a witness in the present action, as well as in some of the proceedings based upon his default in contesting the previous suits, and has claimed to be the inventor of the features shown by telescoping and extending the concrete of the column up into the hollow of the cap.

The issuance of the patents to Thorn at a time when Tresidder was making his own application in the Patent Office for a modification or improvement of the idea and the prosecution of Thorn's applications after Tresidder had prepared drawings for Thorn for that purpose, and after Tresidder had left the Thorn Company to go into competition, makes it impossible to find that Tresidder considered himself to be the real inventor of the improvements claimed by Thorn, or that the Thorn patents should be held invalid on Tresidder's present testimony.

The issuance of patents presumptively gives Thorn the right to be considered the inventor, in the absence of conclusive testimony that

his claims were incorrect, and the present record certainly shows no more than that Tresidder may have recognized some of the difficulties which Thorn solved, and may have reached a partial understanding of such solution, while still in Thorn's employ, but do not go so far as to establish his right to claim the complete invention, which evidently was worked out by Thorn in August of 1905, and immediately communicated to Tresidder for the preparation of his drawings.

Assuming that Tresidder is honest in his belief that these ideas are his own, it is evident that an incomplete or fragmentary mental concept, which is suddenly made practical and workable by full explanation from an outside source, presents a most difficult problem if the person having that concept thereafter attempts to go back and determine just what had been in his own mind and how fully he had appreciated the ideas concerned.

Under the circumstances it must be held that the proof on the part of Tresidder has not shown so clearly and fully that he had done more than work upon the same problems as those which were occupying Thorn's mind before Thorn reached a complete practical solution, and Tresidder's conduct immediately thereafter makes it impossible to upset the Thorn patents and to give priority of invention to Tresidder, even if the date of some of Tresidder's cogitations and partial solutions was shortly before the date upon which Thorn solved the entire problem.

The defendant's structure is exactly like the combined structure of the Thorn patents, and the use of an apertured plate at the top of the cap, both as the means of filling the cap with concrete and for the insertion of a stick by which a hollow or tubular space is left in which a pin can be placed, so as to bind together the cap and the column of the next tier above, renders any defense to the charge of infringement impossible.

Claims 1, 2, 3, 4, and 5 of patent 835,717, claims 6, 10, 11 and 17 of patent 844,973, and claims 16 and 17 of patent 844,974 are alleged to be infringed.

In examining the prior art it will be noticed that the general idea of a continuous column or of a jointed fish pole-like construction was well known. The necessity of making a pillar or column continuous by a sleeve or flush, socket joint, the devices for projections or intermediate flanges as supports for girders or structures at right angles to the line of the column, and devices for strengthening the corners and stiffening the structures, were well known. Such patents as Cornell, 74,312, of February 11, 1868, Cornell, 160,574, March 9, 1875, Johnson, 225,060, March 2, 1880, Kirchhoff, 435,429, September 2, 1890, Gray, 488,274, December 20, 1892, and a publication which had not been pleaded, but which was allowed to go in evidence as illustrative of the prior art (during the course of the trial) from the book known as the Zeitschrift, translated from a copy in the New York Public Library, vol. 29, p. 936, bearing date in the year 1885, show the development of all the ideas involved in the shell or casing, as implied to metallic columns without filling. The article in the Zeitschrift describes a column substantially like the casing of the Thorn and Tresidder columns, with supports for the girders and with a socket and

flanges at the top which would receive any column or girder to be placed thereon. But in this particular column, which is said to be that used in much of the elevated railway in New York City, the so-called socket at each end of the column is for the purpose of the insertion of plates which, by means of a tie, bind together and render rigid the entire column.

The idea of merely filling columns with cement or concrete was old, as has been stated before, and as shown by the extract from Encyclopedie Des Travaux, published by J. Denfer in 1894. This discloses columns of equal diamater superposed and filled with concrete through the length of both, with pins to register the exact position and with brackets to carry floor beams. One drawing even shows a conical end fitting into the top of the column below.

Such patents as Moseley, 108,814, November 1, 1870, for a metallic pile, in which a tube or shell was filled with concrete; Borneman, 360,273, March 29, 1887, who placed a hollow column filled with concrete over the head of a wooden pile driven in the mud, as a bridge foundation; Bryant, 546,758, September 24, 1895, who built up a structure of concrete around two upright piles and by means of terra cotta piping to form a mold for the concrete; Davis, 616,084, December 20, 1898, who filled a column made up of a series of tubes with concrete; Norcross, 701,377, June 3, 1902, who made a solid concrete column in shape like an artificial stone column, stiffening it with metal; Smith, 762,496, June 14, 1904, who made circular sections like bricks or tiles with registering rings to interlock and fit them close together around an iron center, and finally the columns themselves, in use at the time Thorn filed his application, show full appreciation of the additional strength given by filling a hollow column of concrete and of the benefit in having these columns register or stand square one upon the other, by means of a socket cap or flange.

In addition, such patents as Borneman, supra, and Bryant, supra, show the idea of imbedding a center in concrete, while other patents, such as Bryant, Davis, and Smith, supra, show appreciation of the use of a metal core or center to transmit rigidity in position from one column to a superimposed column.

A number of English patents, such as Westwood, 2,191, June 24, 1874, show a pile with a flange or socket, but particularly featuring interlocking lugs. The Cunliffe patent, 2,802, August 26, 1873, discloses the idea of metallic columns made with sockets which are to be bound together with some substance like bitumen to serve the purpose of a binder or glue when solidified in position, and these sockets or bands in the form of ornamental heads actually hold together the light pieces of which the columns were made, but do not at all show the idea of the patent in suit. The Harrison patent, 924, March 4, 1881, discloses the use, in a hollow metallic column, of core which will strengthen the column. The Dixon patent, 222, January 18, 1873, discloses an iron pillar or column of tubular shape, to be filled with concrete so as to give a stiffening or bracing against bending and also against crushing strains, and the tubes are to be slightly tapered at one end so that the casing of the other may set over the top of the one below.

Other patents and publications are shown, illustrating the universal knowledge of the advantages presented by filling a column of concrete, and also the necessity of stiffening or strengthening concrete against bending or breaking strains by the insertion of metallic cores in some form or other and the application of flanges or socket joints with bands or projections for intermediate structures; and it certainly would not be invention to fill any form of device shown in the prior art with concrete.

The plaintiff, however, contends that while he has made use of old ideas, he has secured a patent embodying the features essential to a new and useful combination, designed and adapted to meet a need which was recognized at the time, and which required inventive genius rather than mechanical skill to appreciate and overcome. The matter is so simple and so easily understood that it seems as if a mechanic having any knowledge of the use of metallic columns and of the use of concrete might have easily solved the problem or discovered the idea which made practical and easy of construction a rigid and available concrete filled column for building purposes, but the testimony shows, and the fact seems to have been, that this step was not as obvious as it now seems. While the combination does not differ much in any single detail from the previous structures, its use as a whole presents a great advance, which has apparently been recognized by the trade. The novelty and practicability of the idea has been shown by the extent of the public use proven in the testimony.

Under such circumstances it would seem that the action of the Patent Office, in finding patentability and novelty rather than mere mechanical improvement in the combination of ideas, so as to make the fireproof column shown in the Thorn patents, should be upheld.

Tresidder's own patent, involving the old idea of an interlocking structure, indicates that he was trying to solve the difficulty of building a simple reinforced concrete column, with some scheme for covering the known need of a practical joint, by the employment of some ingenious form of a well-known device. That was exactly the problem which Thorn also was attempting to solve in his patents, and the Thorn patents are so simple in construction that the element of ingenuity or invention might well be inferred from the appreciation of the adoption of simple, practical ideas in a structure which could be easily made and transported.

There is no proof of double patenting, for the last patent is for a combination involving patentable invention over the earlier patents, while the idea or actual invention of the use of a pin or metal core is shown by Thorn's testimony to have been conceived by him during the preparation of the prior applications. Claim 1 of the first patent, if limited to the mere feature of having a diameter no larger than that of the column, would seem to be anticipated, and also to have been first conceived by Tresidder. On the other hand, if intended to show a combination like the more definite claims, it is invalid for lack of definiteness in statement. This claim will therefore be held invalid, but the others are not open to this objection.

The plaintiff may have a decree on all claims sued upon, except claim 1 of patent 835,717.

GEAR et al. v. FAIRMOUNT ELECTRIC & MFG. CO. et al.

(District Court, E. D. Pennsylvania. July 1, 1915.)

No. 759 Oct. Sess. 1911.

PATENTS ⊂=109, 328—VALIDITY AND INFRINGEMENT—CONNECTOR FOR ELECTRICAL CONDUCTORS.

The Williams patent, No. 831,815, for a connector for electrical conductors comprising a pair of separable members composed of insulating material which receive and confine the ends of the conductors, makes hermetically sealing the confined ends of the conductors and the connecting means by the insulating material an essential element of each claim, and inasmuch as such feature is not mentioned in the original specification, but was added to the claims by amendment without oath of invention, the claims are not within the application and are void. Also, *held* void as for unpatentable aggregations and for anticipation and not infringed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. ⊂=109.]

In Equity. Suit by Henry B. Gear and Paul F. Williams, doing business as Gear & Williams and as the G. & W. Electric Specialty Company, against the Fairmount Electric & Manufacturing Company, and J. C. Vogel, president, G. W. Slack, secretary, and C. S. Leonard, treasurer, of said company, for infringement of letters patent No. 831,815, for a connector for electrical conductors, granted to Paul F. Williams September 25, 1906. On final hearing. Decree for defendants.

A. Miller Belfield, of Chicago, Ill., and Augustus B. Stoughton, of Philadelphia, Pa., for plaintiffs.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. The plaintiffs' patent is for a connector for electrical conductors and, as stated in the specification, the invention relates to devices by which connection can be made with the ends of electrical conductors; as, for instance, between two cables or between a cable and an overhead conductor.

The defenses presented are: (1) That the claims of the patent in suit are invalid because: (a) They are for new matter not contained in the original application and inserted by amendment without the oath required by Revised Statutes, § 4892 (Comp. St. 1913, § 9436); (b) they are for unpatentable aggregations; and (c) they are void in view of the prior art. And (2) assuming that the patent is valid, the defendants have not infringed.

The first claim of the patent is fairly illustrative of all the claims, and is as follows:

"1. A device of the class specified, comprising a pair of separable members composed of insulating material, said members receiving and confining the ends of the conductors to be connected, means for connecting said conductors, and insulating material hermetically sealing the confined ends of the conductors and the connecting means therefor within said separable members."

It will be noted that the claim concludes with the element "and insulating material hermetically sealing the confined ends of the conductors and the connecting means therefor within said separable members."

A similar limitation is set forth in each of the remaining four claims of the patent. An examination of the file wrapper reveals that the

original application contained ten claims, none of which set forth the limitation in respect of hermetically sealing. The ten claims were rejected in view of prior patents and five new claims were substituted containing no limitation of hermetically sealing. The five claims were all rejected in view of the prior art. The applicant then filed a third set of six claims, the second to the sixth of which now stand as the claims of the patent in suit, the first claim not containing the clause providing for hermetically sealing. These claims were rejected by the primary examiner as being anticipated by the prior art.

Reconsideration of the claims was thereupon requested, in which request the applicant's attorney stated:

"As pointed out at this interview, none of the references show applicant's arrangement of an insulating casing with the two plates held together upon one another, and connecting devices hermetically sealed in the casing by insulating material. Allowance is requested."

The patent with the claims as they now stand was thereupon allowed. While the original specification referred to filling the separable members "with minerallac or other suitable insulating material," the words "hermetically sealing the confined ends of the conductors and the connecting means therefor within said separable members" state a new element in each claim which is nowhere set out in the original application. "Hermetically," in its broad signification, means "chemically," and, according to Century Dictionary, a "hermetical seal" is "an alchemic or chemical seal; an air-tight closure of a vessel effected by fusion, soldering, or welding." And "hermetically" sealed means "so closely sealed as to prevent the escape or entrance of air, gas or spirits."

As used in the amended claims, it is apparently a vital part of the claims, as all the claims were rejected by the Patent Office prior to the insertion of the limitation of hermetically sealing. This limitation was considered by the Patent Office as necessary to furnish an element of the combination upon which the claim to invention depended, and, whatever its significance, its addition by amendment invalidates the patent if it is new matter essential to the claims not contained in the original specification. It is possible that by "hermetically sealing" the applicant intended to narrow the claims to cover the exclusion of water and moisture as now contended; but, if this is true, it is nowhere indicated in the specification, as minerallac is referred to in connection with other suitable insulating material, and no reference is made to its being a substance impervious to moisture, nor is there any proof of such quality. That such a limitation was not in the mind of the applicant is apparent where in the specification he states:

"In figure 5 I have shown the device modified in two respects. One of these is that the hood *2a* is provided with an overhang *20*, by which rainwater is led down and caused to drip, thereby preventing it from gaining access to the interior of the device."

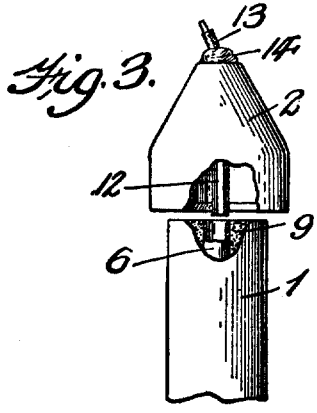
If it was intended that the insulating material should hermetically seal the confined ends of the conductors and the connecting means therefor within the separable members, there would be no apparent necessity to provide an overhang to lead down the rainwater. At all events, no suggestion of hermetically sealing, even as the plaintiffs con-

tend the term should be construed, is contained in the specification or claims as originally filed. That it is regarded as essential by the plaintiffs appears from their brief and was insisted upon at the argument. It must be held therefore that this is an essential new limitation beyond the terms of the original disclosure, and, being added to each claim by amendment without oath of invention, the claims are void under the authority of Steward v. American Lava Co., 215 U. S. 161, 30 Sup. Ct. 46, 54 L. Ed. 139, and the cases therein cited. Moreover, the claims are clearly anticipated by the prior art.

An examination of the drawings and specification in connection with the claims shows that the invention claimed simply comprises a pair of separable members composed of insulating material which receive and confine the ends of the conductors, which are connected by a slip joint, plus insulating material for hermetically sealing the confined ends of the conductors and the connecting means therefor.

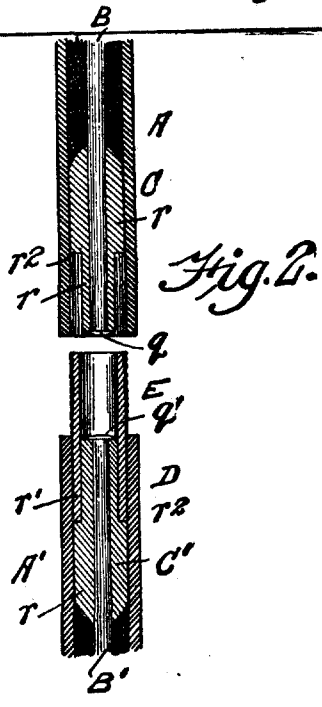
The Cobb patent, No. 396,543, when read in connection with its drawings and specification, contains every essential element of the patent in suit, as shown by the drawings below:

WILLIAMS, 831,815.
PAT. IN SUIT



Williams Claim 1: A device of the class, specified, comprising a pair of separable members, composed of insulating material, said members receiving and confining the ends of the conductors to be connected, means for connecting said conductors, and insulating material hermetically sealing the confined ends of the conductors and the connecting means therefor within said separable members.

COBB #396,543.

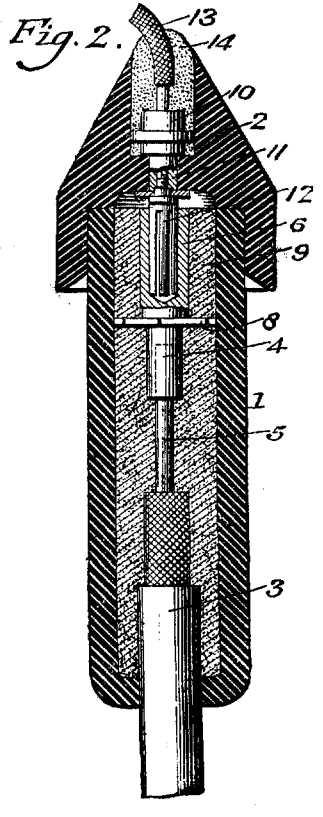


Like the patent in suit, it comprises a pair of separable members composed of insulating material, namely, an outside casing of vulcanized or hard rubber; the separable members receiving and confining

the ends of the conductors to be connected. In the Cobb patent the means for connecting the conductors consist of a sleeve or a thimble fitting with the outside casing of one member and over the insulation of the conductor of the other member, and the members contain as an insulating or sealing material a filling of paraffine. The elements comprising the members of the patent in suit are manifestly equivalents of those in the Cobb patent requiring merely mechanical skill for their substitution. From the accompanying comparative drawings of the patent in suit and Figure 4 of the Eckert patent, it may readily be seen that the separable members and every material part of the connecting device, as well as the overhanging cap in the patent in suit, is present in the Eckert patent, which is also supplied with "hermetical" sealing consisting of a filling of rubber. In the Eckert patent, the slip joint employed in the patent in suit has its equivalent, in that one of the members is provided with a screw which is inserted within a screw provided in the other member, whereby parts of the conductor may be removed by unscrewing one section from another.

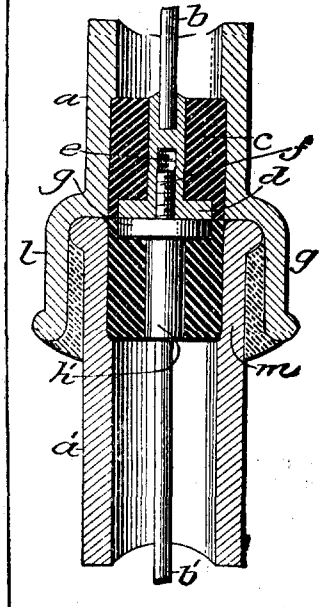
WILLIAMS PATENT IN SUIT, No. 831,815. OF SEPT. 25TH. 1906.

Fig. 2.



ECKERT AND GREGORY PATENT, No. 442,575. OF DEC. 9TH 1890.

Fig. 4.



It manifestly did not require invention to substitute for two of the joints used in the Cobb patent the short overlapping members in the patent in suit, nor to substitute for the casings for indoor wiring disclosed by the Eckert patent shorter couplings. It is only necessary finally to refer to the Tailleur patent, No. 593,442, in which the specification states the object of the invention to be a simple and effective means whereby the terminals of electric cables or wires, particularly such as are designed for carrying currents of high tension, may be joined together in such manner that the access of moisture to the cable-terminals will be securely guarded against.

The Tailleur patent also shows that the separable joints upon which the plaintiffs place reliance are not new.

It is obvious that mere mechanical skill is all that was required to adapt the disclosures of the Cobb, the Eckert, and the Tailleur patents in order to produce the plaintiffs' device. No new element is shown, and no new purpose is accomplished; nor is there any new co-action in the combination of the old elements.

It is held therefore that the claims are invalid because they contain new matter inserted by amendment without compliance with the requirements of Rev. St. § 4892 (Comp. St. 1913, § 9436), because they are for unpatentable aggregations, and because they are anticipated by the prior art, and the defendants have not infringed.

The bill is dismissed.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. DE FOREST RADIO TELEPHONE & TELEGRAPH CO. et al.

(District Court, S. D. New York. November 12, 1914.)

1. PATENTS ⇐234—INFRINGEMENT—DEVICE CAPABLE OF NONINFRINGING USE.
An apparatus made and sold by a defendant for use by the purchasers, which when normally and most effectively used infringes a patent, does not avoid infringement because it is capable of being so used as not to infringe.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. ⇐234.]

2. PATENTS ⇐328—INFRINGEMENT—WIRELESS TELEGRAPH APPARATUS.
The Marconi patent, No. 763,772, and the Lodge patent, No. 609,154, each for wireless telegraph apparatus, *held* infringed on motion for preliminary injunction.

In Equity. Suit by the Marconi Wireless Telegraph Company of America against the De Forest Radio Telephone & Telegraph Company, the Standard Oil Company of New York, and Lee De Forest, for infringement of the Marconi patent, No. 763,772, and the Lodge patent, No. 609,154, each for wireless telegraph apparatus. On motion for preliminary injunction. Motion granted.

Order affirmed in 225 Fed. 373, — C. C. A. —.

Sheffield, Bentley & Betts, of New York City, for complainant.

Samuel E. Darby, of New York City, for defendants.

HOUGH, District Judge. At the same time that briefs on this motion were delivered at my chambers, defendants there left, without leave (and without necessity), certain surrebuttal affidavits. I did not know that this had taken place until I returned to chambers later in the day. These surrebuttal affidavits will not be received, nor will they be filed, and are not a portion of the record herein.

After consideration of all the affidavits and further reflection, I think I made too much of complainant's action in raising the price of its patented article immediately after (and undoubtedly in consequence of) Judge Veeder's decision. The action of Judge Veeder and that of the courts of the Third circuit in respect of the Fessenden patents, followed by a treaty of peace between complainant and the Fessenden party, has undoubtedly put the Marconi Company in a much stronger position than it previously occupied. I am convinced that down to the present time the expense of operation (and of litigation) has been so enormous that complainant has received no fair return from the invention which, under decisions now ruling, I must hold to be of the greatest value and worthy both of praise and reward.

The situation presented by the ships of the Standard Oil Company differs greatly from that existing in the case of vessels affected by the various acts of Congress compelling the use of wireless telegraphy on sea-going craft. Where the sovereign with one hand grants a monopoly to private persons and with the other compels the public to use that of which a monopoly has been given, the situation is one that may cry for justice. But this motion does not raise that question. The Standard Oil Company is not bound to have wireless apparatus on its ships; it wants that apparatus for its own safety and profit, and I cannot say, and indeed do not think, that $100 a month is too much to pay for a device without which it is a matter of common knowledge that the insurance premiums on a large and laden vessel would be greater by more than the amount of complainant's fees. I am not, therefore, disposed to withhold relief by reason of complainant's action in raising rates in this, the only, instance, really before this court.

[1] A reading of the affidavit submitted leaves me in no doubt that defendant Radio Company sold and delivered to the Standard Oil Company on board certain of its vessels a signaling apparatus which, when put together and used in the normal way, the easiest way, and the most effective way, would infringe both the patents in suit. The whole defense amounts to this, viz.: That defendant can take, and has taken, an infringing set of apparatus, and so arranged or co-ordinated it as to avoid infringing. This claim of defendant is, I think, advertised in the Radio Company's Bulletin A 14, wherein it is said that:

"With these improved forms of variable inductances any form of selective receiving circuit can be quickly formed and tested. The maximum possible selectivity of circuits is assured with this radio apparatus."

It seems to me that it would be (under familiar cases) proper to grant a preliminary injunction here on the sole ground that the

apparatus vended and used by defendants was capable of infringing, and would when ordinarily used by operators be so adjusted as to infringe.

[2] But defendants' explanations may be considered a little further: The only reason alleged in argument why the apparatus arranged as shown in defendants' drawings does not infringe the Lodge patent is that the variably acting inductance coil at the transmitting station is not directly in the antenna circuit, but is in a closed circuit which is so connected to the antenna as to control the radiation therefrom. Even if this is true, I do not think that infringement is escaped, because the principal Lodge claims do not require a direct connection; it is enough if the self-inductance coil is electrically inserted between the capacity areas.

It is alleged that the transmitting claims of the Marconi patent are not infringed, because the closed circuit is not in tune with the open radiating circuit. But tune, or syntony, may be produced by the variable inductances shown, and it is inconceivable that the inductances would be shown if it were not intended thereby to produce syntony.

It is also alleged that the condenser coupling shown in the defendants' drawing is not the equivalent of the transformer coupling shown in the Marconi patent. I think it proven that defendants' expert, Mr. Stone, not only says that the two devices are equivalent, but that he found out that they were. If the defendants' device, diagrammatically shown in the affidavits, be considered with respect to the receiving claims of the Marconi patent, complainant admits that, if used exactly as shown, no infringement is proven. It is on this head that the capacity for infringement is important. I do not believe that a noninfringing device, which could be made more efficient by an operator after he got to sea, or just before starting, by making it infringe, would be permitted to remain in the noninfringing and less efficient form.

The injunction may issue as prayed for.

DUPLEX ENVELOPE CO., Inc., v. A. S. KRATZ CO., Inc., et al.

(District Court, E. D. Virginia. June 25, 1915.)

1. PATENTS ⊜328—INVENTION—DUPLEX ENVELOPE.
The Stevens patent, No. 1,013,571, for a duplex contribution envelope, is void for lack of patentable invention in view of the prior art.

2. PATENTS ⊜37—INVENTION—IMPROVEMENT PATENTS.
Every simple improvement of an article is not patentable, but it must be the result of an original conception of something which is new and useful and adds substantially to the knowledge of the art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 41–44; Dec. Dig. ⊜37.]

In Equity. Suit by the Duplex Envelope Company, Incorporated, against the A. S. Kratz Company, Incorporated, and the Union Envelope Company. On final hearing. Decree for defendants.

Church & Church, of Washington, D. C., and Charles V. Meredith, of Richmond, Va., for complainant.

Whitaker & Prevost, of Washington, D. C., and Hill Carter, of Richmond, Va., for defendants.

WADDILL, District Judge. [1] This suit is filed to enjoin the alleged infringement of letters patent No. 1,013,571, issued by the United States to the complainant as assignee of Willis F. Stevens, on the 22d day of January, 1912, for what is known as a duplex envelope, used especially in church collections, whereby the offerings made, whether for general church or benevolent purposes, are placed in separate pockets or compartments in the envelope, each envelope being numbered so as to preserve the identity of the donor, who is presumably registered by number on the treasurer's books of the church, with the amount of the yearly donation to be given to the respective objects.

Complainant's claim 2 of the patent in suit sets forth the invention as follows:

"2. A contribution envelope formed of a body and main flap connected together at the bottom and side edges and along a central line perpendicular to the bottom to form plural pockets arranged edge to edge, there being a line of weakness between the pockets, whereby they may be torn apart without being opened, a gummed sealing flap connected at one edge to the edge of the body adjacent the pocket openings, said sealing flap having its ends ungummed and of reduced width to expose the wall of the pockets below said ends and beyond the body of the flap and in line with the flap for the impression of an identification number and to form an opening for the insertion of an opener, and an identification number on the wall of the pockets in line with the sealing flap, and contribution classification data on the main flap below the sealing flap, whereby the openings to the pockets and classification data are simultaneously exposed to view."

The defendants admit the use of envelopes similar to those covered by the patent, and contest the validity of complainant's patent alike for its lack of novelty of invention, as because anticipated by others in the prior art. They also say that they have long been engaged in

the business of manufacturing and selling duplex envelopes; that the complainant had been for a long period of time their sales agent, and its president their former secretary, and that, while the contract of agency no longer exists, they are still largely engaged in the business, and to sustain the validity of complainant's claim would seriously and disastrously affect their business; that the alleged improvement involves nothing novel, or that shows inventive genius, regarding a matter in respect to which they have as much or a greater right than the complainant. The complainant does not seriously contend that there is anything especially novel or of great originality in the patent in suit, but insists that it has succeeded in producing, by a combination of old elements, a new and effective envelope that is valuable and operative in character; whereas those that preceded it were, for one cause or another, lacking in utility, and ineffective, compared with the completed product patented by it.

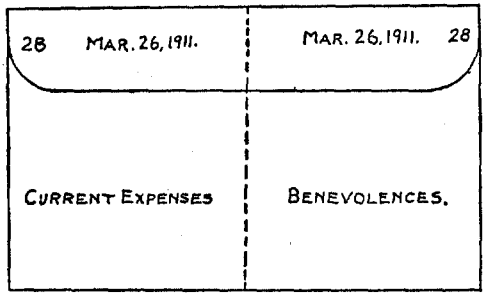
The great purpose to be attained in the making of the envelope was to secure one in which money could be, without confusion, easily placed in the different pockets, confined therein, identified by number, readily opened, and in so doing the number preserved. Several patents of the prior art, including one issued to the complainant, apparently contained all these elements, but the complainant says that, even in its own patent, which was the last prior to the one in suit, the number of the contributor was printed upon the flap at the top of the envelope, was not easily opened, and when opened was liable to be destroyed; whereas, the patent in suit contained the same character of flap, clipped at each end, so as to facilitate the opening of the same, and placed the number substantially where it was before on the flap, upon the body of the envelope, that is, printed on the envelope itself, as distinguished from the flap, which is the distinguishing feature in the patent in suit, and the one upon which the complainant bases its claim, so much so that it admits there would be no infringement, if the number were printed on the bottom or sides thereof, instead of at the top corners of the envelope.

Thus it will be seen upon what a narrow margin this case rests, namely, one of confessed prior anticipation in the art, of lack of novelty in invention, and the mere claim of a right to patent by reason of the clip of the flap, and the location of the number in the top corners of the body of the envelope, instead of on the flap. Envelopes with pockets, perforated to be easily separated, with proper means of sealing, and the proper number printed thereon, and other printed matter, have all gone before, and are in common use. Envelopes containing pockets, including those with the cutaway, as distinguished from the square flaps, are in common use, and the complainant's device can be maintained as patentable only upon the theory that by placing the printed number where it is now placed, under the claim of the patent, in connection with the other elements of the patent, it has produced something of sufficient utility to make the same patentable, and give to itself the exclusive use thereof. The court cannot see its way clear to sustain this view. The placing of the number as arranged by the complainant, in connection with the other elements of the patent,

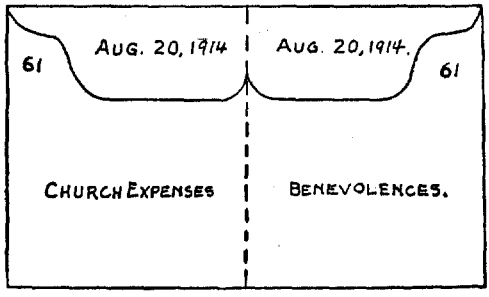
produces nothing either novel or useful arising from a combination of old elements, as in its judgment entitles the complainant to a patent therefor, and to the injunctive relief sought by the bill.

Specimens of the complainant's envelopes under the patent in suit, together with one under a patent previously issued to complainant, with the immaterial printed matter on each omitted, are here shown, with a view of better illustrating just what it is complainant claims in the patent in issue:

PLAINTIFF'S EXHIBIT Nº 6



PLAINTIFF'S EXHIBIT Nº 7
(PATENT IN SUIT.)



[2] It may be conceded to be a matter of difficulty frequently to determine whether a particular improvement is a mere mechanical device, or involves the exercise of creative ability and genius entitling it to patentability; and a new combination of old elements which produces new and useful results may entitle the inventor to a patent; but whether the alleged improvement in the patent in suit involves more than mechanical skill, or what would have arisen from mere common observation, may be seriously doubted. Every simple improvement in an article is not patentable. It must involve an original conception; that is, of what is new, of what is useful, and not something of which the public theretofore had knowledge, and to which it was entitled. Authorities to support this view might be cited almost without number, but only a few will be given. In Smith v. Nichols, 21 Wall. 112, 119 (88 U. S. 566), 22 L. Ed. 566, it was said:

"A patentable invention is a mental result. It must be new and shown to be of practical utility. Everything within the domain of the conception belongs to him who conceived it. The machine, process, or product is but its material reflex and embodiment. A new idea may be ingrafted upon an old invention, be distinct from the conception which preceded it, and be an improvement. In such case it is patentable. The prior patentee cannot use it without the consent of the improver, and the latter cannot use the original invention without the consent of the former. But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of

such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee, in the other, to the public at large."

In Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438, Mr. Justice Bradley, speaking for the Supreme Court, on page 200 said:

"The design of the patent laws is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention."

And further quoting from Mr. Justice Bradley, on page 200 of 107 U. S., on page 231 of 2 Sup. Ct. [27 L. Ed. 438], of the same case:

"To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences."

The changing of the position of the number intended to designate the contributor, from the flap to the body of the envelope, certainly cannot be said to involve any inventive genius or skill, but on the contrary only what would present itself to any thoughtful person as a more convenient method of facilitating the handling of the same, and indicates nothing which shows such inventive skill or genius as would call for the granting of a patent therefor; and while the utility of the new device may be conceded, and complainant is entitled to all the presumptions arising as well from the granting of the patent as from its success from a commercial standpoint, still the court cannot and does not believe that thus placing the number on the envelope, instead of on the flap, involved anything patentable in the then state of the art.

It follows from what has been said that the injunction asked for by the complainant should be denied, and its bill dismissed.

ORR v. ASCHENBACH & MILLER, Inc.

(District Court, E. D. Pennsylvania. August 12, 1915.)

No. 1323.

PATENTS ⇐328—INFRINGEMENT—WHAT CONSTITUTES.

Complainant's patent, No. 659,640, was for a disinfectant composed of formic aldehyde and an essential oil which would slowly evaporate and at the same time be a water repellent. The compound was prepared by exposing the desired oils in the proper container to the presence of formic aldehyde under increased pressure. Defendant's disinfectant was prepared by stirring eucalyptus oil into the commercial solution of formic aldehyde largely diluted with water, in an open vessel under ordinary atmospheric pressure; the eucalyptus oil being used to disguise the odor. *Held*, that there was no infringement, the proportion of formic aldehyde

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

contained in the oil in defendant's disinfectant being inconsiderable, and the presence of water, which complainant's compound was designed to avoid, avoiding any infringement.

In Equity. Bill by William G. Orr against Aschenbach & Miller, Incorporated. On final hearing. Bill dismissed.

L. S. Oliver and Maurice Bower Saul, both of Philadelphia, Pa., for plaintiff.

G. Herbert Jenkins and Randolph Sailer, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The complainant is the owner of reissue letters patent No. 12,084, issued February 24, 1903, to Henry Spencer Blackmore. The original letters patent No. 659,640 were issued October 16, 1900, upon an application filed August 28, 1899.

As stated in the reissue specification, the invention relates to a new composition of matter for disinfecting or germicide purposes, and consists essentially of a mixture, compound, or solution of formic aldehyde or its polymerides in a water repellent, such as nonmineral or essential oil.

The object of the invention is said to be to produce a liquid composition containing formic aldehyde or its polymerides which will slowly evaporate when exposed to the atmosphere at ordinary pressure and temperature and at the same time be a water repellent.

The composition is described as not only having an active disinfectant, formic aldehyde, but as giving off on evaporation a characteristic pleasant odor and at the same time being insoluble in and incompatible with water, preventing its contact therewith from deteriorating the active property of the contained formic aldehyde.

The inventor states that the manner in which he prefers to produce the oily formic aldehyde solution or compound is to place the desired oil, such as camphor oil, in a proper container and expose it to the presence of formic aldehyde under increased pressure, at the same time agitating it, whereby the formic aldehyde becomes absorbed, occluded, or retained therein.

The claims of the patent are thus set out:

"1. As a new composition of matter a mixture containing an essential oil and formic aldehyde.

"2. A new composition of matter substantially consisting of essential oil carrying formic aldehyde.

"3. A new composition of matter consisting of essential oil and formic aldehyde.

"4. A new composition of matter consisting of camphor oil containing formic aldehyde.

"5. A new composition of matter substantially consisting of formic aldehyde associated with a water-repellent vehicle capable of evaporating when exposed to the atmosphere at ordinary temperature and pressure.

"6. A new composition of matter substantially consisting of formic aldehyde associated with an aromatic water-repellent vehicle capable of evaporating when exposed to the atmosphere at ordinary temperature and pressure."

The preparation which the defendant produces, and which it is claimed infringes, is known as "Sanozone." "Sanozone" consists of the commercial aqueous solution of formic aldehyde, known as "forma-

lin," combined with eucalyptus oil. "Formalin" consists of approximately 37 per cent., by weight, of formic aldehyde, and 63 per cent., by weight, of water and methol alcohol. Formic aldehyde is a gas, highly soluble in and with great affinity for water. The aqueous solution of formic aldehyde, above described, has been known and used as an active germicide and disinfectant for a time commencing long prior to the complainant's invention, and is so mentioned in the specification for the Blackmore patent. Eucalyptus oil has a distinctive odor and slight, if any, disinfectant and germicide qualities. In preparing "Sanozone," the aqueous solution of formic aldehyde and eucalyptus oil are combined by stirring the oil into the commercial solution, largely diluted with water, in an open vessel under ordinary atmospheric pressure. Since August, 1910, the defendant has added to the combination a small quantity of saponaceous material which does not enter into chemical combination with either the formic aldehyde solution or the eucalyptus oil, but overcomes the repellent action of the eucalyptus oil and the water which otherwise would constantly tend to separate. "Sanozone" has merely the germicidal and disinfectant action of the formic aldehyde contained in the commercial formic aldehyde solution plus the odor of the eucalyptus oil, and neither of these ingredients is altered or changed in its character, action, or effect by the combination.

Inasmuch as eucalyptus oil is an essential oil and the aqueous formic aldehyde solution used in "Sanozone" contains formic aldehyde, the complainant charges infringement of his patent. It may well be that the combination discovered by Blackmore was novel and is useful for the purpose of conveniently disinfecting by means of formic aldehyde. The patent granted to him, however, does not, upon its face, entitle the complainant to a monopoly which will prevent any and every use of formic aldehyde and essential oils by others in the preparation of other compounds.

In the case of a patent for a composition of matter, the question of infringement depends upon sameness or equivalence of ingredients and upon substantial sameness of the proportions of those ingredients. Addition to a patented composition of matter of an ingredient which the patent purposely avoided and which, when added, substantially changes the character of the composition, avoids infringement. Byam v. Eddy, Fed. Cas. No. 2,263, 2 Blatchf. 521; Atlantic Dynamite Co. v. Climax Powder Manufacturing Co. (C. C.) 72 Fed. 925; Walker on Patents, p. 319.

The patent granted Blackmore was for a new combination of formic aldehyde, which was old as a disinfectant, with an essential oil; the function of the combination being to hold the formic aldehyde in the essential oil and prevent its union with moisture by means of the water-repellent qualities of the oil and thus prevent its polymerization while being carried into the air as a disinfectant. The addition of water, which it is the object of the patent to avoid, to the composition, as it is done in the preparation of "Sanozone," is therefore entirely foreign and repugnant to the specification of the patent, in the light of which the claims must be read. An analysis of "Sanozone" shows that the ratio of water to the mixture of oil is as 1,000 to 5; that 99.75 per cent.

of the formic aldehyde present is contained in the water and ¼ of 1 per cent. in the oil; that there is .05 of an ounce of formic aldehyde in the oil mixture and 20.3 in the water solution to a gallon of the compound, the proportion of formic aldehyde carried in the oil to that carried in the water being therefore as 1 to 400. The respective proportions of formic aldehyde and oil are nowhere stated in the claims or specification of the patent; but it may be presumed that, in the interest of economical preparation of the product, it was the inventor's intention that the oil should absorb as much formic aldehyde gas as it was capable of containing. It is obvious that the proportion of formic aldehyde contained in "Sanozone," which is carried in the oil, is inconsiderable, that its effect upon the function of "Sanozone" as a disinfectant is negligible, and that whatever functions it has as a disinfectant are present in the aqueous solution of formic aldehyde, which was old and in commercial use prior to the plaintiff's invention. The function of the eucalyptus oil is to conceal the odor of the formic aldehyde, and the Blackmore patent does not vest in the complainant a monopoly in the use of fragrant oils in disinfectants. The fact that the two compositions have one point in common, in that formic aldehyde gas is contained to some extent in the essential oil used in "Sanozone" and in the Blackmore composition, cannot obliterate the marked distinctions between the two compositions in ingredients, in proportions, and in mode of manufacture. In short, the defendant is using a disinfectant whose functions were well known prior to the Blackmore patent, with a fragrant oil to conceal the odor of the formic aldehyde, and, even though the oil carries some formic aldehyde, that fact is not sufficient to involve infringement

A decree may be prepared dismissing the bill.

LOVELL-McCONNELL MFG. CO. v. ORIENTAL RUBBER & SUPPLY CO., Inc.

(District Court, E. D. New York. July 2, 1915.)

PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—AUTOMOBILE HORN.

The Hutchison patent, No. 1,120,057, for an automobile horn, was not anticipated, and discloses patentable invention; also, *held* infringed.

In Equity. Suit by the Lovell-McConnell Manufacturing Company against the Oriental Rubber & Supply Company, Incorporated. On final hearing. Decree for plaintiff.

George C. Dean, of New York City (Irving M. Obrieght, of New York City, of counsel), for plaintiff.

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for defendant.

CHATFIELD, District Judge. The plaintiff has alleged infringement of patent No. 1,120,057, issued to the plaintiff as assignee of Miller Reese Hutchison, upon application filed August 14, 1914, under No.

856,826, as a division of original application filed October 26, 1909, under No. 524,762.

The patent shows a horn or signal, consisting of a diaphragm held between two circular clamping members, with a wear piece upon one side of the diaphragm, actuated by cams upon the face of a disk, rotated by the armature shaft of an electric motor; this shaft being perpendicular to the plane of the diaphragm and with means for longitudinal adjustment. In other horns of the prior art, the electric motor had been so arranged as to position the armature or driving shaft in a plane parallel to that of the disk of the diaphragm.

While it has been recognized that no invention was needed to merely rotate the motor or the armature shaft into a position vertical to that of the disk of the diaphragm, and while it would not involve invention to change the cam surfaces from the periphery to the face of the revolving disk, nevertheless the patentee in his present application claims novelty and invention by so positioning the motor as to make its armature shaft perpendicular to and eccentric with the center of the diaphragm, and to provide a compact, useful, commercial structure, with better opportunity for adjustment by affixing the frame carrying the electric motor and the armature shaft thereof in some rigid and simple way to one of the clamping members of the diaphragm. He includes in the combination a limitation upon the size of the frame; but this, of course, is not patentable novelty of itself.

In the drawings accompanying the patent, the frame furnishing the support for the motor and armature shaft is substantially integral with the ring forming one of the clamping members. The defendant alleges noninfringement from the fact that its device presents this frame, attached by a thread and screw to the ring forming the clamping member, and with a tight case inclosing the motor and its attachments, with openings for the electrical contact wires.

The action has been narrowed down to one claim of the patent for the purpose of saving time and simplifying the issue, according to the plaintiff. The defendant, without admitting these propositions, proceeds upon the admission by the plaintiff that this particular claim is the only one concerned in the action, and we need not look into the question of motive as the possibility of maintaining the action depends upon the validity and infringement of this particular claim. This claim is as follows:

"12. In an alarm or signaling device, a diaphragm, a pair of opposed diaphragm clamping members, one of said members having a sound outlet opening therethrough concentric with the diaphragm and the other of said members carrying a rearwardly extending cylindrical motor casing eccentrically disposed in respect to said diaphragm, a motor within said casing having its armature shaft presented endwise to said diaphragm, a wear piece on said diaphragm at the center of the latter, a face cam carried by said armature shaft and engaging with said wear piece, the eccentricity of said motor casing in respect to said diaphragm being substantially equal to the effective radius of said face cam, and means for adjusting the armature shaft and rotor axially to vary the degree of overlap of the face cam projections on said wear piece."

It will be seen that the language of this claim calls for a diaphragm, two clamping members, one with a sound outlet opening, and the other "carrying a rearwardly extending cylindrical motor casing eccentrically disposed," etc., "a motor within said casing," etc.

This claim does not require, however, the narrow construction or single form of device shown by the drawing in which the word "carrying" would be equivalent to comprising or consisting of. The language of the claim is plainly disclosed by the drawing, as it would not involve invention to fasten a casing by a screw thread or by individual screws. Nor would it involve invention to have a separate frame within the case, even though to make the case and the frame identical in whole or in part might be simpler in the number of parts.

The defendant's structure, however, reads directly upon the claim, and the infringement is evident.

The record shows certain interferences in the Patent Office and actions against the Commissioner of Patents. These interferences resulted finally in an opinion by the commissioner himself to the effect that adjustment of an armature shaft, arranged perpendicularly or at an angle to the diaphragm less than a right angle, or even when arranged parallel to the plane of the diaphragm, was old and obvious and could not be considered an invention over the prior art. Also, that the mere transfer or change from a parallel to a vertical position of the armature shaft, with a change of cams to the face of the disk, did not involve invention over the prior art, and that adjustment by means of a thread or set screw so as to move a shaft closer to the diaphragm was not invention. The commissioner did, however, hold that the intentional change of position of the motor so as to put the shaft in a position where it could be adjusted, coupled with the recognition of the fact that adjustment could be thus best made, did involve invention and the patent in suit issued. This applied the idea of combining these two changes, and also of so locating the shaft as to make it eccentric, and thus to enable the cam surfaces to contact with the exact center; that is, the wear piece upon the middle of the diaphragm.

The record shows that in the earlier Hutchison patent application (1909) these ideas of including the motor in the casing and adjusting the contact by moving the parts closer to or further away from the diaphragm by means of an adjusting screw, eccentric position of the shaft with reference to the center of the diaphragm, and the location of the shaft at such position as to enable the wear piece to be placed at the center of the diaphragm, were described. But the other Hutchison patents, Nos. 923,048, 923,049, and 923,122, since held invalid, did not claim or describe (in the form in which they were issued) the combination of the patent in suit.

The only other patent cited, viz., that of Bapst & Falize, 11,390, of July 8, 1887, has a figure (7) showing a drive shaft at right angles to the plane of the diaphragm and eccentric to a line through its center. But Bapst & Falize was a mere application of a ratchet upon a fixed axis, so as to contact with a long spine or point projecting from the diaphragm, and the mere shape of the parts necessitated the structure.

The claim of the patent in suit is a combination of mechanical parts intended and adapted to be convenient and desirable in use, and at the same time to perform mechanical functions different from the mere aggregation of the old elements used therein.

Such patents as Arlitz, 979,246, December 20, 1910; Aufiero, 988,537, April 4, 1911; Weiss & Walther, 1,028,980, June 11, 1912; Weiss, 1,029,521, June 11, 1912; Rubes, 1,049,272, December 31, 1912; Rubes, 1,059,769, April 22, 1913—all issued prior to the patent in suit on later applications, show the various means by which, in the few methods preceding the allowance of this Hutchison patent, different inventors sought to overcome the difficulties presented by attempting to actuate a diaphragm by cam surfaces rotating upon the face of a disk placed upon an axis perpendicular to the diaphragm.

The Hutchison device, while suggested before these later patents, and perhaps even having been avoided by these inventors, cannot be held invalid as anticipated thereby, and, if the idea involves invention and was patentable at the time of its conception by Hutchison, it would plainly be patentable as a combination of parts over these various patents which claim invention for attempting to reach the same results with less satisfactory structures.

It would seem that the simple idea of this device shows more than the mere aggregation of parts or the application of the ordinary principles of mechanics, and that the action of the Patent Office was correct.

As to the defense of double patenting, it is only necessary to state that the particular device was not shown or described and was not even a possible form of the structure which Hutchison sought to claim in his three earlier patents. The features illustrated in those patents are mere mechanical parts, which are now combined in a different way to produce new results in the present structure, and, as this structure is patentable of itself, it must be held valid over the earlier Hutchison devices.

The plaintiff may have a decree.

BYERLEY v. PHILIP CAREY CO.

(District Court, D. New Jersey. July 7, 1915.)

No. 6138.

1. PATENTS ⟸259—INFRINGEMENT—SUFFICIENCY OF PROOF.

A defendant cannot be held chargeable with infringement for purchasing and using an infringing product, where it is not shown that the patentee's product was marked, or that defendant had notice of his rights.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400–402; Dec. Dig. ⟸259.]

2. PATENTS ⟸328—INFRINGEMENT.

Evidence *held* insufficient to establish infringement of the Byerley patent, No. 524,130, for a process of making asphaltic products from the residuum of petroleum after distillation and the products themselves.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by Francis A. Byerley, executor, Francis A. Byerley, trustee, and Francis A. Byerley, against the Philip Carey Company. On final hearing. Decree for defendant.

Fish, Richardson, Herrick & Neave, of Boston, Mass., for plaintiff.
Kenyon & Kenyon, of New York City, for defendant.

ORR, District Judge (specially presiding). This is an ordinary patent case, in which the plaintiffs charge the defendant with the infringement of the Byerley patent, No. 524,130, issued by the United States on August 7, A. D. 1894. That patent was the subject of litigation, and was sustained by the District Court of the Western District of Pennsylvania in Byerley v. Sun Co. (C. C.) 181 Fed. 138, and by the Circuit Court of Appeals of the Third Circuit, in affirmance of the decision of the court last mentioned, in Byerley v. Sun Company, 184 Fed. 455, 106 C. C. A. 537. The patent expired August 7, 1911. The bill in this case was filed April 21, 1911. The question before the court is whether or not the defendant has infringed the product or process claims of said patent. It is unnecessary to recite these claims, because the suit must be dismissed because of a failure by the plaintiffs to prove infringement.

[1] The evidence discloses that the defendant purchased from the Sun Company, from time to time within six years of the date of filing the bill, a certain product of the Sun Company called "Hydrolene B," which product was an infringement of the product of the plaintiffs called "Byerlyte." There is no evidence in the case that the plaintiffs marked their product as patented, and there is no evidence in the case that the defendant ever received notice that the merchandise purchased by defendant from the Sun Company was an infringement of the plaintiffs' product, and there is no evidence in the case that the defendant purchased any of the "Hydrolene B" from the Sun Company after the date of the filing of the bill. Without notice or knowledge of the rights of the plaintiffs, the defendant cannot be held guilty of the tort of infringement.

[2] With respect to the process claims also the plaintiffs failed in their proof of infringement. The plaintiffs offered evidence tending to show that a considerable time before the expiration of the patent a man connected with a manufacturing plant at Rockland, near Cincinnati, in the state of Ohio, admitted that in that plant there was being manufactured asphalt from petroleum residuum by the air-blown process. But such evidence did not, however, go to the extent of proving that the defendant was engaged in such manufacture. The plant at Rockland is owned by an Ohio corporation called the Philip Carey Manufacturing Company, which is a corporate entity separate and distinct from the defendant in this case. Moreover, the evidence introduced does not satisfy the court that even the Philip Carey Manufacturing Company had such notice of the Byerley patent as would warrant a recovery against it for the infringement thereof. The burden of proving notice and infringement has not been sustained by the plaintiffs.

The plaintiffs were surprised at the testimony offered on the part of the defendant, and requested a continuance of the case in order that opportunity be had to meet the evidence. The court refused to grant such continuance, believing that the reason for the application was not sufficient. Had plaintiffs been surprised at the testimony of their own witnesses, a different question would have arisen.

The bill in this case must be dismissed, at plaintiffs' cost.

UNITED STATES v. 267 BOXES OF MACARONI.

(District Court, W. D. Pennsylvania. February 17, 1915.)

No. 3799.

1. FOOD ⟸15—MISBRANDING—STATUTORY PROVISIONS—INTENT.

The purpose of Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (Comp. St. 1913, § 8724), providing that an article shall be deemed misbranded, if labeled or branded so as to deceive or mislead the purchaser, or to purport to be a foreign product when it is not so, is to protect the public from deception, and the intent of one charged with misbranding is immaterial.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 15; Dec. Dig. ⟸15.]

2. FOOD ⟸15—"MISBRAND"—ACTS CONSTITUTING.

Where macaroni manufactured in the United States bore a label containing Italian words, including the name of a town in Italy where macaroni is extensively manufactured, and the general purchaser, looking at the label, would conclude that it represented an Italian product, the macaroni was "misbranded," within Food and Drugs Act, § 8, though the letters "Mfg. U. S. A." appeared in small type within less than an inch of space on a very narrow white margin on the lower edge of the label.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⟸15.

For other definitions, see Words and Phrases, Second Series, Misbrand.]

Libel by the United States for the seizure and condemnation of 267 boxes of macaroni, because misbranded, in which Thomas Monico and another, partners doing business as the Monico-Alles Company, claimants, filed answer. Judgment for the United States.

On December 11, 1914, the United States attorney for the Western District of Pennsylvania, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of 267 boxes of macaroni, remaining unsold in the original unbroken packages at Pittsburgh, Pa., alleging that the product had been shipped on or about November 7 and 14, 1914, and transported from the state of New York into the state of Pennsylvania, and charging misbranding in violation of the Food and Drugs Act. The product was labeled: "Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg. U. S. A." In addition the label bore pictorial representations of three persons, a dining scene, etc. Boxes were also branded by means of rubber stamp "20 lb. net artificially colored." Misbranding of the product was alleged in the libel, for the reason that it was labeled and branded so as to deceive and mislead the purchaser; that is to say, the appearance and construction of the label conveyed the impression that the goods were of foreign manufacture, and this effect was not cured by the statement in minute type on the bottom of the label, "Mfg. U. S. A."

On December 28, 1914, Thomas Monico and August E. Alles, partners, doing business as Monico-Alles Company, New Castle, Pa., claimants, filed their answer, denying the material allegations in the libel. On February 17, 1915, the case having come on for trial before the court, after the submission of evidence and argument by counsel, the court found the product misbranded and ordered its condemnation, but provided that the same might be released to said claimants upon filing of bond, in conformity with section 10 of the act, and the payment of costs.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa.
Miller, Vogan & Nesbitt, of Pittsburgh, Pa., for defendant.

THOMSON, District Judge. The libel in this case was for the seizure and condemnation of 267 boxes of macaroni, remaining unsold in the original, unbroken packages at Pittsburgh, Pa. The libel alleges that the product was shipped by the Dunkirk Macaroni & Supply Company of Dunkirk, N. Y., and transported from the state of New York, and charges that the same was misbranded, in violation of section 10 of the Pure Food and Drugs Act, as defined in subsection 2, which defines what usually may be considered as misbranding of foods under the act of Congress. The said food product was seized by the United States marshal in the possession of certain parties in Pittsburgh, Pa., and was claimed by Thomas Monico and August E. Alles, partners doing business as Monico-Alles Company, who answered, and were made parties to the proceedings by the execution of bond in accordance with section 26 of the admiralty rules of this court. The libel sets forth a copy of the label on each of the boxes of the macaroni so seized, as follows:

"Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg. U. S. A."

In addition the label bears pictorial representations of three persons, a dining room scene, etc.; and boxes are branded by means of a rubber stamp, "20 lb. net artificially colored." The libel also points out specifically the respect in which the product was misbranded as follows:

"That said product, so designated as aforesaid, as analyzed by the Bureau of Chemistry, Department of Agriculture, United States of America, is shown to be misbranded in violation of said act of Congress, commonly known as the Food and Drugs Act, in that it is labeled and branded so as to deceive and mislead the purchaser; that is to say, the appearance and construction of the label conveys the impression that goods are of foreign manufacture, and this effect is not cured by statement in minute type on bottom of label, 'Mfg. U. S. A.'"

The answer filed admits the material facts and allegations contained in the libel, except that it is denied that the macaroni is misbranded. The question thus raised is whether the product was misbranded; i. e., labeled so as to mislead the purchaser by conveying the impression that the goods are of foreign manufacture. The language of section 8, subsection 2 [in case of food (?)], of the act of Congress, is: "If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so." Some testimony was offered on behalf of the government, by persons familiar with the trade, to the effect that the label would mislead the average purchaser

by conveying the impression that it was a foreign product. Some evidence was also offered by the respondents that it would not convey that impression.

[1] The court must determine the issue mainly by an inspection of the label itself. It has been held that it is not important whether the manufacturer did or did not intend to deceive. The purpose of the act is to protect the people from deception by selling him one thing when the purchaser desires to purchase another. The intention of the maker is therefore not an element in the case. U. S. v. 36 Barrels of London Dry Gin, 210 Fed. 271, 127 C. C. A. 119; McDermott v. Wisconsin, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39.

[2] Turning to the label itself, we find from its appearance that it is very distinctly Italian. The label proper is of the dimensions of 8½ inches by 6¼ inches, bearing pictorial representations of three persons, a dining scene, etc., with a very narrow white margin, from one-eighth to one-sixteenth of an inch in width. The name of the manufacturer and the place where the macaroni is made do not appear. Nearly all of the wording on the label proper is in the Italian language. The exceptions are in the use of the words "Vitello Brand" and "Italy Method." Between the words "Vitello" and "Brand" is the picture of a cow or calf. The testimony shows that the word "Vitello" is the Italian word for calf. The words "Torre Annunziata" are the name of a city in Italy where it appears macaroni is extensively manufactured. There is no doubt that the general purchaser, looking at that label, with its distinctly Italian caste and written in the Italian language, with nothing whatever thereon to indicate that it was of American manufacture, would at once conclude that it represented a foreign, and, in this case, an Italian product.

It is claimed that the letters "Mfg. U. S. A." in small type within less than an inch of space, on the very narrow white margin on the lower edge of the label, would be notice to the purchaser of the fact that the product was manufactured in America. It seems clear to the court that the makers did not intend bona fide to convey such notice to the purchaser by the use of these letters, but rather that they were endeavoring to protect themselves from the charge of violating the act of Congress. If it was intended that the purchaser should be informed as to where the food product was manufactured, certainly some words sufficiently conspicuous would be placed upon the label to strike the eye of the purchaser and convey the desired information.

I do not think that the letters on the margin which I have quoted save the label or brand from the charge that it deceives and misleads the purchaser and purports to be a foreign product when not so.

In accordance with the foregoing opinion, the product was thereafter released to said claimants.

UNITED STATES v. WILSON.

(District Court, W. D. Tennessee, W. D. May 31, 1915.)

No. 301.

1. POISONS ⟸2—CONSTRUCTION—CRIMINAL STATUTE.
The Harrison Anti-Narcotic Law Dec. 17, 1914, c. 1, 38 Stat. 785, providing that persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any opium or coca leaves must register and pay a special tax, and making it unlawful to fail to do so, is a criminal statute, and must be strictly construed.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 1; Dec. Dig. ⟸2.]

2. POISONS ⟸4—VIOLATION OF REGULATIONS—REGISTRATION AND PAYMENT OF TAX—KEEPING OPIUM FOR PERSONAL USE.
Section 8, Harrison Anti-Narcotic Law Dec. 17, 1914, c. 1, 38 Stat. 789, providing that it shall be unlawful for any person not registered under the provisions of the act, and who has not paid the special tax provided thereby, to have in his possession or under his control any opium or coca leaves, refers only to those who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away as enumerated in section 1; hence the mere keeping of a small quantity of opium for personal use does not constitute an offense within the meaning of the act.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. ⟸4.]

3. POISONS ⟸9—PROSECUTION AND PUNISHMENT—BURDEN OF PROOF—EXCEPTIONS IN STATUTES.
Harrison Anti-Narcotic Law Dec. 17, 1914, § 8, establishes the rule of evidence that, upon proof that a defendant was producing, importing, manufacturing, dealing in, dispensing, selling, distributing, or giving away, as mentioned in section 1, cl. 1, opium or coca leaves, and that a narcotic was found in his possession, he is presumptively guilty of violating the act, that then the burden of proof is upon defendant to show affirmatively that he is not one of the class mentioned in section 1 as being required to register, or, if so, that he had registered and paid the special tax.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⟸9.]

4. POISONS ⟸9—PROSECUTION AND PUNISHMENT—EVIDENCE—POSSESSION OF OPIUM.
In a prosecution under the Harrison Anti-Narcotic Act of December 17, 1914, the uncontradicted evidence that defendant obtained the opium found in her possession from a Chinaman, and that she had it for her personal use and consumption, and that she never sold, gave away, or dealt in it in any form was held to overcome the presumption of guilt arising from the possession of opium under section 8 of the act, providing that possession or control of opium shall be presumptive evidence of a violation of the act.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⟸9.]

Madge Wilson was convicted of violating the Harrison Anti-Narcotic Law, and she moves for a new trial. Motion granted.

Hubert F. Fisher, U. S. Dist. Atty., and W. D. Kyser, U. S. Asst. Dist. Atty., both of Memphis, Tenn.

Clarence Friedman, of Memphis, Tenn., for defendant.

McCALL, District Judge. The defendant was indicted under the act of Congress, approved December 17, 1914, known as the Harrison

Anti-Narcotic Law, and arraigned, pleaded not guilty, and was tried by a jury. There are three counts in the indictment. The district attorney recommended a verdict of not guilty under the first and third counts. The jury found the defendant guilty under the second count.

The case is now before me upon a motion for a new trial. Several grounds are assigned, but I shall consider only those based upon the proposition that the second count charges no offense, and that none was proven. The others are overruled.

The second count charges the defendant with having violated the eighth section of the act, which is as follows:

"Sec. 8. That it shall be unlawful for any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this act."

[1] It was admitted, at the trial, that the defendant had at her house, in her possession and under her control, an opium pipe and an outfit necessary for smoking purposes, including a small quantity of opium prepared for the pipe, at the time charged in the indictment. The defendant testified in her own behalf that she had for several years been an addict to opium smoking, and that the opium prepared for smoking found in her possession was obtained by her from a Chinaman, and that she had it for her own personal use and consumption; that she never sold, gave away, nor dealt in it in any form, except to buy and smoke it. This evidence was uncontradicted, and presents the question, whether it is an offense under the act, for a person to have in his or her possession any of the drugs named in the act for personal use. If it is an offense, Congress has not in terms so declared, and it must be worked out by a construction of the language of the act. It is a criminal statute, and must be strictly construed. Such portions of the act as are pertinent to the inquiry must be considered. The first section is as follows:

That "every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, sale, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on. * * * At the time of such registry and on or before the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs, shall pay to the said collector a special tax at the rate of $1 per annum. * * * It shall be unlawful for any person required to register under the terms of this act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section."

The first clause of section 1 declares who shall register and pay the special tax. They are those who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away the drugs mentioned. The second clause of section 1 declares it to be unlawful for any person required to register by the first clause of section

1, to do any of those things named therein without having registered and paid the special tax provided in the section.

[2] The question now arises, to whom does the clause "any person not registered under the provisions of this act and who has not paid the special tax" in the eighth section refer? Clearly, it refers to, and at least includes, those doing the things specifically named in the first section. Does it refer to and include others doing things not specifically named in the act, viz., those having in their possession or under their control the drugs named for their personal consumption? It seems to me that to so hold would be for the court to enlarge the list of those whom Congress required to register and pay the special tax. To that extent it would be an amendment of the act. This is not the function of the court. If Congress had intended to require persons to register who had in their possession or under their control drugs for any purpose other than that stated in the act, it would seem that it would have been a simple matter to have said so. It is clear to my mind that the language quoted from the eighth section, supra, when read in connection with the first section of the act, refers only to those mentioned in the last-named section, and however desirable it may be to have that list enlarged, the court is without authority to do it.

[3, 4] It is, in my judgment, the purpose of section 8 to make the mere possession of the drugs mentioned in the act by any of those specified in the first section presumptive evidence that such parties had not registered, nor paid the special tax as required therein, and that it was not intended to enlarge the class that is required to register and pay the tax under the first section, nor is it, in my judgment, susceptible of such construction. The section establishes a rule of evidence, in that, upon the government proving that a defendant was doing any of those things mentioned in section 1, clause 1, of the act, and, further, that a narcotic was found in his possession, he would be presumptively guilty of violating the first section of the act; then the burden of proof shifts, and is upon the defendant to show affirmatively that he is not one of the class mentioned in section 1, required to register, or, if so, that he had registered and paid the special tax. Section 8, in this particular, is very similar to the statute of the state of Tennessee which makes the possession of a retail liquor dealer's federal tax stamp prima facie evidence that the party holding it is selling liquor in violation of the laws of Tennessee. Acts Tenn. 1903, c. 355. This presumption may be overcome by the evidence. In the case at bar, I think the presumption of guilt of the defendant was fully met and overcome by the proof.

The result is that the motion for a new trial will be allowed; and it is so ordered.

SKERMAN v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. New York. July 7, 1915.)

1. NEW TRIAL ⟸99—GROUNDS—NEWLY DISCOVERED EVIDENCE.
In an action for personal injuries sustained at a railroad crossing, affidavits that a certain person, if called as a witness, would testify that plaintiff hurried down the street, did not stop when he reached the gate, and went under it just as a train came along, although in direct conflict with the plaintiff's evidence on the trial, do not present evidence newly discovered, or so plainly likely to affect the result, as to necessitate a new trial.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. ⟸99.]

2. NEW TRIAL ⟸101—GROUNDS—NEWLY DISCOVERED EVIDENCE.
Where a physical opportunity existed to obtain certain witnesses during the trial, but there was lack of time to investigate for the purpose of determining whether their evidence would be introduced, such evidence is not newly discovered in the legal sense.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 205, 206; Dec. Dig. ⟸101.]

3. NEW TRIAL ⟸101—GROUNDS—NEWLY DISCOVERED EVIDENCE.
After-investigation cannot supply, as newly discovered evidence, something that the parties might have gone into before the trial, if it had been considered material.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 205, 206; Dec. Dig. ⟸101.]

4. NEW TRIAL ⟸100—GROUNDS—NEWLY DISCOVERED EVIDENCE.
In an action for personal injuries, where plaintiff had testified that his earning capacity was $30 a week, and that he had made $90 during the month preceding the trial, evidence, from investigation after the trial, that his earning capacity was small, and that he had actually earned much less than $90 during the preceding month, did not constitute after-discovered evidence.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 201–204, 208, 209; Dec. Dig. ⟸100.]

Action by William Skerman against the Philadelphia & Reading Railway Company. Plaintiff had verdict, and defendant moves for new trial. Motion denied.

Gilbert D. Steiner, of New York City (John C. Robinson, of New York City, of counsel), for plaintiff.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. [1] The plaintiff recovered a verdict for $20,000, after a careful trial of the case and full opportunity to present any obtainable evidence to the jury. During the trial allusions to a woman and her daughter, who were present at the crossing, brought up the question of endeavoring to obtain their testimony. It was stated by one of the witnesses that this woman reproached the gateman for causing the accident. Affidavits are now presented from both the woman and her daughter, which make it uncertain what the testimony of the woman would be if she were called as a witness, but

indicate that the daughter would testify that the plaintiff hurried down the street, did not stop when he reached the gate, and went under it just as the train came along. This testimony is directly in conflict with the situation presented upon the trial, at which the plaintiff's witnesses placed the man standing in the middle of the street, waiting for the gates to be raised. It would not seem that the evidence of these women is newly discovered, or so plainly likely to affect the result, as to make it necessary or proper to set aside the verdict and order a new trial upon that ground.

[2] Physical opportunity existed to get these witnesses during the trial, if it had been considered material. The only difficulty presented was lack of time to investigate and report thereon before determining whether an attempt should be made to introduce it at the trial, rather than lack of time to get the witnesses into court. Such evidence is not newly discovered in the legal sense.

[3] Much the same situation exists as to the other matter upon which a new trial is asked, viz., testimony as to actual employment and total wages received by the defendant immediately prior to the accident. During the course of the trial the suggestion of intoxication was raised. Evidence of previous intoxication, if desired as proof of the defendant's responsibility or carelessness, could have been sought before the trial. After-investigation cannot supply, as newly discovered evidence, something that the defendant might have gone into before the trial, if it had been considered material.

[4] The number of days' work performed by the plaintiff and the amount received by him on an average preceding the trial was made the subject of cross-examination. It appeared on the trial that he had actually worked for the defendant. Slight investigation of his record would have produced any testimony which might have been presented as to his earning capacity. The plaintiff was asked how much he earned per week on the average. His answers did not indicate a clear understanding of the language, nor clear expression in his answer. The court inquired of him if what he was stating was that, when he worked six days a week at $5 a day, his earning capacity would be $30. He quickly explained that that was what he was trying to say. Subsequently he was asked the direct question by defendant's counsel, whether he had earned $90 during the month actually preceding the trial. He again showed some confusion, and the jury might have inferred that he did not wish to answer, or that he did not understand the exact meaning of the question. The following questions and answers appear:

"Q. How much did you make in that month? How much do you say you made in that month? A. When I was working for a company— Q. How much did you make with Irish Bros. for the month that you worked before this accident? A. I made about $90. Q. Ninety dollars for that month; was that net to you? A. Yes."

Upon the next page the witness was asked:

"Q. You say you worked for them steady before this accident without any break? A. Yes. Q. Without any break, and you averaged $30 a week net to yourself; that is, $5 a day? A. Yes, sir."

And again:

"Q. You didn't make any less than $30 at any time? A. No; not less than $30."

The court has a definite recollection of the way in which the plaintiff answered these questions, and considered at the time what the effect would be upon the jury. Result of investigation after the trial proving that the plaintiff's actual earnings were much less than $90 for the month, and that his work was irregular and his average earnings small, is not after-discovered evidence. It is impossible for the court to estimate how much the jury assumed that the plaintiff would work, in accordance with their view of his habits and personality.

The court cannot conclude that the plaintiff committed perjury, and it has already denied a motion to set aside the verdict as excessive, from the standpoint of the evidence and the injuries.

Motion denied.

In re LOUIS J. BERGDOLL MOTOR CO.

(District Court, E. D. Pennsylvania. July 23, 1915.)

No. 4742.

BANKRUPTCY ⊂=164—PREFERENTIAL PAYMENTS—RENT—"PREFERENCE."

Payments made by an insolvent to his landlord within four months of his adjudication in bankruptcy, and applied by the landlord, not to rent for the current year, but to rent in arrears, constitutes a "preference," since as to such rent the landlord is an ordinary creditor merely.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⊂=164.

For other definitions, see Words and Phrases, First and Second Series, Preference.]

In Bankruptcy. In the matter of the Louis J. Bergdoll Motor Company, bankrupt. On petition of the North Broad Street Realty Company to review a referee's order deducting certain payments as being preferential from the amount allowed petitioner as rent. Order affirmed, and petition dismissed.

John Weaver, of Philadelphia, Pa., for claimant.

Joseph W. Catherine, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The petitioner, the North Broad Street Realty Company, filed a proof of claim as landlord for $11,687.32 for one year's rent as entitled to priority of payment. There was other rent in arrears, for which a claim was filed. A payment of $1,500 on account of rent had been made to the petitioner in March, 1913, within four months of the date of adjudication in bankruptcy, April 11, 1913. Evidence was taken before the referee, from which he found this payment to be preferential, and ordered it deducted from the amount for which priority was claimed. The case comes before the court upon the petition of the Realty Company for review of this order of the referee. The opinion of the referee (Richard S. Hunter, Esq.), as it pertains to the present controversy, is as follows:

"This brings the referee to the consideration of the second question, as to the payment of $1,500 to the North Broad Street Realty Company on March 12, 1913.

"First. Was this payment of $1,500 made under circumstances which should have put the claimant upon an inquiry which would have informed it of the insolvent position of the company? As to the question of fact the referee has no difficulty. The payment was made five days before the petition in bankruptcy was filed, at the same time with payments to Erwin R. Bergdoll for a large amount, and to the Charles A. Bergdoll Coal Company and the Bergdoll Machine Company for smaller sums, while accounts of longer standing remained unpaid. Louis J. Bergdoll, as has been recited, was not only the president of the Louis J. Bergdoll Motor Company, but practically the only stockholder thereof, and the nominal officers of this company acted entirely at his dictation. The bankrupt company was organized under the laws of Pennsylvania, on March 18, 1912; all of its shares, except 2, being issued to Louis J. Bergdoll, who was elected president of the company. On January 8, 1913, the capital stock of the company was transferred: To Erwin R. Bergdoll, 2,998 shares; to Charles A. Bergdoll, 1 share; and to Grover C. Bergdoll, 1 share—the total consideration paid by Erwin R. Bergdoll being $1. The annual meeting was held January 16, 1913. Erwin R. Bergdoll and Grover C. Bergdoll were elected directors for the ensuing year, and Erwin R. Bergdoll thereafter elected president. The merchandise, machinery, tools, and equipment were carried on the books at their original cost; no reduction being made for depreciation. On March 5, 1913, the two shares of stock held by Charles and Grover Bergdoll were transferred to Erwin R. Bergdoll. On March 6, 1913, Erwin R. Bergdoll transferred 2,997 shares of stock to his mother, Emma C. Bergdoll, 1 share to Joseph M. Hubert, 1 share to E. J. Teague, and 1 share to William Ruhland. The next day a special meeting was held, when the Bergdolls resigned, and Hubert, Teague, and Ruhland were elected in their places. Hubert was a bookkeeper at the Bergdoll Brewing Company, Teague was a canvasser in the employ of G. W. Todd Company, and Ruhland was a grocery clerk. None of these officers knew that they had been elected until after the elections had been held. No meetings of stockholders or board of directors were held subsequent to the election. On March 8th and 9th, motor cars in the course of completion, and motor parts, to the value of $31,639.25, were transferred from the bankrupt company's plant at Sixteenth and Callowhill streets to the Bergdoll Machine Company, then owned by Erwin R. Bergdoll. This transfer was made without authority of the board of directors, and without the knowledge of Hubert, Teague, or Ruhland. The company was being pressed by its creditors. The accounts receivable carried on the books were of the nominal value of $58,000; the value of stock, tools, machinery, and fixtures, as sold by the receiver, was $42,613; the cash deposited with the government $6,250; and the cash on hand, $2,617.12. Even upon the extreme assumption that all the accounts receivable were good and collectible, the total of assets is slightly in excess of $100,000. The liabilities of the company, as shown by the proofs of claim filed with the referee, amounted to about $250,000. In addition to these facts, the claimant knew that the motor company was in arrears for nearly two years' rent, that the coal to heat the building was supplied by the claimant, who was the creditor of the bankrupt company for this heat for over $1,000, and that the claimant had paid the Philadelphia Consistory the sum of $1,000 to prevent an execution on a judgment of $5,000 obtained by the Consistory against the Motor Company. These facts are sufficient to warrant the finding that, when the said sum of $1,500 was paid to the company, the claimant knew, or had reasonable cause to believe, that it was insolvent.

"Second. It is urged upon the referee, however, that even if the payment was made with the knowledge on the payee's part of the insolvency of the company, nevertheless it is not a preference, because paid to a landlord, who was a creditor having priority, and whose leasing of the premises was a constantly accruing consideration. Counsel for the claimant cited In re Barrett, 6 Am. Bankr. Rep. 199, a referee's opinion in the Southern district of New York, who decided that the acceptance of a payment of rent within four months of the tenant's bankruptcy was not the acceptance of a preference,

because there was no transfer of property or payment on account; but upon the payment of each installment of rent the transaction between the debtor and the creditor was closed. That referee also decided that a preference was only obtained, under section 60 of the act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1913, § 9644]), by an act of the bankrupt enabling one of his creditors to obtain a greater percentage of his debt than any other of the same class, and that, the landlord being in a class by himself, the transaction was not a preference. No decision in this case by the judges is reported, and the case has been questioned by Remington and other text-writers; but as regards current rent it has the sanction of In re Belknap (D. C.) 12 Am. Bankr. Rep. 326, 129 Fed. 646, a case arising in this district, where there was a distraint of goods under a landlord's warrant, and the tenant's failure to procure a release of a levy thereunder was held not to constitute an act of bankruptcy. 'It is clear to my mind,' says Judge McPherson, 'that no preference was obtained by the distress.' Then, after quoting section 60 as amended, he says: 'The effect of the distress did not enable the landlord to obtain a greater percentage of his debt than any other creditor of the same class. There is no other creditor of the same class, for there is but a single landlord.' See, also, In re Feuerlicht, 8 Am. Bankr. Rep. 550, and Livingston v. Heineman, 10 Am. Bankr. Rep. 39, 120 Fed. 786, 57 C. C. A. 154. Had the payment been for the current year, these decisions would be conclusive; but the landlord in this case, instead of applying the $1,500 to the current rent, applied it to the payment of back rent, upon which he would have had only the right of an ordinary creditor. This he may not do, for as regards this back rent he was an ordinary creditor, and his application of the payment is a preference, giving him a greater percentage of his debt than other creditors of the same class. See In re Pearson (D. C.) 2 Am. Bankr. Rep. 482, 95 Fed. 425, which is directly in point, and In re Riddle's Sons (D. C.) 10 Am. Bankr. Rep. 204, 122 Fed. 559. Even the payment of current rent may be used as a device for effecting a preference. In re Lange (D. C.) 3 Am. Bankr. Rep. 231, 97 Fed. 197.

"The referee finds that the payment of this $1,500, as applied to rent not within the current year, was preferential, and that this amount must be deducted from the priority claim for rent. The referee states the indebtedness having priority as follows:

One year's rent from April 1, 1912, to March 31, 1913		$11,687 32
Paid on account	$9,383 85	
Preferential payment	1,500 00	10,883 85
Balance due to claimant		$ 803 47"

After an examination of the testimony taken before the referee, I see no reason to disturb his findings of fact, and I entirely agree with his conclusions of law. The referee has clearly stated the distinction between the present case and that of In re Belknap, decided by Judge McPherson, and reported in (D. C.) 12 Am. Bankr. Rep. 326, 129 Fed. 646, and I see no occasion to add anything to the careful reasoning in his opinion.

It is ordered that the petition be dismissed, and the order of the referee affirmed.

In re MADEIROS.

LEWIS v. BILLINGS.

(District Court, D. Massachusetts. August 3, 1914.)

No. 1009.

1. ALIENS ⟸54—DEPORTATION PROCEEDINGS—MEDICAL CERTIFICATE—JUDICIAL REVIEW.

The exclusion by the Immigration Department of an alien will not be interfered with by the courts, where essential justice was attained, and the medical certificates as to the alien's physical inability were not so defective that action based on them was illegal and void.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

2. ALIENS ⟸54—EXCLUSION—PROCEEDINGS BEFORE IMMIGRATION OFFICIALS—PREJUDICIAL ERROR.

Error in refusing the attorney of an alien, in proceedings before immigration proceedings to exclude him, to appear before officers in behalf of the alien, did not render the proceedings resulting in exclusion so unfair as to warrant the court on habeas corpus to grant relief, where the alien was excluded because of physical defects which might affect his ability to earn a living, and where his attorney was refused permission to make his argument before the immigration officers, who considered additional evidence offered by him, and where the result was clearly right under the evidence.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

3. HABEAS CORPUS ⟸30—GROUNDS—EXCLUSION OF ALIENS—FAIR HEARING—SUBSTANTIAL JUSTICE—REPRESENTATION BY COUNSEL.

An application by an alien, ordered deported, for habeas corpus, on the ground that by refusing to permit counsel to argue in his behalf before the board he was denied a fair hearing, should not be granted, unless he can make out a prima facie case, so that, where he was excluded because of physical defects which might affect his ability to earn a living, and the facts were not in dispute, but the only questions were the deductions therefrom, habeas corpus should not be granted.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⟸30.]

In the matter of Antonio R. Madeiros, an alien. Habeas corpus petition by William H. Lewis against George B. Billings for the discharge of Antonio R. Madeiros. Dismissed.

William H. Lewis, of Boston, Mass., for petitioner.

Leo A. Rogers, Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. This case was heard upon the evidence contained in the record of the Immigration Department and the additional facts that Mr. Lewis, counsel for the applicant, was in attendance at the place of the hearing on March 16, 1914, requested leave to participate therein, and was not allowed to be present at the hearing or to take part therein, and upon the further agreement of parties that all proceedings in the immigration record, those subsequent to the filing of this petition as well as those prior to it, are to be considered upon the questions here involved.

[1] No one of the three medical certificates which appear in the record states explicitly and categorically that the applicant is afflicted with a defect which may impair his ability to earn a living. In re Felix Petkos, 214 Fed. 978, 131 C. C. A. 274, June 24, 1914. But I think that, fairly construed, that is what Dr. Grubb's certificate, and Dr. Safford's letter or certificate, dated February 7, 1914, mean. In proceedings of this character, in which substance rather than form, and essential justice rather than technicalities, are to be regarded, I do not think it can properly be held that the certificates were so defective that action based upon them was illegal and void.

[2] The other substantial contention urged against the action of the department is that counsel for the applicant was excluded from the hearing of March 16, 1914. It is, so far as my observation or knowledge goes, the uniform practice of all tribunals in Massachusetts to allow parties to proceedings before them to be represented by counsel. The precedent relied on by the board for not permitting applicant's counsel to be present, viz., having therefore excluded a person who desired to be present, "not as a representative of the alien being heard, merely as a matter of curiosity," does not seem to me to cover the case here presented. U. S. Commissioner's letter of March 27, 1914. Counsel for a party are not "the public," as that word is used in section 25 of the Immigration Act (Act Feb. 20, 1907, c. 1134 [Comp. St. 1913, § 4274]). The rules of the department explicitly provide for the appearance of attorneys "in behalf of detained aliens" and regulate the fees in such cases. Rule 18 of Rules of Department of Commerce and Labor Relating to Admission or Expulsion of Aliens. Assuming, however, that the board erred in excluding Mr. Lewis, it by no means follows that the petitioner is entitled to the relief prayed for.

The final question is, not whether a technical error of law was committed, but whether the proceedings as a whole amounted to a fair hearing and decision of the issues involved. It is to be observed that the point on which the witnesses for the applicant were offered, viz., that the applicant was not likely to become a public charge, was finally decided in his favor. He was excluded as a person having physical defects which may affect his ability to earn a living. Vote of March 16, 1914. The only possible injury which he could have suffered by the refusal to permit his counsel to be present was that the Board of Special Inquiry decided against him without having heard argument by his counsel, who had requested to be heard only "for the purpose of introducing evidence." Mr. Lewis' letter of March 16, 1914. The department telegram of March 11th directed merely that such additional evidence as Mr. Lewis might offer should be considered, and that was done.

[3] It seems to me, and I find, that the proceedings of the Board of Special Inquiry amounted to a fair hearing and decision of the case, that the result reached not only was proper on the evidence before the board, but was so plainly right that there is no reasonable probability it would have been different if counsel for the applicant had been allowed to be present and had been heard, and that no substantial injury was therefore done to the petitioner by the exclusion of his coun-

sel from the hearing. "A petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out a prima facie case." Holmes, J., United States v. Sing Tuck, 194 U. S. 161, 170, 24 Sup. Ct. 621, 48 L. Ed. 917.

It is true, as the petitioner contends, that he appears to have no organic disease; but it is equally true that he has serious bodily infirmities which greatly restrict the occupations which he may safely pursue. These infirmities may well have been found by the Board of Special Inquiry to be physical defects of a nature which may affect the ability of the petitioner to earn a living. In a different sort of case, where the facts were in dispute and the testimony conflicting, a denial of the right to be represented by counsel might perhaps result in such an inadequate presentation of the applicant's case as to be sufficient ground for holding that there had not been a fair hearing.

Petition dismissed.

OMO MFG. CO. v. MYSTIC RUBBER CO.

(District Court, D. Massachusetts. June 9, 1914.)

No. 460.

TRADE-MARKS AND TRADE-NAMES ⊂=58—INFRINGEMENT—SIMILARITY IN APPEARANCE.

The trade-mark "oMo" for a dress shield *held* infringed by the mark "ɔMɒ," used in the same place on the same class of goods; the distinctive feature of both being a large central M flanked by smaller letters, and defendant's mark as a whole having such a close resemblance to complainant's as to be likely to deceive purchasers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 66, 67; Dec. Dig. ⊂=58.]

In Equity. Suit by the Omo Manufacturing Company against the Mystic Rubber Company. Decree for complainant.

Boyden, Palfrey, Bradlee & Twombly and Howland Twombly, all of Boston, Mass., and Archibald Cox and Robert W. Byerly, both of New York City, for plaintiff.

Clyde L. Rogers, of Boston, Mass., for defendant.

MORTON, District Judge. This is a suit to restrain infringement of the complainant's trade-mark oMo, which was registered in the United States Patent Office on April 2, 1895, No. 26313. No question is now raised as to the validity of this trade-mark, nor as to the complainant's ownership of it. The respondent has used to a limited extent, and intends to continue to use upon the same class of goods as that to which the complainant's mark is applied, viz., dress shields, the trade-mark DMD. The real question at issue between the parties is whether the respondent's mark resembles that of the complainant so closely as to constitute an infringement; i. e., so closely as to be likely to be mistaken for it by the ordinary purchaser of the goods.

The salient features of the complainant's mark are a large M flanked on either side by small O's—oMo. The salient features of the respondent's mark are a large M, preceded by a small D, which

is made with the vertical part noticeably shorter than the curved part, so that it looks not unlike the letter o, and followed by another D in which the vertical part is decidedly longer than the curved portion, and which, considered separately, would not be likely to be mistaken for the letter O—OMD. The respondent's mark is applied to the same class of goods, in the same place, and in the same way as the complainant's. The surroundings of the two marks are different; but such differences, although they might be very important upon an issue of unfair competition, are relevant here only upon the question whether there was an intent on the part of the respondent to imitate the complainant's mark, a question which I do not find it necessary to decide. Walter Baker & Co., Ltd., v. Delapenha (C. C.) 160 Fed. 746, 749. The complainant plainly has a property right in its trade-mark, and is entitled to be protected against any imitations thereof, whether the imitation be put out naked or be clothed with accessories. Walter Baker & Co., Ltd., v. Puritan Pure Food Co. (C. C.) 139 Fed. 680; Bass & Co. v. Feigenspan (C. C.) 96 Fed. 206, 212.

The general principle upon which the respondent's mark is constructed is the same as that on which the complainant's is constructed, viz., a large central M flanked by two smaller letters. The first of these letters on the respondent's mark is of unusual shape, and so closely resembles the corresponding letter in the complainant's mark as to be easily mistaken therefor. The prominent central letter is the same in each. The general design of the complainant's trade-mark and two of the three elements of which it is composed are thus found in the defendant's.

It seems to me that the dissimilarity between the final D of the respondent's mark and the final o of the complainant's is not sufficient to overcome the strong resemblances in the other two elements of the marks, and in the marks as a whole, and I therefore find that the respondent's trade-mark does so closely resemble in appearance that of the complainant as to be likely to deceive the public and the trade, and to constitute an infringement of it.

Decree for the complainant.

UNION TRUST CO. v. BEACH MFG. CO. (W. S. PATTERSON & CO., Interveners).

(District Court, S. D. Georgia. May 27, 1915.)

CHATTEL MORTGAGES ⊂=138—CONDITIONAL SALE—FAILURE TO RECORD—PRIORITIES.

Where property, bought under a conditional sale contract which was never recorded, was mingled with other property of the buyer covered by a pre-existing mortgage, which was to include after-acquired property, the seller could, under the laws of Georgia, enforce his reserved title against the mortgagee.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228–236; Dec. Dig. ⊂=138.]

In Equity. Suit by the Union Trust Company against the Beach Manufacturing Company, in which W. S. Patterson & Co. intervened,

claiming the property. Report of the master, allowing the claim of the interveners, confirmed.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for complainant.
Levi O'Steen, of Douglas, Ga., for interveners.

NEWMAN, District Judge. In the Case of the Atlanta News Publishing Company (D. C.) 160 Fed. 519, I held that under the law of Georgia, as interpreted by the Supreme Court of the state, a vendor, making a conditional sale of property and having a contract in writing by which he retains title to the property sold, such property going into and being mingled with other property of the vendee on which there was a pre-existing mortgage, could recover his property as against such antecedent mortgage, although the conditional contract of sale was not recorded. In the Atlanta News Case I quoted from the opinion by Judge Blanford in Conder v. Holleman & Ballard, 71 Ga. 93, as follows:

"But the object of the registration of mortgages is to give notice to all persons having dealings with the mortgagor of the existence of the mortgage; and in this case it appears that the dealings had between the plaintiff in execution and the defendant had taken place long before the sale of the property levied on, which was sold by the claimant to the defendant in execution, and the judgment in said case had been obtained long before said conditional sale. Then, whether said conditional sale had been duly recorded or not, it would not in any manner affect the plaintiff, whose judgment had been obtained before the sale, and as to him it made no difference whether the sale was recorded or not. A judgment creditor of a mortgagor, whose judgment was obtained before the making of a mortgage, would not be affected by the record of such mortgage in any way. So this judgment creditor is in no wise affected by the nonrecord of this conditional sale; no right has accrued to him between the making of the conditional sale and the record of the same; he is not hurt by its nonrecord; and as to him it is the same as if the sale had been duly recorded. The title to this property was in the claimant, he having reserved the same until it was paid for by the defendant in execution, and he did not lose the same, nor render it liable or subject to the judgment and execution of plaintiff, by reason of not having his conditional sale recorded within 30 days. The lien of this judgment never attached to the property levied on."

And after citing other Georgia decisions to the same effect I quote an expression from York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, as follows:

"There was no clause in the mortgage covering after-acquired property, and in any event the mortgage would not cover property so acquired, the title to which, as in this case, was reserved to the vendor."

In this York Manufacturing Company Case, as will be seen by an examination of it, the contract was never filed, as required by the statute of Ohio relating to a conditional sale. In the present case there is said to be a clause in the mortgage of the Union Trust Company covering after-acquired property; but, even if that is so, it never attached to this property of Patterson & Co.

The master's report is therefore confirmed as to the three mules described by him in his report, viz.:

"One red mare mule, about 9 years old, weighing about 900 pounds; one yellow mare mule, about 8 years old, weighing about 900 pounds; and one horse mule, about 15 years old, weighing about 900 pounds."

If counsel can agree upon the amount to be found for hire, I think that should be found in favor of the interveners, but, as the special master states, not as a preferred claim. Otherwise, I do not know how much to find from this report. But the three mules the interveners W. S. Patterson & Co. should have at once, and the report of the master is confirmed to that extent.

UNION TRUST CO. v. BEACH MFG. CO. (DU PREE, Intervener).

(District Court, S. D. Georgia. May 27, 1915.)

No. 5.

SALES ⊂=474—CONDITIONAL SALE—LIEN—PRIORITY.

A judgment in favor of a judgment creditor, who gave no credit to the debtor on the faith of his ownership of chattels covered by an unrecorded conditional sale contract, does not affect the seller's right to the chattels under his reserved title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1391–1402; Dec. Dig. ⊂=474.]

In Equity. Suit by the Union Trust Company against the Beach Manufacturing Company, in which Mrs. S. A. Du Pree intervened, claiming the property. Report of the master, allowing the claim of the intervener, confirmed.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for complainant.
Girard M. Cohen, of Savannah, Ga., for intervener.

NEWMAN, District Judge. In this case the report of the master is correct, and all exceptions to the same should be overruled. This is true for the reasons given by me in the opinion just filed on the intervention of W. S. Patterson & Co. in the above case, 225 Fed. 93. The lien of the mortgage of the Union Trust Company could not attach to this property, because no title ever went into the Beach Manufacturing Company, as the master correctly held.

Under the statute of Georgia, it seems to me he also found correctly that the intervener will have the right to proceed against the five mules still on hand, purchased from Fender & Johnson, and the two mules still on hand, purchased from Fender & Plowden, and thereafter, if the seven mules in question do not bring enough to pay the debt, to proceed upon the bond given to dissolve the garnishment.

The judgment set up here against the rights of this intervener cannot affect the same in any way in my opinion. The rule with reference to the nonrecord of these conditional sales, where they are in writing, is that the failure to record them only affects persons who contract with the purchaser of the property on the assumption that he is the owner of the property the subject of the conditional sale; and the law goes upon the idea that it would be a fraud on them to allow people to sell property in this way and leave it in the hands of the purchaser without recording their contract of conditional sale, thus deceiving them, and then claim the right to set up their contract of conditional sale. There is nothing whatever in the record to show that either of the judgment creditors sold goods to the Beach Manu-

facturing Company on the strength of the ownership of these mules. I think, under any view of the matter, the judgments have no effect upon the title to this property.

The master's report is therefore confirmed. The cases referred to in the opinion on the intervention of W. S. Patterson & Co. (In re Atlanta News Publishing Co. [D. C.] 160 Fed. 519, and York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782) are absolutely controlling in this case.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(District Court, S. D. New York. June 24, 1915.)

Equity 2-9, 2-33, 2-149, 3-37.

1. RECEIVERS ⇐163—CLAIMS AGAINST ESTATE—EFFECT OF ASSIGNMENT TO RECEIVERS.

Receivers for a street railroad company were appointed first in a creditor's suit and afterward successively under first and second mortgages. The receiver of another company filed a claim against the estate which, after negotiations, was assigned to the first-named receivers, who were described in the assignment as receivers under the mortgages. *Held*, that such description was not conclusive as to the rights of the parties, and that, the consideration for the assignment having been paid from the general estate, in part from the earnings of the receivership, the claim could not be proved against the general estate for the benefit of the mortgagees alone, but inured to the benefit of all creditors, and the effect of the assignment was to cancel it.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 312-316; Dec. Dig. ⇐163.]

2. RECEIVERS ⇐148—CLAIMS AGAINST ESTATE—ENLARGEMENT BY ASSIGNEE.

Where an itemized claim filed against an estate in the hands of receivers was afterward assigned, the assignee cannot thereafter enlarge it, either by adding to the items or to the amounts claimed thereunder.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 260; Dec. Dig. ⇐148.]

3. STREET RAILROADS ⇐58—CONSTRUCTION OF LEASE—RIGHT TO RENTALS.

Under a provision of a lease of street railroad property requiring the lessee to pay as rent quarterly dividends on the stock of the lessor company, an installment of rent falling due before the appointment of a receiver, in a suit to foreclose a mortgage against the lessor, *held* to belong to the stockholders, and the right thereto not to have passed to the receiver.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. ⇐58.]

4. STREET RAILROADS ⇐58—INSOLVENCY AND RECEIVERSHIP—CLAIMS PROVABLE AGAINST ESTATE.

A receiver for a street railroad company, appointed in a suit to foreclose a second mortgage, who paid interest on the first mortgage on default of a lessee which was obligated to pay it, may prove a claim for the amount of such interest against the receiver for the lessee.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. ⇐58.]

5. STREET RAILROADS ⇐49—LEASES—LIABILITY OF LESSEE.

A lessee of a street railroad system, including lines leased by the lessor and controlled by it through stock ownership, which control passed to the lessee, *held* liable for failure to keep the controlled lines in repair and

for taxes and other liens existing when the lease was terminated by insolvency of the lessee.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. ⊂⊃49.]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and the Metropolitan Street Railway Company, and three other cases. In the matter of the claim of the Third Avenue Railroad Company, No. 44, against the Metropolitan Street Railway Company. On exceptions to report of special master. Modified and confirmed.

The following is the opinion of the special master:

As this memorandum is addressed to counsel having a full knowledge of the facts it will, in the main, be limited to indicating the conclusions upon which the report will be based, leaving the recital of the facts suggesting such conclusions to formal presentation.

The claim of the receiver of the mortgaged premises is against the Metropolitan Company alone, and not against the City Company. It is based on the covenants contained in the Third Avenue-Metropolitan lease of May 13, 1900. Liability for proven breaches of covenants, as alleged, affecting lines and property owned by the Third Avenue Company which it demised is not disputed, but liability respecting such property of the so-called "Controlled Companies" is. That liability is asserted because of a covenant in the lease by which the Metropolitan undertook, "from time to time, to do all the things which shall be necessary to enable the party of the first part (Third Avenue Company) to comply with the provisions of said mortgage," i. e., a Third Avenue mortgage which was prior to the lease. The latter company had agreed in the mortgage that any corporation to which the premises might be conveyed, transferred, or leased should observe the covenants of the mortgage as fully as it was bound to do, and I think that the covenant by the Metropolitan quoted is to be regarded as a fulfillment of this promise, and as an undertaking by the Metropolitan absolute on its face to comply with the covenants of the mortgage. In other words it constitutes a promise by the Metropolitan to the Third Avenue Company, made for the benefit of the mortgage trustee and its bondholders, to observe and perform the mortgage covenants. It is urged, however, that, assuming that there is such assumption, the resulting Metropolitan obligation is not primary, but secondary, being, so far as controlled companies and their property are concerned, undertakings to do the things specified if those companies failed to do them, and that this is so whether the covenants are absolute or conditional in their terms. In view of the opinion of the Circuit Court of Appeals in the Second Avenue Bondholders' Case (198 Fed. 747, 117 C. C. A. 503) it may not be difficult to see that this may be so, not only as to covenants in terms conditional, such as the covenant to pay taxes, but also as to covenants which are absolute in form, such as covenants to keep property of controlled companies in repair or to pay their indebtedness, principal, and interest at maturity, the failure to observe which is the basis of many items of damage claimed. The difficulty is that this contention does not carry the matter very far. The case relied on also holds that contingent liabilities which have ripened into fixed liabilities at the date fixed for filing claims are provable. Here the date fixed is January 15, 1908. The lease from the Third Avenue Company to the Metropolitan Company must now be deemed to have terminated with the expiration of the period of experimental operation which was January 11, 1908. 216 Fed. 458, 132 C. C. A. 518. What the Metropolitan had failed to do on this date, respecting obligations of controlled companies then matured, and care of property then in disrepair, which under lease and mortgage it was bound to do, suggest liabilities within the Second Avenue Bondholders' Case that were fixed on January 15, 1908, whether the Metropolitan was bound conditionally or absolutely. This is obviously so as to matured debt and in-

terest or accrued taxes (198 Fed. 747), but it is just as clearly so respecting repairs to roadway, track, equipment and buildings. The evidence shows conclusively that the condition of disrepair of these items existed, not only when the lease terminated, but for a long time prior thereto. Indeed, the complete failure of the Metropolitan and of its assignee, the City Railway Company, to discharge its obligations respecting the physical properties in their care for years prior to the receivership is too notorious to be disputed. With the possible exception of the claim for the franchise taxes which were in litigation at the termination of the Third Avenue-Metropolitan lease and on the day fixed for filing claims, and which will be discussed below, items demanded, respecting controlled companies and their properties, set out in the claim as originally filed, suggest, I think, fixed obligations provable as such.

The claim herein was filed by the receiver of the Third Avenue Company in 1909 as of January 15, 1908, and it sets forth items and amounts demanded respecting property both of that company and of its controlled companies. At a hearing on March 15, 1910, a motion was made to strike out testimony of a claim for new cars of the Union Railway Company, a controlled company, and for repairs to its car house which were not specified in the claim as filed, which was granted on that ground, and a counter motion to amend was denied for lack of power. At a subsequent hearing on February 26, 1913, a stipulation was placed on the record that: "No actual amendment of the claimant's claim as filed need be asked for or obtained except in case items have been or shall be offered in evidence of a different character than any item contained in the claim as filed." The taking of testimony was finally closed on January 12, 1914. Thereafter, on February 27, 1914, the claimant petitioned the court for the amendment both in respect to items of a different character than any contained in the claim and as to items of the same character—the amounts of identical items in fact which under the stipulation need not have been asked. As it was asked, those asking it are concluded by the result so far as this stipulation is concerned. The court denied the motion in toto, saying that to grant it "seems wholly inequitable." Thereupon there was filed a petition for a reargument March 30, 1914, which apparently eliminates the items of a "different character" set out in the prior petition, consisting, in large part, of demands for damages to properties of controlled companies not specified in the claim as filed, and asks only for amendments increasing amounts for items which were specified, and this, too, was denied. Notwithstanding, counsel for claimants are now insisting on allowances of amounts in excess of those originally demanded on the strength of the stipulation quoted, although they ask, as to the items of a different character, only that the amount of damages be fixed and reported, but not included in the total of damages allowed, the purpose being to have these latter items liquidated so that they may be ascertained in the event that the Appellate Court shall ultimately grant the amendments. In my opinion no amounts in excess of those originally demanded for items specified in the claim as filed can be reported, notwithstanding the stipulation. On its face, it is merely an agreement that a party need not apply, but a party may waive it, assuming its validity, and apply, as he has here, and is bound by the result. Moreover, it was entered into long before the motions to amend were made, and to give it effect would be to grant the very amendments which the court denied, and which it evidently regards as wholly inequitable to creditors whose claims were duly presented, and who are not parties to it. As to the request concerning items of a character not originally specified, it seems to me that if the motion to amend be ultimately granted, the principle on which the evidence concerning damages is to be viewed will be so definitely ascertained by the result in this and the Metropolitan breach of lease proceeding that counsel will be able to determine amounts by agreement. In any event it is not for the master to report on matters which the court has flatly said cannot be considered.

Limiting myself, then, to the items and amounts set out in claim as originally filed, I take them up in the order in which they there appear, which is followed in claimant's brief.

1. I think that the claim to the first installment of rent, amounting to $239,937, which accrued October 13, 1907, belonged to the stockholders of the Third Avenue Company under its lease to the Metropolitan; that such claim as Mr.

Whitridge may have had as receiver of Third Avenue properties did not pass by assignment to claimant under the agreement of December 29, 1911, and that it cannot be allowed. The second installment of an equal amount accrued on January 13, 1908, the day after Mr. Whitridge entered into possession of the mortgaged premises, so that it would seem that, as receiver in possession of the mortgaged premises, he was on the day fixed for filing claims—January 5, 1908—entitled to this installment, and that the claim passed under the agreement referred to. It is allowed at $239,937.

2. The interest on the 5 per cent. first mortgage bonds, due on January 12, 1908, but not exceeding the amount demanded in the claim as originally filed, is allowed.

3. The claim as originally filed demands $797,106.67 interest on the 4 per cent. consolidated bonds from July 1, 1907, to January 12, 1908, "less such sum as may be paid to the receiver of the Third Avenue Railroad Company or the receivers of the Metropolitan Street Railway Company for rent or for the use and occupation of the property of the Third Avenue Railroad Company from September 20, 1907, to January 11, 1908, both dates inclusive."

The agreement of December 29, 1911, provides for the payment of $200,000, as part of the consideration, for the use and occupation above referred to, as well as for the other things to be done by the Third Avenue receiver. The agreement does not appropriate the payment to the use and occupation demand, nor to any of the other demands which it settled, but that demand was the only demand which entitled the receiver to a present cash payment in full from the estate of the insolvent lessee. The matter is not free from doubt, but I think it should be assumed that this large cash payment was in settlement of the use and occupation claim, and that its amount should, in accordance with the claim as originally filed, be deducted from this amount claimed for interest.

4. The claim for cars, trucks, motors, and other equipment of the Third Avenue and of the Union Railway Companies is allowed at the amounts demanded in the claim as originally filed, aggregating $394,000; enlarged demands contained in the briefs respecting these items and other properties both of these companies and of other controlled companies not specified in the claim being denied for reasons stated.

5. The amounts demanded in the claim as originally filed for failure to keep in repair rails, tracks, roadway, and structure and pavements in the railroad area of the Third Avenue Company and the four controlled companies therein specified, aggregating $626,000, are allowed, as claimed.

Respecting these items, I may say that the court in the Metropolitan breach of lease proceeding accepted the testimony of the witnesses of the there claimant allowing 15 per cent. for betterments, which the evidence there showed were included in the witnesses' estimates. The same witnesses testify here, and where claimant has proffered others respecting properties not within the knowledge of the former, they have been of like standing and are of equal credibility. The estimates here do not include betterments to any considerable extent, and in any event they tend to show that the amounts demanded in the claim as filed were conservative enough to suggest the amounts allowed exclusive of betterments.

6. Paving claims to the extent that the amounts now claimed are within the amounts specified in the claim as filed are allowed as follows:

Third Avenue Co.	$ 3,800	00
42nd St. U. & S. Co.	6,940	27
D. D. E. & B. Co.	42,082	92
Union Railway Co.	159	74
Southern Boulevard Co.	50,000	00
Yonkers R. R. Co.	14,763	89
Westchester Elec. Co.	8,500	00
Tarrytown W. & M. Co.	14,447	37
	$140,694	19

These are not taxes, but obligations imposed by a law of the state of New York which the Third Avenue Company in its mortgage unconditionally agreed to meet, which agreement the Metropolitan unconditionally assumed and which had matured on the day fixed for filing. It was not necessary for

claimant to show payment any more than it would have been necessary for the Third Avenue receiver to show it. I think, too, that the transcripts of judgments and reports of masters are sufficient proof of these claims.

7. In the claim as filed the only amounts demanded for failure to keep the buildings repaired were those demanded for Third Avenue buildings ($395,000) and those of the Forty-Second Street Company ($4,000). In addition to these amounts demands are now made respecting buildings of five other controlled companies, which are not considered for reasons stated. The amounts claimed for the five buildings owned by the Third Avenue Company under column A, represent, as I hold, the sums required to put them in that condition of good order and repair required by the covenant. Those under column B, for fire protection, and under column C, for extraordinary repair, were excluded from consideration by the ruling made at the close of the hearings. A similar ruling in the Metropolitan-City breach of lease case has been sustained by the court. In that case the testimony of the same witness proposed here was accepted by it. The testimony as to these five buildings shows damages under column A of $166,171 (subject to verification), which is allowed as the maximum of the damage to buildings of the Third Avenue Company. Damage to the Forty-Second Street Company building has been shown in excess of the $4,000 claimed, but the allowance under the ruling of the court is limited to that amount. I may say in this connection that it is only as to this allowance respecting the five buildings of the Third Avenue Company that the contention of claimants respecting its right to the larger amounts under columns B and C relates, since as to all other demands of a similar character the amount demanded in the claim as originally filed, which under the court's ruling suggests the maximum allowance, is to be recommended.

8. No claim is now made for this item, i. e., for failure to keep the Third Avenue supplied with materials necessary for operation.

9. In the claim as filed franchise taxes aggregating $2,420,575.68 against the Third Avenue and the nine controlled companies are demanded. The amount now claimed with interest to January 11, 1908, is $1,321,790.69. As to these taxes against the controlled companies it is urged that by the very language of the Third Avenue mortgage, that company and by consequence the Metropolitan were only bound to pay them if the controlled companies failed to. But these taxes had all accrued at the date of filing claims, at which time the controlled companies had failed to pay them. It is true that their validity and extent were then being litigated, and that under the lease the Metropolitan was not bound to pay while contesting that validity, but its obligation to pay when that validity was determined had become fixed on that date, and represents a provable claim. I therefore allow the amounts now claimed, subject to verification, with interest to January 11, 1908.

10. The claim for the real estate taxes against the Third Avenue and the three controlled companies, i. e., the Forty-Second Street, the Dry Dock, and the Yonkers are allowed at the amounts stated in the brief of claimant, aggregating $79,613.04.

11. The water rates can be allowed only to the extent of $14,235.97 which is the amount originally claimed.

12. The tax on the Third Avenue Company under section 185 of the Tax Law is allowed at $2,543.33.

13. The percentage of gross earnings is allowed at the amount claimed $52,143.95.

14. The claim for damage and contract claims against the Third Avenue Company and the six controlled companies are allowed at the following amounts:

Third Avenue Company	$ 3,850 00
Forty-Second Street Company	170,348 27
Dry Dock Company	47,366 63
Union Railway Company	104,809 01
Yonkers Railway Company	55,000 00
Westchester Electric Company	65,439 12
Tarrytown White Plains Company	24,058 00
	$470,871 03

15. The claims for cash and for the construction and operating stores taken over by the Metropolitan at the beginning of the lease are disallowed. The lease in terms gave over to the lessee the expenditure of this cash, which it nowhere undertakes to return. The construction stores were taken over for immediate consumption, and are not of the kind of property which the lessee undertook to return.

16. The claim for the deficiency is disallowed on the ground that it was contingent on the day fixed for filing claims.

The foregoing disposes of all the items in the claim as originally filed which are now insisted on. The Metropolitan receiver, by reason of covenants contained in the Metropolitan City lease, is entitled to prove against the estate of the City Company in the hands of its receiver certain of the items above allowed. The distributive share paid by the Metropolitan receiver out of unmortgaged Metropolitan assets on the aggregate of the items thus provable against the City estate will, under a recent decision of the court, be the amount recoverable from the City estate, and there remains to be determined what those provable items are.

The foregoing items numbered 1, 2, 3, 10, and 11, allowed against the Metropolitan estate, are not provable against the City estate. The items 4, 5, 6, 7, and 14, as allowed against the Metropolitan estate, are provable against the City estate. The item 9 is provable so far as it includes franchise taxes against both the Third Avenue and the controlled companies for the years 1902 to 1906, inclusive, with interest to September 24, 1907, but only to that extent. The item 12 apparently should be allowed, as should item 13, unless they represent taxes accruing subsequent to October 1, 1907. Remaining items disallowed against the Metropolitan estate are, of course, not allowable.

Proposed reports may be presented accordingly, on which hearings will be fixed.

J. Parker Kirlin, of New York City, for Metropolitan St. Ry. Co.

James L. Quackenbush, of New York City, for New York City Ry. Co.

Dexter, Osborn & Fleming, of New York City, for receiver of New York City Ry. Co.

Byrne & Cutcheon, of New York City, for Pennsylvania Steel Co. and Degnon Contracting Co.

Davies, Auerbach & Cornell, of New York City, for Guaranty Trust Co. of New York.

Geller, Rolston & Horan, of New York City, for Farmers' Loan & Trust Co.

O'Brien, Boardman & Platt, of New York City, for John D. Crimmins and others.

Charles Benner, of New York City, for Ben. S. Catchings and others.

Simpson, Thacher & Bartlett, of New York City, for John I. Waterbury and others.

Strong & Mellen, of New York City, for Central Park, N. & E. R. R. Co.

Richard Reid Rogers, of New York City, for New York City Ry. Co. and Central Crosstown R. Co.

Masten & Nichols, of New York City (Arthur H. Masten, of New York City, of counsel), for receiver of Metropolitan St. Ry. Co.

John R. Abney, of New York City, for Molly Latta.

LACOMBE, Circuit Judge. This is a claim prosecuted by Robinson, surviving receiver, against Robinson, surviving receiver. Why he thus occupies a position not unlike that of Lord High Chancellor

in "Iolanthe" will be apparent from the following statement: On September 24, 1907, under creditors' bill Joline and Robinson were appointed receivers of all the property of the City Railway Company; within a week, upon application of its codefendant in said suit, the Metropolitan Company, they were appointed receivers of all the latter's property. One week later they were, upon application of mortgagee, appointed receivers of the property of the Metropolitan covered by its second mortgage; on March 17, 1908, they were, upon application of mortgagee, appointed receivers of the property of the Metropolitan covered by its first mortgage. On January 3, 1908, the Central Trust Company, as successor trustee under a second mortgage of the Third Avenue Railroad, brought suit to foreclose the same, and on January 6, 1908, the same court appointed Whitridge receiver of all its property covered by said mortgage. Its whole system had been leased to the Metropolitan Company in 1900, and on January 12, 1908, this property was turned over by Joline and Robinson, receivers, to Whitridge, receiver.

[1] The Metropolitan had breached its lease, and the Third Avenue had claims against it for such breaches. By direction of the court January 15, 1908, had been fixed as the last day for filing claims against the Metropolitan estate. Repeatedly after that, upon proper showing, orders were made allowing various claimants to file their claims nunc pro tunc. On January 15, 1910, Whitridge, receiver, verified a claim against the Metropolitan estate, enumerating items and giving figures, which upon presentation the court, on January 17, 1910, ordered to be filed nunc pro tunc as of January 15, 1908. It was filed forthwith, being known as "Claim of Third Avenue Railroad Company No. 44 against Metropolitan Street Railway Company," and claimant began taking testimony thereunder. Subsequently, and shortly after December 29, 1911, this claim, which is the one now under consideration, was assigned by Whitridge, receiver, to Joline and Robinson "as receivers of the property of Metropolitan Street Railway Company covered by its said mortgages, dated [first] February 1, 1897, and [second] March 21, 1902." Of these assignees Robinson is the survivor, and his receivership, under the various decretal orders appointing himself and Joline, has not yet terminated; but on July 27, 1908, Ladd was appointed as receiver of the City Railway Company.

It is the theory of claimant that this assignment transferred this claim No. 44 to Joline and Robinson solely as receivers of the mortgaged property, and for the specific and exclusive interest of the mortgage creditors. Therefore it is sought to prove this claim as an independent one, belonging exclusively to mortgage creditors against the general estate.

Although the mortgage creditors held such security as their mortgages afforded, and could prove against unmortgaged assets for any deficiency on foreclosure, they could also, if they chose to do so, buy up the claim of any other person against such assets if they could get it cheap enough to make the speculation apparently profitable. If they had thus bought this claim, they could prosecute it exactly as the original claimant could. Apparently that is the position for which the

present claimant contends, but it is thought that the facts do not support such contention.

The estates of the three railway companies had various claims against each other; it was desirable that these should be adjusted in some way, and Whitridge, receiver, was especially anxious to secure adjustment so that some reorganization of Third Avenue property and interests might be effected. After long negotiations the receivers of the three estates finally entered into an agreement (December 29, 1911) for such adjustment. Whitridge, receiver, agreed to turn over this "claim No. 44" to Metropolitan receivers, executing an assignment of it himself and fortifying such instrument by assignments executed by the old and the new Third Avenue Companies, by the purchasing committee and by the Third Avenue mortgage trustee. Joline and Robinson, receivers, agreed to turn over to Whitridge, receiver, $200,000 in cash and all claims of Metropolitan against Third Avenue. Ladd, receiver, agreed to turn over to Whitridge, receiver, several hundred thousand dollars, face value of notes and open accounts due to it from the various "controlled companies" (i. e., companies of which the Third Avenue owned the stock), for moneys expended before receivership by the City Company in operating, maintaining, and improving the property of those companies. This agreement was approved by the court and fully carried out. The assignments to Joline and Robinson, receivers, described them "as receivers of the property of the Metropolitan Street Railway Company, covered by its said mortgages dated February 1, 1897, and March 21, 1902." The use of this quoted phraseology is not conclusive as to the rights of the parties; what was actually done is quite as important as what was said or written. Not infrequently an obligation from a debtor to a creditor is liquidated and discharged by assignment of such obligation to the debtor by the creditor, and it is the opinion of the court that this is what happened when Whitridge, receiver, assigned his "claim No. 44" against the Metropolitan to the Metropolitan receivers. It is apparent from the language used that the parties to the agreement of December 29, 1911, expected that for some purposes the claim should survive; but to the proposition here contended for that it survives as the sole property of the mortgage creditors of the Metropolitan to be proved as a claim against its general estate, thereby reducing the dividend payable to other general creditors, I cannot assent—it seems too inequitable. The mortgage creditors did not put up the consideration which Whitridge required for his assignment. The $200,000 cash was paid from general funds of the receivership, produced in part by receivers' operation of the road; cash could come from no other quarter. Whether or not some of the Metropolitan claims against Third Avenue which were turned over to Whitridge, receiver, were covered by the Metropolitan mortgages is not important; manifestly not a dollar of the hundreds of thousands due to the City Company by the controlled companies was covered by any Metropolitan mortgage. It seems equally manifest to one familiar with the situation that the elimination of these claims was an important element of the consideration which induced the transfer; Whitridge was receiver of the most important of these controlled

companies, and was desirous to get their affairs wound up. I am not persuaded by the argument that this assignment was paid for out of the funds of the mortgagees, and, that being so, see no reason to hold that they may prove it for their sole benefit as a claim against the general funds of the Metropolitan estate.

The logical conclusion would be to refuse to confirm the report and to enter an order dismissing the claim. To do so, however, would leave other questions undetermined, and, should the Circuit Court of Appeals take a different view of the situation, would probably delay final adjustment. It seems wiser briefly to dispose of the various questions presented here by the exceptions, to modify the report of the special master accordingly, and then to confirm it pro forma. Appeal and cross-appeal will then bring up every question in the case for final disposition.

[2] The special master limited receivers under the various items to the amounts specified in the filed claim; to this exception is taken. As has been stated, the claim is a detailed one, asserting the right to recover specific sums of money for specific items of alleged damage. Repeated efforts have been made to enlarge this claim, in part by increasing the amounts of money damage specified, in part by adding new items. Every such effort has been defeated by the special master and the court. The claim is now exactly what it was when the agreement of December 29, 1911, was entered into by the receivers of the three estates. As the claim was the subject-matter of such agreement, it must be presumed that its details were fully understood by all of the parties to the agreement, and that such agreement was entered into on the strength of such understanding. It seems to this court—as it always has seemed—grossly inequitable to allow the assignee of this claim, after the agreement has been carried out, to amend any one of its items so as to increase the amount asserted to be payable therefor. The special master was entirely correct in confining his award to the items and amounts demanded in the claim filed in January, 1910.

[3] The special master correctly held that the installment of rent under the Third Avenue-Metropolitan lease falling due October 13, 1907, belonged to the stockholders; no other conclusion seems possible under the decision of the Circuit Court of Appeals in Metropolitan Stockholders' Appeal, 198 Fed. 761, 117 C. C. A. 503. Such rental, therefore, was not part of the property covered by the Third Avenue mortgage, did not go to Whitridge, receiver, under foreclosure suit, and did not pass by his assignment of his filed claim. None of the other assignments in evidence were competent to pass any live claim against the Metropolitan estate, because none of these other assignors filed any claim at all within the time limited; none of them ever subsequently obtained (as did Whitridge, receiver) an order allowing claim to be filed nunc pro tunc; none of them, so far as the court remembers, ever made any application for such an order. I do not see how the circumstance that Whitridge, receiver, took possession of the road one day before the due date of the next installment (January 13, 1908) changes the situation. The exception to the disallowance of the first

item of rent is overruled, and the exception to his allowance of the second item is sustained.

[4] The next item allowed and excepted to is the interest on the underlying first mortgage of Third Avenue road, which has always been promptly paid by some one, so as to avoid foreclosure. Presumably the installment falling due January 1, 1908, was paid by Whitridge, receiver, to preserve the interests of the second mortgage, in foreclosure of which he was appointed. Under the Third Avenue-Metropolitan lease a failure of the latter to pay interest coming due under the first mortgage would give to the Third Avenue a chose in action which would be covered by the second Third Avenue mortgage. The exception to allowance of this item is overruled. The special master's disposition of the item of interest on 4 per cent. mortgage bonds is also approved, and exception thereto is overruled.

[5] The question as to liability for failure to keep the property of the so-called controlled companies in repair and to pay taxes and other liens thereon has been vigorously disputed. These companies were, no doubt, not only separate legal entities, but were in fact separately operated. Nevertheless, and despite the decision of the Court of Appeals in the Second Avenue Bondholders' Case, 198 Fed. 747, 117 C. C. A. 503, I am inclined to think that the obligation of the lessee (Metropolitan), which through stock control itself managed these companies, was itself to make good any of their deficiencies which were found existing whenever the lease terminated. The exceptions dealing with this branch of the case are overruled.

There are various exceptions to the special master's allowance for necessary repairs to cars, trucks, motors, rails, tracks, etc.; also to buildings. It is not necessary to go into the details of the controversy as to the degree of repair which the lease requires, nor as to the conflicting testimony as to the cost, nor whether the special master should have adopted the figures in the A or in the C column of estimates. He has limited his allowances to the amounts specifically stated in the filed claim, which generally are less than the sums given in either column of estimates. Since the court is satisfied that he correctly thus restricted the amount of recovery, it will be sufficient to overrule all exceptions to these items. Concurrence may be noted with his construction of the clauses in the lease relating to buildings; it seems in accord with the decision of the Court of Appeals in the Metropolitan-City breach of lease proceeding.

Exceptions as to disallowance of claims for cash and operating supplies, supplies on hand at the date of the lease, are overruled for the reasons given in the report. A similar disposition is made of exceptions to disallowance of claim for deficiency on foreclosure of Third Avenue mortgage. The prior decisions of the Court of Appeals in these proceedings seem conclusive on this proposition.

Any other exceptions not specially mentioned are overruled; and, as above indicated, the report as modified by the views expressed supra is confirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(District Court, S. D. New York. July 10, 1915.)

Equity 2-9, 2-33, 2-149, 3-37.

1. STREET RAILROADS ⟸49—LEASE—CONSTRUCTION—EXPENDITURES BY LESSEE.

A lease of a street railway system provided that if the lessee should deem it expedient at any time to extend the lines, construct branches, or provide additional equipment, and the lessor should agree to the same, and that the extension or improvement was properly chargeable to capital account, the lessee should provide the money and the lessor should issue to the lessee its securities as agreed upon to cover the "expenditures" so made. Both lessor and lessee became insolvent, and receivers were appointed for each. *Held*, on an accounting between the receivers, that the lessor was not chargeable for materials and supplies purchased by the lessee prior to the receivership for use in making an agreed extension or improvement under such provision of the lease, unless the same had actually been used or "expended."

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. ⟸49.]

2. STREET RAILROADS ⟸49—LEASE—CONSTRUCTION—ACCOUNTING BETWEEN RECEIVERS OF LESSOR AND LESSEE.

A long-term lease of a street railway system required the lessee to replace any of the demised premises, or any cars that should be destroyed by fire or other cause. It also provided that for permanent betterments and additional and increased equipment provided by the lessee it should be reimbursed by the lessor. *Held*, on an accounting between the receivers of the lessor and lessee after the lease had been terminated by their insolvency, that the lessor was not chargeable with the cost of new buildings built by the lessee in place of others destroyed by fire, or of new cars purchased, where a larger number had been destroyed by fire, in so far as they were replacements; that if larger and better buildings were constructed or the cars purchased were of a more expensive type, the matter was one for apportionment.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. ⟸49.]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and another, and three other causes. On distribution of proceeds of an action against Metropolitan Securities Company.

See, also, 117 C. C. A. 560, 198 Fed. 778.

The following is the opinion of the special master:

This is an accounting had under the decree entered on the mandate of the Circuit Court of Appeal in accordance with the conclusion reached by it in the so-called "Apportionment Proceeding." See 198 Fed. 778, 117 C. C. A. 560. The provision is: "(2) The receiver of the City Company is also entitled to reimbursement from said share for the expenditures made upon the Twenty-Third Street loop and the First Avenue line of said Metropolitan System described in the foregoing findings of fact; and for all such *other* expenditures made and *obligations incurred* by the City Company prior to the appointment of receivers on September 24, 1907, for the purposes described in article XV of the lease made by the Metropolitan Company to the City Company, dated February 14, 1902, as shall hereafter be found due upon an accounting to be had upon further order of the court."

The purpose of the accounting is to determine these "other expenditures made and obligations incurred" prior to September 24, 1907.

The "share" from which reimbursement is to be made is the share by the

decree mentioned, accorded to the receivers of the Metropolitan Company from a fund which it defines and which is in the possession of the city receiver. "Expenditures made," are the payments actually made by the City Company prior to the receivership for the purposes indicated and what they are suggests dispute. "Obligations incurred" are those for the same purposes which prior to receivership had not been met by the City Company and which are asserted against the fund on the authority of the Hugh Thomas decision (206 Fed. 663, 124 C. C. A. 463) by its unpaid creditors either through the "Contract Creditors' Committee" or individually and to an extent to be indicated, but only to that extent by the city receiver himself.

A stipulation has been placed upon the record, which classifies in three groups, numbered I, II, and III, items appearing in construction accounts, which were not only charged on the city books to the Metropolitan, but credited by the latter on its books to the former. Group I consists of nine conceded items aggregating $794,500.31, and each item comes within one or the other of five purposes specifically named in article XV of the lease. On the strict construction urged by counsel for the Metropolitan receivers and for the Guaranty Trust Company these constitute the only purposes for which expenditures made or obligations incurred are chargeable to the Metropolitan, even though the two companies had, prior to the receivership, agreed in the most formal manner that the expenditures made for purposes claimed not to be within any one of those five classes should be regarded as capital expenditures under the clause referred to and chargeable as such, and even though, I may add, they might justly be deemed to be for betterments. Group II consists of disputed items aggregating $644,830.50. All of these items appear on construction accounts charged on city books to the Metropolitan and on its books credited to the City Company, and many, if not all of them, are to be regarded as having been accepted by the Metropolitan through its directors as within article XV. They represent expenditures made and obligations incurred for services rendered and materials furnished prior to the receivership, and it appears from the stipulation as to the practice in making book entries that these materials prior to September 24, 1907, were actually used in what the parties had, by corporate action and by book entries or by book entries alone, agreed to be construction work under the article. It is here that counsel for the city receiver parts company with those creditors whose materials, though ordered prior to the receivership for purposes thus agreed to be for construction, were diverted by the receivers themselves to other purposes. Holders of obligations for materials actually used before September 24, 1907, for the agreed purposes, even if such purposes were not within the letter of the article, should, on this view, be paid from the fund, if used prior to the receivership, but only those, and to the extent that he opposes claims for materials subsequently diverted he is in accord with counsel for the Metropolitan receivers and the Trust Company.

Taking up the grounds of objections urged by these latter to disputed items and claims, it will be enough if I indicate briefly conclusions respecting them without dictating arguments fully presented in the briefs. I dispose of them shortly because I think that both the lower and appellate courts have in the action at law ([C. C.] 164 Fed. 144, and 173 Fed. 269, 97 C. C. A. 435), as well as in this apportionment matter (198 Fed. 778, 117 C. C. A. 560) and in the Thomas Case (206 Fed. 663, 124 C. C. A. 463), indicated conclusions which do not justify the contentions.

The first contention is that the expenditure or obligation must be for one of the five specified purposes before referred to. To this I do not agree. What the parties have agreed to be properly chargeable to capital account is within the article by its own terms whether originally debatable or not. In construing the section Judge Ward says ([C. C.] 164 Fed. 150): "The City Company and the Metropolitan Company might alter as they chose the nature of the expenditures. * * * *Whatever the Metropolitan Company agreed upon as a capital charge was to be a capital charge.* The parties could change and rechange the character of the expenditures as much and as often they pleased without in any way affecting the liability of the Securities Company." This was only saying that the practical construction placed by the parties themselves on this clause of their contract is conclusive not only on each other, but on an outsider interested in its interpretation.

The second contention is that the findings of fact in the action at law and the books of the Metropolitan Company upon which they were based are not conclusive as to the expenditures made and the obligations incurred by the City Company between May 1, and September 24, 1907, for the purposes described in article XV of the lease. Doubtless the finding of fact and conclusions of law are not res adjudicata as to any of the parties here not parties to that action, and such parties are at liberty, if they can, to show the facts to be other than found, but the law suggested by those facts as declared by the court and affirmed on appeal controls here and in the court below if the facts again appear and are not changed by different proofs. The same proofs are present here, being the entries on the books of both companies upon which the stipulation suggesting these findings of fact was based, and they are not falsified by counter evidence, although the Metropolitan receiver challenges them because they were made under the direction of an auditor and by clerks who were in the employ of both companies and because, as it is said, the Metropolitan was in the control of the City Company. I do not understand this latter to be a correct statement of the relation. Indeed the reverse is more nearly true, the exact truth being that both companies were at the times with which we are concerned, in the ownership so far as majority stock interest goes to the Interborough Metropolitan Company. However, even if the Metropolitan were controlled as asserted, these entries are admissible on the authority of the conclusion reached by the Circuit Court of Appeals in the Barber Asphalt Paving Co. v. Forty-Second St. M. & St. N. Co., 180 Fed. 648, 103 C. C. A. 614, that entries made under just such circumstances are prima facie evidence against the company on whose books they appear The entries themselves were made under the competent direction of an auditor, since deceased, who commanded the confidence of the court and of counsel for all parties in these litigations, and in making them he was but construing and applying the formal determination of the Metropolitan directors themselves that such expenditures made or incurred *were* within this article of the lease and a charge to capital account for which this company was obliged to issue its securities. To this end he was fully authorized, and on the record here I think the entries furnish conclusive proof of the assent of the Metropolitan that the services and materials entered were chargeable to it.

The final general contention urged by Metropolitan interests is that no claim for materials furnished or services rendered should be allowed unless the materials had, prior to September 20, 1907, gone into permanent betterments of the character described in the article in question. I do not agree with this proposition because I think that the status existing on the day of the appointment of the receivers determines rights in the funds. If prior to the receivership materials purchased by the City Company for purposes which the two companies had agreed were within the article had been diverted to operation (for which the Metropolitan was not to be called upon to pay) then it may be that neither the city receiver nor a creditor, for such unpaid for materials has any interest in the fund for the agreed value. When, however, such materials had not been diverted, it is clear that the contract price is allowable out of the fund to company or creditor, as the case may be, without any regard to use prior to the receivership. What the receivers may have done with such material on hand after they were appointed cannot affect rights accrued as of that date, a proposition which the claim of the National Conduit & Cable Company for materials which the receivers refused to take illustrates. The claim referred to is for cable ordered in May, 1907, for use in electrification of roads not theretofore electrified, which the Metropolitan directors approved as construction work within the article. The City Company did not refuse to take it prior to the receivership because none of the construction work authorized had been abandoned. The receivers rejected it because they determined to abandon such of the work as had not progressed so far as to make it inadvisable to continue it, and it included work on which this cable would on every presumption have been used if it had been continued. How can it be argued under the Thomas decision that this claim should not be met out of the fund because the materials were not used? The court distinctly says: "The lease and contracts show that the fund in question was provided for the purpose of reimbursement for expenditures—to enable the City Company to pay debts incurred by it in construction work—*and not for the purpose of paying it the value of improve-*

ments made." (Italics mine.) This debt is a debt of the City Company provable against its assets, as the court has decided. 198 Fed. 746, 117 C. C. A. 503. It was contracted for that construction work which the Metropolitan Company had agreed to as a charge against it and which even counsel for Metropolitan interests here concede to be within article XV, i. e., change in motive power. The City Company had not, prior to the receivership, called for its delivery nor used it for any other purpose. On the 20th of September, 1907, therefore, it was a debt incurred by the City Company on construction work. What the receivers of the City Company did, upon that date, either with material then on hand delivered under the contract and unused or with the contract itself thereafter is immaterial.

What has been said in effect disposes of the objection of what I have called the Metropolitan interests to the items set out in group II of the stipulation. Every one of these items with the exception of item (*s*), which is disallowed, was credited on the books of the Metropolitan Company to the City Company as a construction charge to capital account which, I think, for reasons stated, brings them within article XV of the lease, the objection being that they are not within the strict letter of that article. Each represents services ordered and material furnished prior to the receivership which had actually been used for purposes specified, which the Metropolitan had thus agreed to be a capital charge against it. Many of them represent, in part at least, obligations incurred which were subsisting in outstanding claims of creditors on the 20th of September, 1907, and their allowance means the allowance of the claims, most of them being represented here, not only by the city receiver, but by the creditors themselves. Two of them, however, call for special comment, as contentions are suggested not before alluded to, these being the item (*i*) with the subdivisions for new revenue car bodies, new work cars, electric equipment of cars and car accessories, and item (*u*), which covers charges in connection with fire losses. The two seem interrelated, and I first take up the item of fire loss $101,246.03.

Under the lease the City Company was bound to restore or replace property destroyed by fire and during the existence of the lease down to the appointment of receivers it met all expenses of insurance. One would have supposed from this that the course pursued, when a fire occurred, would have been for the City Company to take the insurance moneys charging itself with the cost of restoration even where that cost exceeded the adjusted loss except when the restoration involved substantial betterments which the parties might have agreed to be chargeable under article XV of the lease. It was, however, clearly within the competency of the parties to determine how the obligation to restore should be discharged, even where the course adopted involved an apparent departure from the indicated course. The book entries show an understanding by which the Metropolitan took and was permitted to retain all insurance moneys in full discharge of the City Company's obligation to restore, the latter making the restoration, but charging the total expense to the Metropolitan, which credited the City Company with the expenditures, the corresponding charge on its books being to the particular fire loss account. As for the insurance moneys, the company probably used them for any purposes that pleased it, and that in any event is what it is stipulated the receivers, as Metropolitan receivers, did with such moneys. The practical effect of these entries is to establish an agreement by which the Metropolitan, in consideration of the payment to and retention by it of the insurance moneys, treated all expenditures made or obligations incurred by the City Company in restoration after a fire as construction work and a charge to capital account under article XV of the lease, whether distinct betterments resulted or not. The item here in dispute represents, I assume, on the theory on which the books were kept, expenditures made and obligations incurred by the City Company for restoration in excess, not of insurance moneys, but of payments made to it by the Metropolitan Company on this capital account. It is an amount due under the agreement to be spelled out of such entries. Such agreement as the books show was the practical construction placed by the parties on the obligation to restore during the whole existence of the lease, and it had the approval of the Metropolitan Company through the formal action of its directors in settling accounts on May 22, 1907, containing charges against their company made on just such a basis. Moreover, that it resulted fairly to both parties is clear,

because in one case the Metropolitan or its receivers determined not to restore at all, while in another it effected a restoration of much greater value than the loss. If these book entries and the action of these directors are to be thrown aside, and rights and obligations are to be determined solely on the lease, without regard to what the parties did under it, as shown by those authorized entries, as Metropolitan interests are here contending that they should be, then on facts stipulated here the result reached in the Metropolitan breach of lease proceeding was erroneous. There the Metropolitan receiver conceded against its claim for failure to restore, a credit of insurance moneys paid, which was a concession of a general claim against his insolvent against a general claim in its favor against the insolvent City Company. But the facts stipulated here show that $1,253,617.79 of these insurance moneys for fires occurring previously were collected after September 24, 1907, when Metropolitan receivers were acting in the dual capacity of receivers of both insolvents. If, therefore, the contention as to these insurance moneys made here be adopted and, disregarding these book entries, it were held that in spite of them the City Company was entitled to these insurance moneys, then these subsequent collections are part of its estate to be paid in full from the Metropolitan estate, either by offsetting them against the dividend due it from the city estate, if large enough, or in cash. The allowance as an offset of a general claim against a general claim does not affect this result. Furthermore if it were thus paid in full, it would at once suggest particular funds in which creditors of the City Company, holding obligations incurred by it in fire restoraton, would, under the Hugh Thomas decision, have an interest which they might enforce. The item illustrates again the difficulties arising from a refusal to recognize the status existing on September 24, 1907, and from attempts to change it. I am of the opinion that the book entries are conclusive, that the item should be allowed as claimed, and that the claims of such creditors as that of Montgomery & Co. (123), Hastorf (120), and Brady (106), are likewise allowable if they are not included in it.

What has been said disposes of all objections to the subgroups under (*i*) in the printed stipulation which are based on the contention that as the cars and accessories were ordered after the destruction by fire of a very much larger number of cars, they must be regarded as replacements which the City Company was bound to make. That they were ordered *after* destruction is disputed as a fact, and the book entries do not treat them as replacement, but as new and additional equipment chargeable to capital account against the Metropolitan. These book entries I accept, but if they are to be regarded as replacements, they would still be chargeable to the Metropolitan if the disposition made of the charges in connection with fire losses be correct.

The disposition made of disputed items in the stipulation involves the allowance, to some extent, of obligations incurred for materials and supplies which might not have been actually used for construction on or prior to September 24, 1907, and which, being on hand on that day, have already been credited to the city receiver in the proceeding known as the interreceivership account. The decree in that proceeding provides for this contingency, however, as the report recommended that the allowance therein of the sum stated for materials, supplies, and repair parts on hand on September 24, 1907, should be "subject to the deduction of the amount of the claims of creditors who supplied such materials, supplies and repair parts which are allowed in the so-called apportionment proceeding."

In pursuance of the notice required to be given by the master by the order of July 29, 1913, 179 claims of creditors against the fund involved in this proceeding were filed with me within the time limited. Of the claims so filed there were withdrawn or dismissed 43 on which no record was made. Of those on which a record has been made 12 have been wholly and 5 partially withdrawn. Records have been made on 124 additional claims. Of these 10 have been briefed by counsel for creditors individually represented by counsel and 53 by counsel for the Contract Creditors Committee. Sixty-eight have not been briefed, but are summarized in the brief of counsel for the Metropolitan receiver. Conclusions already indicated dispose of many, if not most, of these claims. I take them in the order in which they are presented in the Metropolitan receivers' brief.

Claims Independently Briefed.

The Brill Company (163). This is allowed at the amount claimed by the creditor in its brief $60,538.09.

Byrne & Murphy (172). This claim is allowed, but only to the extent of $1,390; the motion to dismiss for the amount claimed in excess of that sum being granted.

Eggleston Bros. & Co. (67). This claim, consisting of the three items aggregating $321.63, is allowed. The claim (66) discussed in creditors' brief for $573.12 was apparently charged prior to the receivership to "General Stores," and is not credited to the City Company on the Metropolitan books. I disallow it without prejudice to its assertion in the Preference Proceeding.

William T. Fitzgerald (167). This claim, consisting of two items aggregating $6,317.71, is allowed.

General Electric Company (162). This claim, consisting of five items aggregating $6,771.90, is allowed. Of the five, that representing an obligation incurred and outstanding at the date of the receivership for rewinding certain armatures, amounting to $5,792.34, is important as indicating the practice between the two companies when a fire occurred. Here a fire at a Forty-Second street carhouse, which occurred on March 4, 1906, a year and a half before the receivership, and more than a year before the settlement between the two companies in the spring of 1907, suggest the obligation. Of the obligation thus incurred $939.50 was paid by the city company to the claimant on April 16, 1907, the amount here claimed being an unpaid balance. This $939.50 was charged on city books to the Metropolitan, the supporting voucher distributing the charge as follows: "Metropolitan Street Ry. 42nd Street Fire Loss a/c." It was credited on Metropolitan books to the City Company, and in the intercompany settlement of accounts of April 30, 1907, was, by the formal action of its directors, directed by the Metropolitan to be paid, not out of a particular fire loss account, although insurance moneys were then on hand, but out of the general moneys furnished by the Metropolitan in pursuance of article XV of the lease for which it issued the very securities from which the fund under distribution here was derived. The facts suggesting this item emphasize the justice of the conclusion hereinbefore indicated respecting fire losses, and show clearly that the book entries are not to be regarded as the irresponsible acts of an auditor and clerks common to both companies, but as entries accurately and intelligently made by its agents, authorized after full consideration and in the most formal way, in pursuance of a construction of the article deliberately accepted by the Metropolitan Company itself.

The Lorain Steel Company (48). This claim is for $60,067.32. Counsel has divided it into 10 lettered groups. I have concluded that all of the items should be allowed as claimed for reasons heretofore suggested, the application of which will be clear to counsel, but the groups D, E, and K suggest special comment. Group D, covering special work aggregating $21,464, which was ordered for use in connection with the electrification of Twenty-Eighth and Twenty-Ninth streets, suggests a case where the item is disputed because the work was not used, having been abandoned either before or after the receivership. It was concededly ordered for purposes which counsel admit to be within article XV of the lease, and there is no evidence that prior to the receivership it was used for any other purpose. As it had not been used, it does not appear as a credit to the City Company on Metropolitan books, but it was an expenditure specifically authorized in May of 1907 by the Metropolitan as a charge against it. The material ordered in group E was ordered for the same purposes, but not delivered at all, the receivers refusing to take, whereupon it was scrapped. Metropolitan interests object to it because it never went into betterments, an objection which has been disposed of. As to group K and its first two items, I think that it would not violate probabilities if the presumption were indulged that one rail used on First avenue work was taken from the 10 delivered to the yard by claimant rather than from the only other 4 of the same kind that were there when delivery was made, and that the next 3 so used were taken from the 139 supplied by claim-

ant then in the yard rather than from these 4. This, if a resort to presumptions be necessary at all. If, however, they be regarded as among the rails on hand on September 24, 1907, the fact that they were then unused for construction is immaterial, provided they were bought for that purpose. The other two items of this group are clearly allowable for reasons discussed generally above.

National Conduit & Cable Co. (10). This claim has been hereinbefore discussed and disposed of as allowed.

National Conduit & Cable Co. (11). The payment of $11,122.80 under the order of October 3, 1913, was not, in my opinion, improperly made. The Metropolitan brief states that it was purchased in connection with the change in the Twenty-Eighth Street line, but not used until after the receivership when it was diverted to a purpose which it is urged was not within the article. This purpose was, I think, within the article, but what was done with it after September 24, 1907, is, in any event, immaterial. As to the next disputed items of $7,716.94 and $3,295.60 for cable used in connection with electric lighting necessitated by what was undeniably construction, and so treated by the parties, done on the Lexington Avenue building the record leaves it in doubt whether the work was done before or after the receivership. If done after, the reels were on hand on September 24, 1907, and having been originally ordered for what the parties had agreed should be construction, the items would be allowable accordingly. If done before, they were used for construction even though the use was temporary and they were so treated in the entries. That they should not have been treated thus cannot be said either, for it was an expense necessarily caused by construction and as much part of the cost as a necessary, but temporary, scaffolding would have been. After the receivership, when the temporary purpose was accomplished, the reels included in the larger item were used for a purpose which Metropolitan interests concede to be within the article, but the allowance of the item is not based on that fact. They are both allowed.

Pennsylvania Steel Co. (157). This claim is for $36,032.11, being an unpaid balance due on a contract for materials the agreed value of which was $96,290.87, which balance was duly allowed as a claim against the City Company. This agreed value was for materials for use in the change on First Avenue and Twenty-Eighth Street lines which are conceded to be within the article, and which were accepted as a charge against it by the Metropolitan. Of this agreed value $41,421.64 was paid by the City Company and a credit for that amount is conceded in the General Stipulation to the city receiver. The balance of $54,869.23 is, to the extent of this claim of $36,032.11, represented by an obligation incurred under the order of reference and by the difference of $18,837.12, being a payment by the City Company represented, I assume, in one or more of the disputed items set forth in the stipulation and heretofore allowed. Whether this assumption be correct or not is unimportant. What is clear is that of the $36,032.11 claimed here as unpaid $31,895.18 must be conceded since it was an obligation incurred for material on hand on September 24, 1907, bought for a purpose conceded to be within the lease. The difference of $4,136.93 is conceded by counsel for claimant to have been diverted by the City Company prior to the date named to maintenance purposes for which the Metropolitan was not chargeable, and I disallow it for that reason, without prejudice.

Post & McCord (160). This claim consists of four items, aggregating $11,880, which are allowed.

I. P. Sjoberg & Co. (Claims 5 and 6). These are allowed in the aggregate of $6,018. They have been heretofore indicated in connection with 7 of classification and (*i*) of the group II of disputed items set forth in the stipulation.

Sicilian Asphalt Paving Co. (21). The items aggregating $2,019.28, relating to paving at Essex street, Forty-Second street, The Bowery, Amsterdam avenue, and Columbus avenue between Fifty-Fifth and Fifty-Sixth streets are allowed. This claim is classified as an unbriefed claim in the brief of the Metropolitan receiver, but the creditor filed its brief with me, and it is included here for that reason.

Claims Briefed by Contract Creditors Committee.

There are 53 in number, and I indicate the disposition to be made of them in the order in which they appear in their brief.

Share & Trust Co. (137). This claim is allowed at $4,127. The material was ordered for use on the First Avenue and Twenty-Eighth Street construction, and none of it had been diverted to any other purpose prior to the receivership. That some of it was unused when it began is immaterial.

William Wharton, Jr. & Co. (145). This claim is for a balance of $31,052.28 due on three claims heretofore allowed against the city estate, the difference having been allowed as a charge against the fund and paid. I allow this balance with the following exceptions which are disallowed as a charge against this fund without prejudice:

Cast steel frog for 125th street and Amsterdam avenue	102
Crossover for Broadway and Houston streets	3,920
Extension of tracks Kingsbridge Railroad	3,825

The total of these items, $7,847, taken from the balance claimed, leaves $23,205.28 at which the claim of this creditor against the fund is adjusted.

Schoen Steel Wheel Company (136). This claim, aggregating $20,819, consists of three items. The item (1) for 183 steel wheels amounting to $4,419 is disallowed without prejudice because it does not appear that they were ordered for purposes that the Metropolitan accepted as construction purposes. The only inference from the evidence is that they were ordered as supplies. The two other items, aggregating $16,400, are allowed against the fund.

Sterling Meaker Company (139). This is allowed as claimed at $1,766.52.

Brady Brass Company (10). This claim is allowed at $885.81. I think that it is for the Metropolitan interests to show that materials credited on Metropolitan books to the City Company as expenditures for capital were diverted to other uses prior to the receivership. There is even a presumption that this material *was* used before September 24, 1907, for the purpose for which it was bought.

E. W. Bliss Company (102). The only other objection to this claim of $300.30 not hereinbefore overruled is that it was not originally allowed as a claim against the City Company, although it was allowed against the Metropolitan. This was doubtless accidental, and because in the very early days of the receivership the relation of a creditor to the two companies had not been defined, though it soon was on the report in the matter of National Conduit & Cable Company, which the court accepted. See 97 C. C. A. 185, 172 Fed. 659. Claims were originally filed against the Metropolitan, which were in reality claims against the City Company estate, and they were subsequently allowed against that estate, under the decision referred to. That disposition of this claim should have been made at that time. That it was not is not important under the order under which I am acting, because such allowance is not made a prerequisite. To treat it otherwise would be unjust, as the creditor was not really in default.

Curtain Supply Company (108). This is allowed at $676.

Munson Bros. Company (125). This claim is allowed at $5,419.75. It is for material ordered for Twenty-Eighth Street electrification, and the Metropolitan brief states that it was never used, and intimates that it is probably still on hand. The contention of claimant, which that brief sharply questions, that the City Company had not the right, so far as the creditor was concerned, to divert material purchased for a purpose agreed by the companies to be a capital charge does not arise in this connection.

The Union Nut & Bolt Company (143). This claim for two items aggregating $539.80 is allowed.

Dayton Manufacturing Company (113). This claim is allowed at $2,551.21. The Metropolitan brief states it to be for $2,550.55, but the brief of claimant fixes a corrected amount, which I adopt.

In connection with an item of this claim amounting to $1,736 for 310 headlights for use on cars ordered, which they state to be still on hand, counsel for the Metropolitan receiver make a statement as to the general stipulation with which I do not agree. They say that it states that items which went

either into the general stores or construction stores were charged to those accounts, and were not charged to the Metropolitan Company until *issued*. The precise language of the stipulation is: "That no part of such material was charged to Metropolitan Street Railway Company in the said account unless and until it was *used* for one of the purposes covered by the subsequent classifications." I do not think that actual use is material if a charge was made and accepted, provided there was no diversion prior to the receivership, but if the court differ, it seems clear to me that under this stipulation the city receiver and the claimant are entitled to argue that materials were actually *used* and not merely *issued*, where they were charged. Both that receiver and claimants are so urging, and the stipulation justifies the contention.

H. W. Johns Manville Company (129). This claim is allowed at $215.33. The same objection is made to it that was made to the E. W. Bliss Co. claim (102, supra) that it was not allowed against the City Company, although allowed against the Metropolitan. It should be treated in the same way.

Continental Asphalt Paving Company (111). Allowed at $5.66.

O'Brien Bros. (130). Allowed at the aggregate of the three items involved, viz., $2.70.

Genasco Roofing Company (119). This claim involves two items, one for $151.81, which does not call for special comment, and is allowed. The other item is for $2,404.41, the agreed price of 600 barrels of paving pitch for construction work on First avenue and on Twenty-Eighth street, and so charged on city books and credited on Metropolitan books to the City Company. The stipulation shows that prior to the receivership 471 of the barrels were used for what has been agreed were construction purposes (N. B. The master's record shows a correction in red ink of 80 to 120, which meets the criticism of Metropolitan counsel that claimants' counsel are in error in their brief in stating that 120 were used.) The use made of the remaining 129 barrels is not shown, but they were charged as stated. There is, I think, an error in the statement in the brief that the invoices indicate that the material was to be used for stock. The stipulation containing this statement was expunged at a subsequent hearing, leaving the facts as above stated. As all the material was credited on Metropolitan books to the City Company as a charge to construction, I rule that as to these remaining 129 barrels the burden is on the Metropolitan receiver to show a diversion by the City Company prior to the receivership to purposes to which the Metropolitan was not chargeable. The claim is allowed at $2.404.41.

Smith & Wallace (135). This claim is allowed at $430.53.

Eichman & Co. (116). This claim is allowed at $1,060.

Charles Moser Company (124). This is allowed at $150.48.

Imperial Rubber Co. (122). This was originally allowed against the Metropolitan Company. The facts are the same in this respect as those suggested by the Bliss Company claim, supra. It is allowed at $84.92.

Douglas Taylor Co. (140). Allowed at $11.50.

Theodore Saudners (148). Allowed at $101.50.

Rail Joint Co. (171). Allowed at $192.50.

Warren Scharf Co. (146). Allowed at $245.53.

Robert Endore & Son (69.) Allowed at $9.

Devoe, Reynolds & Co. Allowed at one-half of $34.67, since counsel for creditor appear to concede the division.

Uvalde Asphalt Pavement Co. (142). Allowed in the aggregate of the two items claimed, which is $88.16.

Ramapo Iron Works (133). Allowed at $1,691.69.

Billings & Spencer Company (56). Allowed at $451.35, the burden being on the Metropolitan receiver to show diversion of the material prior to the receivership.

Barret Manufacturing Co. (100). Of this claim for $727.87 for 200 barrels of pitch, I allow the two items, aggregating $109.18, as prior to the receivership, the 30 barrels were used for construction, and so treated on the books. The further demand for $345.80, the value of 95 additional barrels, I disallow without prejudice. It affirmatively appears that these 200 barrels were ordered by the City Company for stock, i. e., as ordinary supplies. These 95 barrels had not been used when the receivers were appointed, but subsequent

to the receivership were used by them for what is undeniably construction, e. g., for completion of electrification of First avenue. Counsel for the Contract Creditors Committee contends that this use by the receivers gives the creditor rights in the fund which he otherwise would not have had, but I do not agree. On the 24th of September, 1907, these 95 barrels were supply materials and, as was decided in the Termination of Lease Proceeding, part of the assets of the city estate (190–609). When the receivers retained and used them thereafter, either for construction or operation, an obligation resulted in favor of that estate from the estate of the Metropolitan, but there is no basis in this for a contention that, when this resulting obligation was based on the use by the receivers of such supplies for construction purposes, it gave a supply creditor of the City Company a beneficial interest in the particular fund to be disposed of in this proceeding which he did not have by acts of lessor and lessee under the lease when it terminated. On September 24, 1907, to the extent of the agreed value of its 95 barrels, this creditor was a supply creditor of the City Company, not interested as a construction creditor in this particular fund, and nothing that the receivers did thereafter as receivers of either insolvent or of its estate could change its status. I therefore disallow this item without prejudice to the assertion of a claim for its amount in the Preference Proceeding.

Montgomery & Co. (123). This claim is allowed at $4.80. It has been heretofore disposed of in connection with the disputed item of fire loss charges classified as (*u*) in group II of the stipulation.

Duffy & Co. (16). This is allowed as the aggregate of the three items involved $336.51.

Rahman & Co. (137). This is allowed in the aggregate of the two items involved at $188.38.

Topping Bros. (141). This is allowed for $286.11.

Albert H. Hasborf (120). This is allowed in the aggregate of the three items claimed $136.80.

Carey Machinery & Supply Company (107). Allowed at $816.

Yellow Pine Company (147). Allowed in the aggregate of the two items claimed $4,227.62.

Clinton Point Stone Company (110). Two items are here involved, one for $553.29, which is allowed; the other for $115, which represents stone that counsel for the Metropolitan receiver says does not appear to have belonged to the claimant. The stipulation left standing in the master's minutes (pages 683, 684) apparently shows that it does, and I therefore allow it.

Phœnix Sand & Gravel Company (131). The two items of this claim aggregating $601.61 are allowed.

Sheridan Company (170). The several items of this claim aggregating $62.10 are allowed.

Barber Asphalt Paving Company (104). The aggregate of the four items of this claim $541.47 is allowed.

Vought & Williams (144). The aggregate of the six items of this claim $398.61 is allowed.

Richard Fitzpatrick (117). The aggregate of the two items involved is $619.69. One of the items $363.24 has been allowed under (*r*) of group II of the general stipulation, and is of course allowed in this connection. Counsel for the Contract Creditors' Committee refers to it as allowed under group II and also under one of the compromised items included in group III. I think, however, that the other item of $256.45 must have been intended as the item compromised since (*r*) of group II specifically allows to Richard Fitzpatrick $363.24 for carting. If this be correct, one-half of this latter item only should be allowed. The matter can be settled on the settlement of the report.

Bishop Gutta Percha Company (90). The aggregate of the three items ($574.42) involved is allowed.

Burnett Company (105). The aggregate of the seven items of which this claim is made up is allowed, $1,114.84.

East River Mill & Lumber Company (115). The aggregate of the three items composing this claim is allowed at $1,846.69.

Consolidated Car Heating Co. (71). This is allowed at $1,740.

The Metropolitan receivers' brief includes, among claims not briefed, seven claims which have since been very fully briefed by counsel for the Contract Creditor's Committee. These are taken up in the order in which they appear in the latter's brief.

American Brake Shoe & Foundry Company (99). The aggregate of the claim of three items is $996.57. Two of the claims, those of $92.61 and $145.83, are allowed. The third, of $758.13, calls for special comment, as it differs in some features from those heretofore considered, and determines larger claims. This claimant, between May 31, 1907, and August 22, 1907, delivered 3,500 manhole covers at a Thirty-Second Street yard, which are unpaid for. Between the earlier date and September 24, 1907, other similar covers, not furnished by claimant, presumptively paid for, were delivered at the same yard to the number of 980. The total of 4,480 were all that were in the yard during these times, and from these withdrawals were made from time to time, aggregating 2,160 which it is agreed were *not* used for construction purposes. Out of the remaining 2,320, 423 *were* used for purposes which the companies treated as construction uses, 407 of the 423 for Marginal Street and First Avenue construction being for purposes conceded by the receivers to be within the article. I may add to these facts that it does not appear that any of these covers were purchased for a specific purpose, as much of the material claimed for and allowed herein was. Thus there is suggested a question of fact which can only be solved by a resort to formal rules. That question is, Were these 423 covers taken from the 2,320 unpaid for covers furnished by the claimant? or were they taken from the 980 paid for covers furnished by others?

I think on these facts, that the claimant has made a prima facie case, and that the burden is on the two receivers to show that the withdrawal of the 423 covers used for construction was made from the 980 covers furnished by others, which were paid for, rather than from these 2,320 not paid for. Payment is always a defense where the circumstances are such as to leave a doubt that payment has been made, and where the City Company acting now for itself and again for the Metropolitan, and as its agent, purchased material in both capacities and chose to mingle them in such a way that neither it nor its principal is able to identify those used for the latter's purposes as those paid for, then, I think, that the loss, if there be a loss, was caused by its agent's act, and must fall on the Metropolitan estate. To hold otherwise would involve an injustice to this creditor, for, if not entitled to a presumption here, he would not be entitled in the "Preference Proceeding" to a presumption that his 423 covers had been used for supplies and thus, through no fault of his own, but because of the default of the City Company in not in some appropriate way preserving a distinction which under the lease it was bound to do, he would fall between two stools, and be reduced to the condition of a general creditor of the City Company's estate. This would do violence to the intention of the court, District and Circuit, worked out with patience and care in the Apportionment and Preference Proceedings, that creditors for materials should be paid in full, either as construction or supply creditors. This claimant to the extent of this $758.13 is clearly one or the other. I allow the amount as a construction claim.

Davies & Thomas Co. (114). This claim is for $6,847.96. On the 24th of September, 1907, the City Company owed the claimants $29,372.99 for materials. The latter had in their yards on that date materials not delivered of the agreed value of $22,525.03. Of these $11,432.22 had not been paid for, and it is a matter of inference from the stipulation that the difference of $11,092.81 had been paid for. I take the view that what was done after the receivership, if important, was that the claimants canceled that part of the debt due for materials then in its possession, which were unpaid for, thus reducing the debt for materials which they had actually delivered to the City Company to $17,940.76, and that they credited against this debt the price as previously paid for the balance of the material in their possession on September 24, 1907, leaving the difference of $6,847.96, the amount of the claim.

This claim is developed in a long record which suggests many legal contentions elaborately argued by counsel for claimants. On the record it is enough to say that it shows that of all the material actually delivered to the City Company prior to the receivership of the above-mentioned contract value of

$17,940.96, which includes this difference, $15,474.45 was actually ordered for the electrification of the First Avenue and Twenty-Eighth and Ninth Street lines, and that the balance of $2,466.31, though not ordered for these purposes, was actually used for them, before the receiverships. Of the legal contentions it is not necessary to say more than to state and pass on the ground of the objection urged by Metropolitan interests which the brief states as follows: "This claim, amounting to $6,847.84, is another one involving numerous and complicated items. * * * *The materials were used on the First Avenue line either prior to or subsequent to the receivership.* There is also a question whether certain payments made should not be applied to items for which a claim is here made. We suggest that the master make a ruling that only those materials which were actually used in the First Avenue electrification prior to the receivership, and to which there is clear evidence of nonpayment, should be allowed."

I have given the reason for thinking the evidence of nonpayment clear, based on the act of the receivers in agreeing to the retention by claimants of the materials in their possession on September 20, 1907, paid for and unpaid for, and in accepting a credit for the contract price against the total claim then outstanding. The balance remaining could not represent anything else than the amount unpaid on September 24, 1907, for the materials actually delivered on or prior to that date.

As to the ruling asked for, it is coupled with the statement, or admission, that the materials represented by this claim for $6,847.84 were not used on First Avenue electrification either before or after the receivership. But on the facts any not expressly ordered for that or a cognate purpose were used for such a purpose prior to the receivership, and those used thereafter were previously ordered for such a purpose, and must have been on hand on September 24, 1907. In either case, for reasons heretofore accepted, their agreed value would be payable out of the fund as obligations incurred for construction purposes. I therefore think that the ruling requested should be denied and the claim allowed.

Scranton Bolt & Nut Co. (138). This claim consists of many items which are set forth in one hundred and odd pages of the record, and the demands against the fund, aggregating $12,018.77, which they are said to suggest, are summarized under seven heads in the brief of counsel, which, for convenience, is here reproduced:

1. Material furnished by the claimant under orders given for the purpose of and actually used in the electrification of the First Avenue line	$2,332 81
2. Material furnished under such orders for the purposes of electrification of the First Avenue line, actually used for that purpose and by presumption the material furnished by claimant under such orders	4,752 02
3. Material furnished under such orders for the purpose of electrification of the First Avenue line and the Twenty-Eighth and Twenty-Ninth Street Crosstown line being a balance actually of $2,097.15 and presumptively of $50.63 of that very material on hand and not used	2,147 78
4. Work and freight with respect of the rethreading of track bolts ordered for the First Avenue line, but not shown to have been used and therefore presumptively on hand	291 60
5. Material furnished by claimant but not shown to have been ordered specifically for any particular purpose, but actually used for the purposes of article XV of the lease	95 51
6. Material actually used for various purposes of article XV of the lease and upon presumption material furnished by the claimant under orders not shown to have been given for any particular purpose	2,200 75
7. Material actually used for the purposes of article XV of the lease and charged on the books of the Metropolitan Company to it	280 50
	$12,018 77

Items summarized in the foregoing paragraphs 1, 3, 5 and 7 are allowable. Except as to the item of $50.63 mentioned in paragraph 3, they suggest no dispute, or at most a dispute that has been disposed of in connection with credits claimed by the city receiver. Items summarized in 2 and 6 suggest withdrawals from a mass of similar material, part of which, furnished by claimant, was admittedly unpaid for, and the balance of which, furnished by other than claimant, is by stipulation deemed to have been paid for. Their disposition turns on the presumption adopted in disposing of items considered in the two previous claims (114 and 99), and since the receivers have not shown that the paid for material was insufficient to meet withdrawals for operation, it will be assumed that the materials undeniably used for construction are represented in this unpaid claim due claimant. The items included in paragraph 4 are allowed, since the burden is on the Metropolitan receiver to show a diversion prior to the receivership of material admittedly ordered for construction purposes. It should otherwise be presumed to have been on hand on September 24, 1907. Counsel asserts that by mistake one of the claims here involved was allowed against the City Company for an amount $972.14 less than it should have been. This is not important. I have not, while writing, means of verifying the correctness of the statement, but, assuming its truth, its allowance against the City Company is not essential to the assertion of a claim based upon it against this fund, as has been held respecting two or three claims hereinbefore disposed of, which were not allowed against the city estate at all. Of course, the time for filing further claims against this fund has, under the order and the advertisement, long since expired, but this claim was filed within the time.

Thomas McClarnon (126). This claim is allowed at $6,539.89.

Watson Stillman Co. (97). This claim is allowed at $630.

D. A. Breen (106). This claim is allowed at $2,253.21.

Thomas Crimmins Contracting Co. (109). This claim is allowed at $1,416.38.

Unbriefed Claims.

The following 61 claims not briefed by claimants are summarized in the Metropolitan brief:

Hammacher, Schlemmer & Co. (49). This claim is disallowed without prejudice to its assertion in the Preference Proceeding. All the material seems to have been ordered for stock, and none is shown to have been used for construction.

Same (50). This claim is allowed in the aggregate of all items involved at $154.93.

Dimock & Fink (65). Such of the items of this claim as are credited on Metropolitan books to the City Company as construction charges are allowed. The balance is disallowed without prejudice.

Gold Car Heating & Lighting Company (64). Allowed at $2,560.

Westinghouse Electric Company (84). The item of $295.91 in connection with the multiple unit car control is allowed, the balance of the claim being disallowed without prejudice.

Consolidated Car Heating Company (71). Allowed at $1,740.

Western Electric Company (155). This claim is disallowed without prejudice.

Isaac G. Johnson (24). Of this claim the item of $1,052.52, material for stock, is disallowed without prejudice, the balance of $1,968.27, the aggregate of five items, being allowed.

Virginia M. Flynn (17). Of this claim an item of $75.90 (line 179) is disallowed, the balance of $1,161.32 being allowed.

New York Telephone Company (127). This claim is disallowed without prejudice.

United States Wood Preserving Company (151). Disallowed without prejudice.

Estate of Joseph Moore (152). Disallowed without prejudice.

Vulcanite Portland Cement Company (153). Of this claim $777.92 are allowed, the balance being disallowed without prejudice.

John P. Kane Co. (154). Allowed at $116.

Harlem Contracting Company (156). Allowed at $72.48.

Eureka Fire Hose Company (1). Disallowed without prejudice.

George T. McLaughlin Company (2). $3,383.34 allowed. Balance disallowed without prejudice.

Atlantic Cement Company (3). The balance of $445.88 for bricks does not appear to have been charged to the Metropolitan, and was apparently used in repairs. Disallowed without prejudice.

Dittrick Jordan Electric Company (4). It may be that these armature coils were actually used for replacing after a fire (146th street), but the record does not show that they were regarded as a charge against the Metropolitan, nor that they were actually used in replacing. There is a stipulation that this claim may be asserted in the Preference Proceedings, so I dismiss it without prejudice.

White Manufacturing Company (7 and 51). The total of these claims is $9,060.14. Of the items the following are allowed, those remaining being disallowed without prejudice:

Items charged to	Const. Store Yards	$ 478 76
	Met. St. Ry. % D 4	195 40
	Sec. I., Account D	240 00
	Met. St. Ry. % Sec. One	335 00
	Sec. Two	161 00
	96th and First Ave	2,800 00
	Worth St. and Fulton	1,093 00
	Construction Store Yds	499 49
	Account D, First Avenue, Sec	194 41
	Account D, First Avenue, Sec. 4	305 08

In addition, there should be allowed the agreed cost of 300 manhole covers used on First avenue. The Metropolitan receiver, admitting that they were so used, says there is no evidence to show that they were used prior to the receivership; but the burden, I rule, is on him to show that they were used subsequently.

Candis, Smith & Howland (9). Allowed at $57.

Manning, Maxwell & Moore (13). Of the amount of this claim it does not appear from the record that more than $1,347.88, which I allow, was credited on Metropolitan books; but the Metropolitan brief states that the total $3,657.29, represents the cost of tools, all of which were ordered for use either on repairs or replacements of property destroyed by fire at the Lenox Avenue car house. If the difference was charged to the Metropolitan and accepted by it, I shall allow it, otherwise not, as it seems to represent operating expenses. The accountants can examine the matter for the report.

William Kensler (18). Disallowed without prejudice.

John C. Rankin Company (19). Allowed at $133.

H. A. Welch (20). Disallowed without prejudice.

Sicilian Asphalt Paving (21). This claim is included in the Metropolitan brief among unbriefed claims, but a brief was filed by Mr. Kiernan, as counsel for the creditor, and it has been disposed of as hereinbefore stated.

International Steam Pump Co. (22). This claim is disallowed without prejudice.

Henry R. Worthington (23). Disallowed without prejudice.

Phœnix Fire Extinguisher Co. (27). This is a claim for material and services involved in the installation of a fire-sprinkling system in the car house at 129th street and Amsterdam avenue. There is a stipulation in the record that the items do not appear upon the general books, either of the city or Metropolitan, and that the amount, if allowed, is in addition to those covered by the accounts of the companies as they at present appear on the books. The testimony is that the work was done between August 20 and September 24, 1907, and it is not unlikely that the receivership intervening may account for the absence of entries. Work of this kind on that car house at that time was treated, as foregoing claims show, as construction chargeable to the Metropolitan Company. I think this should be thus treated, and dispose of

it accordingly, unless the stipulation placed on the record at page 243a at the suggestion of counsel for the city received means that the claim has been paid. The Metropolitan brief treats it as unpaid.

Grenson Mfg. Co. (29). Allowed at $277.

Hungerford Brass & Copper Company (30). This is disallowed without prejudice.

The record hardly justifies an inference that any of the copper was used for construction, and it was not bought for such purpose.

William J. Keubler, Receiver (18). Dismissed without prejudice.

S. Harburger (32). Dismissed without prejudice.

American Supply Company (33). Dismissed without prejudice.

Mutual Gas Light Company (35). Allowed at $40.50.

Walter McLeod Company (36a). Dismissed without prejudice.

India Alkali Works (38). Dismissed without prejudice.

Thomas F. Griffong (40). Dismissed.

Electric Service Supplies Company (41). Dismissed without prejudice.

Amsterdam Broom Company (42). Dismissed without prejudice.

Beckwith Chandler Company (43). Dismissed without prejudice.

Schaeffer Budenberg Company (45). Dismissed without prejudice.

Semon, Bache & Co. (46). Dismissed without prejudice.

James S. Barron & Co. (52). Dismissed without prejudice.

E. G. Long Company (54). Dismissed without prejudice.

Coe Manufacturing Company (70). Dismissed without prejudice.

Keasby & Matteson Company (73). Dismissed without prejudice.

W. H. Kings Company (74). Dismissed without prejudice.

Harmon & Dixon (75). Dismissed without prejudice.

Henry D. Sears (76). The material represented by this claim for $231.35 seems to be charged to Construction Stone Yards on city books, but is not allowed as a credit on Metropolitan books. I allow it on the theory that the entry is an admission by the Metropolitan's agent that the material was bought for construction purposes. There is no evidence that it was diverted prior to the receiverships. Presumptively it was on hand.

Joseph K. Larkin (77 and 78). Disallowed as to $108.45 without prejudice, being claim (77). Claim 78 is allowed at $104.50.

Alfred Box & Co. (80). Disallowed without prejudice.

Buffalo Concrete Mixer Company (82). Allowed at $930.

Underhay Oil Company (83). Disallowed without prejudice.

Eugene H. Tomes (93). Disallowed without prejudice.

Cornell Construction Company (96). Allowed at $978.

Hildreth & Co. (98). That part of the claim $164.66 charged to operation is disallowed. It is difficult from the records to determine the amounts.

John W. Sullivan (158). Dismissed without prejudice.

Keuppel & Esser (161). Dismissed without prejudice.

Estate of Adolph P. Starke (164). The item of $212.50 is allowed. The item of $25.50 which the Metropolitan brief refers to appears from the record to have been withdrawn.

Coleman J. Mullen (165). Disallowed without prejudice.

All claims presented in the briefs filed have been disposed of, and I think they cover all claims suggested for disposition by the record. If, however, by oversight any have not been passed upon, omissions can be supplied on the settlement of the report. At that time, too, facts suggested by the new stipulations respecting the claims of the Scranton Bolt & Nut Company and the Phœnix Sand & Gravel Company can be taken up, and corrections respecting the Davies & Thomas Company claim, referred to in a letter of counsel for the Contract Creditors Committee, will be disposed of if disputed. There remains for notice only the demand of the city receiver for interest at 6 per cent. upon the expenditures and obligations from the date when they were made or became due to July 8, 1910. In the Hugh Thomas claim no such interest was allowed by the order directing the payment. That order controls here, not only as to obligations incurred, as in the Hugh Thomas Case, but as to expenditures made.

A proposed report may be submitted on March 15, 1915.

J. Parker Kirlin, of New York City, for Metropolitan St. Ry. Co.

James L. Quackenbush, of New York City, for New York City Ry. Co.

Dexter, Osborn & Fleming, of New York City, for receiver of New York City Ry. Co.

Byrne & Cutcheon, of New York City, for Pennsylvania Steel Co. and Degnon Contracting Co.

Davies, Auerbach & Cornell, of New York City, for Guaranty Trust Co. of New York.

Geller, Rolston & Horan, of New York City, for Farmers' Loan & Trust Co.

O'Brien, Boardman & Platt, of New York City, for John D. Crimmins and others.

Charles Benner, of New York City, for Ben. S. Catchings and others.

Simpson, Thacher & Bartlett, of New York City, for John I. Waterbury and others.

Strong & Mellen, of New York City, for Central Park, N. & E. R. R. Co.

Richard Reid Rogers, of New York City, for New York City Ry. Co. and Central Crosstown R. Co.

Masten & Nichols, of New York City (Arthur H. Masten, of New York City, of counsel), for receiver of Metropolitan St. Ry. Co.

John R. Abney, of New York City, for Molly Latta.

LACOMBE, Circuit Judge. This cause comes here upon exceptions to a report of the special master. Under previous proceedings a considerable sum of money came into the hands of the receiver of the City Company, which was divided into two shares, one to be delivered to the Metropolitan estate, the other to be retained by the city estate. A prior decree provided that out of the share going to the Metropolitan the receiver of the City Company should be reimbursed for certain expenditures made and obligations incurred by the City Company prior to appointment of receivers on September 24, 1907. A more specific statement of the questions presented will be found at the outset of the special master's opinion. "Obligations incurred" cover the claims of a great number of persons from whom the City Company bought materials of various sorts (or obtained services) for which, at the date of receivership, it had not paid. When the process of reimbursement puts in the hands of the city receiver money to pay any of these claims, the holder of such claim, under the Hugh Thomas decision (206 Fed. 663, 124 C. C. A. 463) may assert that such money is a trust fund which should be applied to the payment of his claim. Therefore the present report deals with a multitude of claims presented by various counsel. A perusal of the opinion will show what an extremely laborious task has been accomplished, practically the trial of very many separate actions. It is desirable that the opinion of this court upon the questions involved should be presented in some way which will not add to the complications already existing, and will submit to the court of review a few concrete propositions; when the opinion of that tribunal

as to those propositions is obtained, final disposition of all the claims may easily be had. On most of the propositions advanced in the report this court is fully in accord. In those cases where there is no such accord no attempt will be made to indicate the result upon individual claims by modifying the report as to such claims, because should the Court of Appeals accept the special master's conclusion, final disposition will be accomplished by a simple confirmation of the report as to such claims. Should that tribunal accept the conclusion of this court as to any such proposition, the effect thereof upon individual claims can be then determined.

[1] The questions presented involve the construction of certain articles of the Metropolitan-City lease. Since these are not set forth in full in the opinion of the special master, it may be convenient to quote them here.

Article XII provides:

"The lessee shall furnish to the lessor the sum of twenty-three million dollars ($23,000,000) for the purpose of paying the unfunded debt of the lessor, and providing for expenditures for improving, extending and equipping the lines of railroad and other property of the lessor and its subsidiary companies."

This sum of $23,000,000 was in due course furnished and spent; the article under which the present claims are advanced is article XV, which provides:

"The intention of this agreement is that the lessee shall pay not only the fixed charges of the lessor and the rental herein provided to be paid, but also *all sums of money properly chargeable to current maintenance and operation,* but if after the expenditure of such part of said sum of $23,000,000 as shall be available for additional equipment, improvements and extensions, *it shall be deemed expedient by the lessee to extend lines of railroad hereby demised or the lines of railroad of any subsidiary company, or to construct any branches of any such lines, or to provide any additional and increased equipment for or make any change of motive power upon, or any radical change in the construction, location or character of any such lines, then such expenditures shall be provided as follows:*

"(A) The lessee shall deliver to the lessor a written statement of the proposed expenditures, stating the approximate amount thereof and the purposes for which they are to be made.

"(B) If the parties hereto shall not within twenty days thereafter agree that such expenditures are advisable and are properly *chargeable to capital account* and shall not further agree upon the nature and amount of the securities to be issued by the lessor to provide for such expenditures, then the question upon which the parties shall have failed to agree shall be submitted to arbitration in the manner hereafter provided.

"(C) When such questions have been agreed upon by the parties or determined by arbitration, then the lessee shall provide the moneys required for the capital expenditures so agreed upon or determined, and the lessor shall issue to the lessee therefore such securities, whether stock, bonds or other obligations, as shall have been fixed by such agreement or arbitration and at the price and upon the terms so fixed.

"(D) * * * Any such obligations shall be subject to the provisions hereof relative to the funded debt of the lessor, and the lessee shall in no event be relieved from its obligation to pay 7% per annum upon the capital stock of the lessor.

"Nothing herein contained shall prevent the lessee from arranging for the extension, consolidation or refunding of any funded debt of the lessor * * * or from advancing money to the lessor * * * for any expenditure chargeable as herein provided to *capital account,* or for any purpose not herein other-

wise provided for * * *; provided, however, that the lessee shall in no event be relieved from paying the guaranteed dividend of 7% upon the amount of the capital stock of the lessor and the other fixed charges of the lessor as herein provided."

The prior decree, above referred to, directed reimbursement for expenditures made and obligations incurred "for the purposes described in article XV of the lease." No one of the claims now advanced, therefore, can be a basis for such reimbursement unless it represents supplies or labor "for the purposes described in article XV of the lease." The special master holds that supplies furnished by a claimant come within this category if, at the time they were ordered and received, it was the intention of the City Company to use them for the purposes described, although in fact they never were so used and were found among the unexpended supplies when receivers took possession.

The opinion sets forth the reasoning by which this conclusion is reached, and the proposition is vigorously contended for in the briefs of the various parties, but the arguments are not found persuasive.

The word used in the lease is "expenditures"; it says nothing about "obligations"; the latter word makes its first appearance in the opinion and decree in the Apportionment Proceeding. 198 Fed. 778, 117 C. C. A. 560. Let us take the simplest of the specified purposes—constructing a branch line, which lessor and lessee have agreed shall be built—and see what were the expenditures which the lessor was ultimately to pay. They must be expenditures actually made for the purpose of the particular extension; that is materials used in that extension must be bought and paid for by the lessee, for clause C provides "the lessee shall provide the moneys required for the * * * expenditures * * * agreed upon." Having done that, certain securities will be delivered by the lessor to lessee to reimburse the latter. In other words there is to be a purpose, a use for such purpose and a disbursement—then we have an actual expenditure for the purpose. Buying on credit, the lessee might, at any given time (such as date of receivership), be found in the situation where it had bought and used materials for the purpose of building the branch, but had not yet paid for them. In one sense this might not technically be an "expenditure," since money had not yet been actually paid out; hence we find that the decree above referred to provides for reimbursement, not only for "expenditures made," but also for "obligations incurred." But that circumstance does not, as it seems to me, in any way modify the meaning which the word "expenditure" has in the lease. If the City Company has not in fact *expended its money* for the special purposes—say for building the branch line—it must at least have *expended its supplies* for that purpose. Until it has expended something there is no "such expenditure" which, as the lease provides, the lessor will issue securities for.

Overmuch seems to be made in argument of "intent" at the date of purchase of supplies. To take a converse proposition as an illustration: Suppose the City Company had bought 500 steel yokes for renewal and repair work, and had charged them up to its supply account, but had not paid for them before receivership. Suppose, moreover, that it

had actually used 100 of these very yokes in the new work on First avenue expressly referred to in article XV. Could it not demand reimbursement for them, and could not the man who sold 100 yokes, upon proving they were used for such purpose, maintain a claim against this fund—although neither he nor the City Company, nor any one else, at the time of sale and delivery intended that they should be so used? Having been used in that work they would be an "expenditure" of the City Company, and, not having been paid for, they would be an "obligation" for which reimbursement was to be made out of the fund.

It is suggested, in argument, that the Metropolitan might have issued the securities in advance, and the City Company have raised money on them for the purpose we are considering, viz., building a branch line, that if this had been done such money would be a trust fund not to be diverted to other purposes, and that supplies bought with such money could not be used for other purposes. The illustration is unpersuasive because nothing of the sort happened, nor so far as the lease shows was it contemplated. The course of business was for the lessee to go on and build the branch, using for the purpose supplies which it had purchased, itself providing the money to pay for supplies so used, and receiving securities from the lessor to make it whole for such expenditures. All the supplies which form the basis of the claims here presented were bought by the City Company on its own credit; the sellers knew nothing of the contract between the two companies, nor of any trust fund out of which they were to be paid. Pursuing the concrete example we have taken—a branch line which both lessor and lessee approved of: The City Company buys 10,000 steel rails, intending and expecting to *expend* them in building such branch. Subsequently, and before the branch is built, urgent repairs are needed somewhere, and 2,000 of the rails are used for that purpose. Certainly the use to which those 2,000 rails are put is not within the terms of article XV, and the concern which sold them to the City Company would have no claim against this fund for their price, although when they were bought the purchaser expected to use them for purposes within the terms of the article. It is understood that the special master and all counsel substantially agree to this. But if, after purchase, the purchaser was thus free to select to what use it would put the supplies purchased, it certainly remained free to make that selection, until their destination was finally determined by their being expended on some particular object. If it be granted that original intent alone does not absolutely determine the use to which purchased material must be put, and no one seems to argue to the contrary, then it seems quite clear to me that as to all supplies which were bought with intent to use them for one or other of the designated purposes, but which had not actually been used or expended and still remained on hand when receivership came, they were in the same situation as any other supplies bought also on City Company's credit, without any special intent and not actually used.

The special master has, in my opinion, attached too much weight to the entries in the books. Inasmuch as they were all made with the approval of the auditor of the Metropolitan, no doubt they evidence a willingness on the part of that company to pay the charges so made.

The Metropolitan might agree to pay any claim the City Company might make upon it, which was not forbidden by law, or obnoxious to good morals or to public policy; but it does not follow that all these entries of charge were made and audited with any intention to expand or modify this clause XV of the contract by "practical construction." A significant entry is referred to in respondent's brief. For the year ending June 30, 1907, the Metropolitan Company was charged with $24,185.57, representing 5 per cent. of the expenditures on account of injuries and damages for that year. "The theory upon which this was done was that there would be more injuries on a given street after electric lines had been established than there were during the preceding period." If the lessor company chose, it might pay some proportion of the lessee's losses from operating the road, but it would seem to extend the doctrine of practical construction beyond all reasonable limits to hold that an entry of that sort operated thus to modify the plain language of the written lease. The special master has been extremely liberal in allowing items claimed as expenditures under clause XV, such allowances as those for track connections required by the removal of the old tracks on Amsterdam avenue, and the placing of vestibules on cars are on the very border line. Nevertheless his decision on this branch of the case will not be disturbed except in the following instances:

[2] Allowance has been made for the full amount of various items of expenditures made necessary by a partial or entire loss of buildings by fire. Article V of the lease expressly provided that:

"The lessee will replace any of the demised premises or any addition thereto, which may be destroyed by fire or other causes."

This clause, which deals with a single subject is more specific than clause XV, which deals with several subjects and should control if there be any conflict between the clauses. But there is no such conflict, the clauses are entirely harmonious; the lessee is to keep the plant in fit condition at its own cost, but for betterments of the sort mentioned in clause XV it is to be provided with funds by the lessor. I do not see how any system of bookkeeping can operate to nullify the explicit provisions of clause V; there was a fixed obligation on the part of the lessee to restore what was destroyed. It may be that in the process of restoration improvements and betterments were made which might fairly be considered "additional and increased equipment." The correct rule would be to ascertain as to each building what would have been the cost of mere restoration and what was the cost of a larger and better building, the percentage of total cost representing betterments could thus be ascertained and applied to any individual item, allowance being made only for such improvement.

A similar situation arises in the case of certain cars. The City Company ordered 155 cars, substantially standard. Subsequently it directed that these should be new type, i. e., pay-as-you-enter cars, a more expensive type of car. It also ordered 40 other standard cars. If nothing had happened subsequent to these orders, these cars would have been "additional and increased equipment," and the City Company could have called upon the Metropolitan to provide the securities neces-

sary to raise the money to pay for them. It presumably was the original intent to place these cars on the road as an addition or increase; but long before their completion 280 cars were destroyed by fire. The City Company was bound by the lease to replace these at its own expense. It did not order 280 new standard cars to take their place; the cars under order would, therefore, as completed, become replacements until the loss was made good. The obligation of the City Company might fairly be limited to the replacement of standard cars. If some new and more expensive type were provided, the extra cost may be considered as coming within the classification of article XV. An application of the percentage rule above indicated would be the correct method of disposing of such P. A. Y. E. items as may be left after eliminating all such as fail by reason of the circumstance that they were not actually used before receivership.

It is thought that the findings in the action at law against the Securities Company are not controlling here—and that an item should not necessarily be allowed here as a charge under article XV because it was held to be such a charge in that action. In addition to the other reasons advanced—e. g., an action between different parties, etc., this circumstance may be noted. The action at law and the suit in equity against directors were both settled together in a single transaction upon payment of a lump sum of money. That sum was less than the aggregate amount of the judgment (with interest) in the one cause, plus the amount claimed in the other cause. Something claimed was waived manifestly, and it cannot be said, as to any single item now under discussion, that it is represented by cash to its full value in the fund with which we are concerned because it figured in the total for which judgment was entered against the Securities Company.

In all respects not covered by what has been above written the special master's findings and conclusions are confirmed.

In re OAK LEAF COAL CO.

(District Court, N. D. Alabama, Jasper Division. July 31, 1915.)

No. 89.

1. EASEMENTS ⟸51—RESERVATION—CONSTRUCTION.

A reservation in a deed of the "right to build railroads through [land conveyed] in order to reach other lands beyond and above," when read in connection with a reservation of minerals and mining rights, includes lands owned by the grantor at the time of the execution of the deed, and coming within the designation as being "beyond and above," and also includes lands subsequently acquired by the grantor engaged in acquiring mineral lands and in bodying them up for profitable mining propositions, and also includes lands to which the grantor does not obtain title, but which are necessary for the utilization of his own lands.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109–112; Dec. Dig. ⟸51.]

2. EASEMENTS ⟸26—RESERVATION—CONSTRUCTION.

A deed contained a reservation of the minerals and usual mining rights and the right to build railroads through the land conveyed to reach other

lands beyond and above. A lessee of the land the grantor then owned and subsequently acquired obtained a lease of other lands for the purpose of mining. The grantor's land could not alone be profitably used for mining. *Held*, that the reservation for railroads terminated when the mineral was exhausted in all the lands of the lessee.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72½–74, 80–82; Dec. Dig. ⊂⊃26.]

3. EASEMENTS ⊂⊃48—RESERVATION—RIGHT OF WAY.

Where a right of way in a deed was not defined, but was actually located on the ground with the acquiescence of the holder of the land under the grantee, the right of way became defined.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 103–107; Dec. Dig. ⊂⊃48.]

In Bankruptcy. In the matter of the Oak Leaf Coal Company, bankrupt. Petition by one Hood to review order of referee permitting purchasers at the trustee's sale to take possession of a railroad. Petition for review denied.

A. F. Fite, of Jasper, Ala., for petitioner.

M. M. Ullman, of Birmingham, Ala., for respondent.

GRUBB, District Judge. This is a review by the respondent of an order made by the referee, upon the petition of Shannon and Lunsford, purchasers at the trustee's sale of the property of the bankrupt, including a mining lease, executed to the bankrupt by the University of Alabama, and a right of way, railroad track, and roadbed, which ran over the lands of the respondent, Hood. The order directed respondent to permit the petitioners to take possession of the railroad. The jurisdiction of the bankruptcy court to make the order is conceded. The right of the petitioners depends upon the construction of a reservation in a deed, executed by B. M. Long to his daughter, Carrie Garner, the grantor of the respondent herein, conveying certain lands, with a reservation to the grantor of minerals and usual mining rights, also certain parts of the river and creek bank, and the "right to build railroads through said land in order to reach other lands beyond and above."

The respondent contends that a proper construction of the reservation would limit the right to build railroads to those built for the purpose of reaching the lands of the grantor then owned or thereafter to be acquired, and as the petitioners, at the time of the filing of the petition, were not mining coal on any lands ever owned by the original grantor, but only from lands the mining rights to which were acquired from the University of Alabama, the petitioners acquired no title or right to the possession and use of the railroad over the respondent's lands, by their purchase at the trustee's sale, and were not entitled to be put into possession of them. On the other hand, the petitioners contend that a proper construction of the reservation in the deed from B. M. Long to Carrie Garner does not limit the lands to be reached by the railroad to be constructed to those owned by B. M. Long, when the deed was executed, or to those which he afterwards acquired, but is broad enough to include lands in which B. M.

Long or his personal representatives or assigns were interested in having the railroad reach, even though they were never owned by him.

[1] At the time of the execution of the deed to Carrie Garner, the grantor, B. M. Long, was a large owner of coal lands in the vicinity of the lands conveyed. At that time he owned lands which came within the designation of the reservation in the deed as being "beyond and above" those the surface of which was conveyed to Mrs. Garner. He was engaged in acquiring mineral lands and in bodying them up, so as to make profitable mining propositions. It is to be presumed that he reserved the rights described in his deed to his daughter in his own interest and that of his heirs and assigns, and for the purposes of the occupation and projects he was then engaged in. It would be a narrow construction that would limit the reservation to lands then owned by the grantor, as distinguished from those that he might afterwards acquire. The same advantage that would come to the lands then owned would come equally to those thereafter to be acquired, by reason of the reservation. The purpose of the grantor in making the reservation applied equally to the class of then-owned, and of after-acquired, lands. This is particularly true of one who, like the grantor, was constantly acquiring new mineral lands. It would also be equally advantageous to reserve the right to build railroads to reach lands to which the grantor never got title, since it might be impossible for him to utilize, either by mining or sale, his own lands, except in connection with the adjoining lands of others. As the right of way over the Hood lands was the only available one to reach lands north of those lands, it is reasonable that the reservation was intended to cover such lands, north of the Hood lands, as it was probable the grantor or his heirs might be interested in having served by the railroad, in connection with his own lands "above and beyond" the Hood lands. If the grantor or his heirs had leased the University lands, and operated them in connection with his own, north of the Hood lands, they being too small a proposition to operate by themselves, the interest of the grantor in having the railroad reach the University lands would be evident. If he could only dispose of his own lands north of the Hood lands, in connection with the University lands, for the same reason, it would be to his evident interest to be able to confer the right on his grantee or lessee to reach the mineral in the University lands, as well as that in his own lands north of the Hood lands. Otherwise, his chance to dispose of his own lands would be impaired or destroyed. It seems reasonable that the grantor intended the reservation to be as broad as the necessity. If the necessity included other lands than those then owned by him, or those thereafter acquired by him, it should be held to extend to and cover such other lands.

[2] It was stated on the hearing that the Oak Leaf Coal Company leased the lands of the grantor north of the Hood lands from the personal representative of B. M. Long, in connection with the University lands, from which its successors, the petitioners, are now mining, and that the lands leased from the Long estate would not of themselves have justified a mining proposition. If the reservation be construed to exclude lands other than those owned by the Long estate,

the reservation would not be broad enough to accomplish what the grantor evidently intended by the reservation; i. e., the retention of ample means for the proper development of his own coal lands, north of the lands conveyed to Mrs. Garner. It would seem reasonable to so construe the reservation as to make it sufficient for the evident purpose the grantor had in mind in inserting it in the deed to his daughter, which was the full development by operation, sale, or lease of his own lands, north of those conveyed. The interest of the grantor or his heirs or representatives in the application of the reservation in favor of the University lands is shown by the lease that was executed by the Long estate to the predecessor of the petitioners to the minerals in the lands of the estate north of the Hood lands, and by the subsequent execution of the quitclaim deed to the right of way to the Oak Leaf Coal Company. The limit of the reservation is the interest of the grantor or his heirs and assigns in the mineral of the lands then owned by him, or thereafter acquired, north of those conveyed. When that interest ceases, the purpose of the reservation ceases, and with it the right to further possess the right of way. Though the lease to the Oak Leaf Coal Company from the Long estate has expired, the interest of the lessee in the railroad remains till the coal is exhausted in the University lands, leased by the predecessors of the petitioners at the same time as those leased from the Long estate. When the interest of the petitioners in the coal in the University lands, so leased, ceases, their interest in the right of way will also cease. It exists only in favor of the grantor or his heirs and those in privity with him.

[3] The right of way is not defined in the grant, but has been actually located on the ground, with the acquiescence of the respondent, and this as effectually serves to define the grant as would a description in the deed. The grant, so defined, ceases to be uncertain, and no use of the right of way, other than one that is reasonable and necessary to develop the lands covered by the reservation, would be permitted. The context of the reservation shows that the right of way was reserved for the purpose of mining operations and not for a general commercial railroad.

The petition for review is denied, at the costs of the respondent and petitioner, Hood.

In re FRANKEL.

(District Court, W. D. Washington, N. D. July 17, 1915.)

No. 5417.

BANKRUPTCY ⇐140—CONDITIONAL SALE—CONTRACTS—VALIDITY.

Under Rem. & Bal. Code Wash. § 3670, making a conditional sale absolute as to incumbrancers and subsequent purchasers, unless a memorandum stating the terms of sale and signed by the parties shall be filed, a memorandum of sale, containing the printed name of the seller, but unaccompanied by anything indicating the adoption of the name as the signa-

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

ture of the seller, is insufficient to reserve title in the seller, as against the buyer's trustee in bankruptcy, where the buyer was in possession at the time of the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

In Bankruptcy. In the matter of Joseph N. Frankel, bankrupt. Petition by trustee in bankruptcy to review order of referee directing the delivery by the trustee of property to a seller of the bankrupt on failure to pay the price due. Decision of referee reversed.

Nelson R. Anderson, of Seattle, Wash., for trustee.
L. R. Kerley, of Seattle, Wash., for Toledo Scale Co.

NETERER, District Judge. On the 22d of April, 1914, the Toledo Scale Company delivered to Mrs. Josephine Jilg, one scale, upon the following order:

Order Form for Scales.

City, Seattle. County, King. State, Wash. Toledo Scale Company, Toledo, Ohio. Date, ———, 19—.

Deliver or ship to the undersigned at No. Stall 51 So. End Market Street, mailing address ——— as soon as possible, one (1) of your style 757 chart scales, gold finish. In consideration the undersigned will pay you Ninety Dollars, $90.00. * * * Cash with order, $10.00; $80.00 in 10 monthly installments, of $8.00 each, and ——— of $——, evidenced by installment note of the undersigned.

These scales will be used in the delicatessen business of the undersigned at the address first above given, and none of same shall be removed therefrom without your previous written consent.

The title to said scales shall remain in you until purchase price or judgment for same is paid in full.

You are authorized to give said note such date and to insert therein such place of payment as you may elect, either prior or after the execution of such note.

The signing and delivering of note shall not be deemed nor considered a payment or waiver of any term, provision, or condition of this contract.

It is expressly agreed that this contract shall not be countermanded, and upon refusal of undersigned to accept any of said scales when tendered, or to make any cash or other payment above provided for, it is agreed that the purchase price of all of said scales, less any previous actual payments thereon, shall at once become due and payable.

Upon failure of undersigned to make any payment provided for herein at the time same is due and payable, or upon any removal of any of said scales or any attempt to remove any thereof contrary to the terms of this agreement, or upon any attempt to sell or transfer possession or ownership of any of said scales, you or your agent may take possession of and remove all of said scales without legal process, and in such case, it is agreed that all payments theretofore made to you hereunder shall be deemed and considered as having been made for use of said scales during the time they remained in possession of the undersigned, and shall be retained by you as such payment.

Should any of the said scales get out of order from ordinary use, any time within two years from the date of shipment, you agree promptly to repair same gratis, the undersigned paying transportation charges to and from your factory or nearest agency capable of making the necessary repairs, or if repairs are desired made where the scale is located, the undersigned will prepay the expenses of the repairman from and to your factory or nearest agency capable of making the necessary repairs. Any repairs made without your previous written consent, or contrary to your instructions, or those of your represent-

atives, will be at the expense and risk of the undersigned. It is agreed that your guaranty does not extend to electric batteries or bulbs.

The undersigned shall hold said scales at his own risk pending the vesting of title in him, and no injury, loss, or destruction of same shall release him from this absolute obligation to pay said purchase price.

This contract covers all agreements between the parties hereto, and all the terms and specifications have been distinctly understood; and you shall not be bound by any representation or promise made by any agent relative to this transaction, which is not embodied herein.

Notice.—No scale placed on trial. [Signed] Mrs. Josephine Jilg.

Witnesses: Geo. A. Brodie.

Accepted ———, 191—.

Toledo Scale Company.

It was stipulated that the above memorandum was filed for record in the auditor's office of King county, Wash., within 10 days after the delivery of the scale, and properly indexed as required by the laws of Washington. Thereafter the scale was sold by Josephine Jilg to Joseph N. Frankel, who was thereafter adjudged bankrupt, and the scale delivered into the possession of the trustee, who refused to pay $24, the unpaid balance, or surrender the same to the petitioner. Petition was filed and presented to the referee, praying the return of the scale or the payment of the balance due. The referee directed that the scale be returned upon failure to pay the money due. The matter is now before the court on a petition for review.

It is contended on the part of the trustee that the memorandum set out and relied upon as a conditional sale contract does not conform to the laws of Washington, in that it is not signed by the vendor; while the petitioner contends that the written name appearing upon the memorandum was an adoption by it of the printed name as its signature, and that the filing and recording of the same was conclusive of such fact, and that the law in every respect having been complied with, with relation to indexing, etc., no person was injured, and hence no innocent persons' rights could have been jeopardized, and cites In re Covington Lumber Company, Bankrupt, 225 Fed. 444, decided by this court on October 22, 1914.

This case, I think, is readily distinguished from In re Covington Lumber Company, supra, in this: That in that case the conditional sale memorandum was signed by "A. Chandler, Salesman for the Stetson-Ross Machine Works," while in the memorandum in this case there is no indication anywhere upon the face of the document of any affirmative act on the part of any one for the vendor. Geo. A. Brodie appears to have signed as witness, but nowhere upon the face of the memorandum is there any expression that would indicate any adoption of the printed name as the signature of the vendor. Unless there is something upon the face of the document indicating that some affirmative act was done by some one in behalf of the vendor, the court cannot say that the mere printed name should be held as the signature. As Judge Morrow, in Re Osborn, 196 Fed. 257, at page 259, 116 C. C. A. 59, at page 61, said:

"It is objected to the order in question that it is not in accordance with the requirements of the statute, and is therefore not the evidence of a conditional sale. A memorandum of a conditional sale is subject to the general rules respecting the formation of other contracts. Among other things, there

must be a mutuality of assent; that is to say, there must be an offer of purchase or sale on the one part and an acceptance of the terms of the purchase or sale on the other part, and where the statute requires the terms and conditions of the sale to appear in the memorandum, and such memorandum signed by the vendor and vendee, it follows that the signatures of the parties to the memorandum must be so affixed that it will clearly appear that both parties have accepted the terms and conditions of the contract. In this respect the instrument before the court is fatally defective. It is, in form, an order in writing, directed to the Purcell Safe Company, the vendor, signed in writing by S. C. Osborn and S. C. Osborn Company, the vendee, requesting the delivery to S. C. Osborn & Co. of 'one group of 1,020 safe deposit boxes.' Below the written signatures of S. C. Osborn Company and S. C. Osborn in the printed form upon which the order is written is a single cross-line, indicating that the preceding matter had come to an end, and that what follows is a different subject, and so in fact it appears to be. What follows is a notice that 'salesmen are not allowed to collect for us,' and the further notice that 'any payments made to them will be at your risk.' Under these two notices is the printed name of 'Purcell Safe Co.,' the vendor. Without stopping to consider the objection that this printed name is not the 'signed name' of the vendor, we think it is otherwise insufficient as evidence of a conditional sale contract. Neither of these notices to which this printed name is appended refers to the previous order of the vendee, and neither expresses the assent or the acceptance by the Purcell Safe Company of the offer contained in the order of S. C. Osborn & Co. for the delivery of the safe deposit boxes."

I think that this memorandum is "on all fours" with the instant case. In this case there is no indication anywhere that the printed name has been adopted as the signature of the vendor, or that the order was accepted. On its face it does not appear to be an enforceable contract; whereas in Re Covington Lumber Company, supra, there is such indication, and, nothing appearing to the contrary, the court held that the statute was substantially complied with in that case. Section 3670 of Remington & Ballinger's Code of Washington provides:

"All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, encumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The statute not having been complied with, and the scale being in the possession of the bankrupt at the time of the adjudication, the lien given the trustee by the Bankruptcy Act brings the right of the trustee fully within the decisions of the Supreme Court of the state with relation to the right of lien creditors as against the rights of the vendor under such a sale. Pacific Electric & Automobile Co., Bankrupt, 224 Fed. 220, decided by this court June 8, 1915.

I think the decision of the referee should be reversed, and an order entered denying the prayer of the petitioner.

In re O'CALLAGHAN.

(District Court, D. Massachusetts. March 21, 1914.)

No. 17346.

1. BANKRUPTCY ⊂=140—CONDITIONAL SALE—TITLE AS AGAINST TRUSTEE IN BANKRUPTCY—WHAT LAW GOVERNS.
Where a seller in one state received a conditional order from a buyer in another state, and the seller delivered the goods under the order subject to approval of them by the buyer, title thereto, as between the seller and the trustee in bankruptcy of the buyer, is governed by the laws of the state of the buyer.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⊂=140.]

2. BANKRUPTCY ⊂=140—SALES TO BANKRUPT—CONDITIONS—WAIVER.
Where a seller in New York, shipping goods to a buyer in Massachusetts 21 days before the filing of a petition to have the buyer adjudged a bankrupt, under an agreement that the buyer would send a check if the goods proved satisfactory after examination, did not complain during the 21 days of the failure of the buyer to send a check, or take any steps during that time to reclaim the goods, the right of the seller to reclaim the goods under the agreement was waived, under the law of Massachusetts that failure of a seller to insist on the performance of a condition justifies a finding of waiver of the condition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⊂=140.]

3. SALES ⊂=202—CONDITIONS—PAYMENT—WAIVER OF CONDITION.
Where goods were shipped from New York to a buyer in Boston, to be paid for as soon as received, if satisfactory, and for 21 days the seller took no steps to reclaim the property in default of payment, there was evidence supporting a finding that the seller waived the condition.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 542–551; Dec. Dig. ⊂=202.]

In Bankruptcy. In the matter of Margaret G. O'Callaghan, bankrupt. Heard on certificate from the referee on an agreed statement of facts. Order affirmed.

Jesse W. Morton, of Boston, Mass., for petitioner.
Friedman & Atherton, of Boston, Mass., for trustee.

MORTON, District Judge. This case comes up on certificate from the referee and has been heard on the following agreed statement of facts:

"The petitioners are engaged in business in New York City under the firm name of Kramer & Weitzner, and were so engaged in May and June, 1911.

"In May, 1911, the petitioner received an order from the bankrupt for 16 fur coats, the price of which was $665.52. The petitioners did not fill this order, and on June 8, 1911, a buyer representing the bankrupt called on the petitioners and asked them to send the goods as ordered. The buyer said: 'We are running sales now, and if the goods are satisfactory we will send you a check as soon as we receive them.' The petitioners then shipped the goods, which were duly received and accepted by the bankrupt as satisfactory; and the whole or a part of the same are now in the possession of the receiver in this case. No check was sent, and no other payment made. It is further agreed that these are all the facts material to this petition."

[1] The questions as to the title of the property are to be decided according to the Massachusetts decisions. Bryant v. Swoffard Bros., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; In re Legg (D. C.) 96 Fed. 326.

[2, 3] Two points are presented:

(1) Was the sale a conditional one, i. e., did the petitioners part with the possession of the goods only uopn the condition that payment therefor should be made upon receipt of the goods if they proved satisfactory?

(2) If so, was the condition subsequently waived, so that title became vested in the bankrupt?

Under the view which I take of the case it is only necessary to consider the second of these questions. Under the decisions in Massachusetts, where goods have been sold on condition, and delivery has been made to the vendee, it is a question of fact as to whether or not the vendor has waived the condition. Mere negligence on the part of the vendor in asserting his rights is not, of itself, a waiver of the condition; but failure to insist upon the performance of the condition is evidence from which it can be found that the condition was waived. In Smith v. Dennie, 6 Pick. (Mass.) 262–265, 17 Am. Dec. 368, the sale was conditioned on the giving of a note at the time of delivery. A clerk of the vendor, not knowing the condition, made delivery without receiving the note. There was an attachment of the goods as the property of the vendee eight days after the delivery, up to which time there had been no demand by the vendor for the note. The court said:

"The principle is that if the vendor, who has sold upon condition, permits the vendee to take the goods without exacting of him a compliance with the terms of the sale, he shall be presumed to have abandoned the security he intended, and to trust to the personal security of the vendee; and whether such is the state of things or not is matter for the jury to settle upon the facts proved.

"The vendor certainly had a right the day after to insist upon his indorsed note or to rescind the bargain and reclaim the goods. If so, why not two days or three, and if so, the time which elapses is a mere fact, from which the jury may infer the intention."

And it was held:

"There was nothing in the case from which an intention to hold on upon the condition can be inferred."

In Farlow v. Ellis, 15 Gray (Mass.) 229, in which there had been a delivery without receiving the note agreed to be given, the court said (Shaw, C. J.):

"The question, then, on trial in this case was whether the plaintiff had waived the condition of this sale, and manifested by his language or conduct * * * a willingness to waive the condition and make the sale absolute, without having the satisfactory paper.

"Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, he would have enjoyed. It may be proved by express declaration, or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage, or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive. Still voluntary choice not to claim is of the essence of waiver, and not mere

negligence, though from such negligence unexplained such intention may be inferred.

"The question of waiver, therefore, is a question of fact for a jury."

In this case there is no question of waiver of the condition by the delivery, because the delivery was pursuant to the terms of the contract. The condition was to be performed after the delivery. A condition precedent to the delivery may be waived by delivery, but a thing done pursuant to one of the terms of a contract can hardly be said to be a waiver of another of such terms.

The goods were shipped by the petitioners from New York on June 8, 1911. The petition in bankruptcy was filed on June 29, 1911. Thus there was a lapse of 21 days during which the petitioners took no steps to see that the condition was complied with. The bankrupt was to have an opportunity to examine and approve the goods before making payment; but, considering that the shipment was only from New York to Boston, the petitioners must have known long before the bankruptcy that the bankrupt had not complied with the condition. They made no complaint, and took no steps to reclaim their property, until after the bankruptcy proceedings had been instituted. The arrangement out of which it is said the condition arose was loosely made, and does not indicate that the sellers originally had any strong and definite purpose not to part with the title except upon receipt of payment. Under such circumstances, a waiver is more easily inferred than in cases where the vendor plainly intended at the start to retain his ownership of the goods until he got his money. Conditions of this character ought to be promptly enforced, if they are to be relied upon. The conclusion seems to me to be irresistible that the condition, if one existed, was waived.

There is great doubt whether the sale was conditional, and whether the transaction amounted to anything more than an ordinary sale, made in reliance on the word of the buyer that the goods would be paid for on delivery and approval. The conduct on the part of the vendors which has been referred to as indicating a waiver of the alleged condition is equally consistent with the theory that the vendors did not suppose that they had any right to retake the goods by reason of the bankrupt's failure to send the check. But, as what has been decided is sufficient to dispose of the case, it is not necessary to pass upon this question.

The referee's order is affirmed.

ALFRED DECKER COHN CO. v. ETCHISON HAT CO. et al.

(District Court, E. D. Virginia. June 28, 1915.)

COPYRIGHTS ⊂=29—INFRINGEMENT—ACTS CONSTITUTING.

Under Copyright Act March 4, 1909, c. 320, § 20, 35 Stat. 1080 (Comp. St. 1913, § 9541), providing that where a copyright proprietor has sought to comply with the act with respect to notice, the omission by accident or mistake of the notice from a particular copy or copies shall not invalidate the copyright, or prevent a recovery of damages against a person who after actual notice of the copyright infringes it, but shall prevent recov-

ery of damages against any innocent infringer misled by the omission of the notice, a copyright proprietor, whose notice of copyright is defective because of the characters or symbols therein being so small that an average observer may discover nothing therefrom, may not recover damages against one innocently infringing the copyright, and on ascertaining the facts promptly discontinuing the use thereof; but he will be enjoined from future use, if injunction is desired by the proprietor, for the defects in the notice do not invalidate the copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. ⟸29.]

In Equity. Bill by Alfred Decker Cohn Company against the Etchison Hat Company and another to enjoin infringement of copyright. Relief granted in part.

Pines & Newmann, of Chicago, Ill., and Jo Lane Stern, of Richmond, Va., for complainant.

George C. Fitzhugh, of Richmond, Va., for defendants.

WADDILL, District Judge (orally). The court can dispose of this case now, and assumes that it will be more satisfactory to all parties for it to do so.

Congress, by Act March 3, 1909, has sought most comprehensively to make plain all matters we are considering. It passed an act with 64 sections, dealing with almost every phase of this case. Among other things, it provided for publication of a copyright to make it valid; it must be registered with the authorities in Washington; and the copyright, when issued, shall contain a certificate with specific symbols attached. The purpose of having publication of the symbols is that no one shall be misled as to the existence or nonexistence of the copyrighted article. Copyright is a very valuable privilege; it runs for 28 years. Just how it shall be procured, and of what it shall consist, and what shall be done respecting its publication, is sought to be covered by this act. Damages are allowed for infringing, pirating, or copying it. It provides for a minimum and maximum allowance of damages, and also for costs, and for attorney's fees in the discretion of the court, in favor of the party owning the copyright. Whether this allowance of damages is discretionary or not is not entirely clear. The court is inclined to think that the interpretation of section 25 of the act leaves it within the discretion of the court to allow or refuse damages entirely. But it is not necessary to determine that question. Section 20 bears materially on this case. It provides that, where a copyright proprietor has sought to comply with the provisions of the act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not make invalid the copyright, or prevent recovery of damages against a person who, after actual notice of the copyright, begins an undertaking to infringe, but shall prevent the recovery of damages against an innocent infringer, who has been misled by the omission of notice, and in a suit for infringement no permanent injunction shall be had, unless the copyright proprietor shall reimburse the innocent infringer his reasonable outlay innocently incurred, if the court in its discretion shall so direct. That section seems to be reasonably clear.

There has been more or less feeling in this case, for which the court has not seen the slightest reason. The complainant claimed to have a copyright, and the defendants, citizens of Richmond, Va., did put a miniature copy of it in a publication of comparatively limited circulation. They did not take it from what they believed to be a copyrighted article, and the moment their attention was called to it they explained that they did not mean to infringe any copyright, and at once stopped its publication, and have not used it since. That is this case, and it does not impress the court as having much merit in it, but, on the contrary, is one in which an innocent mistake had been made, which was at once corrected, and from which no serious result or damage occurred, sufficient to support a lawsuit other than from a mere technical viewpoint. Theoretically copyright owners may sustain damages by a publication of this character, and it may be difficult to prove the same; but here we are not furnished with evidence of any damage sustained from any standpoint, and the case is one certainly void, from the evidence adduced, of any intentional wrong on the part of the defendants.

The alleged infringement consists in copying a picture illustration in "Men's Wear," which defendants insist contained no symbol or mark or other thing to indicate that it had been copyrighted. Complainant insists that the publication did contain the proper symbols or marks to show that it had been copyrighted. This presents a question of fact, and while, if it be conceded that the rule applicable to the claims of a patent may have general application to that of copyright, that is to say, that such symbols must so appear upon the publication that one ordinarily skilled in the art, as distinguished from a layman, would observe the same, still, to the mind of the court, this publication is so defective in the respects indicated, so absolutely lacking in furnishing what the statute in terms prescribes it shall have, to the end that persons to be affected thereby might secure notice thereof, that the defendants ought not to suffer from such neglect.

The statute, among other things, prescribes that the notice shall contain the letter "C" inclosed within a circle. There is no excuse for any one to make a character so small that you cannot see what it is. Perhaps the "C" in the publication of "Men's Wear" might be discovered with a microscope, by a person skilled in the art, still an average observer would discover nothing therefrom, even with such aid; and what is said in this respect applies likewise to the other symbols on the notice.

The judgment of the court is that the notice published in Men's Wear was so defective in the respects indicated as not to convey to any one the existence of a copyright, and its conclusion upon the whole case is that the complainant has a valid copyright; that incidentally these defendants have infringed the same; that by reason of the improper and defective publication in Men's Wear, from which the defendants copied the same, no damages will be awarded against them; that, the defendants having promptly discontinued the use of the copyrighted illustration, they will be enjoined only from its future use, if such injunction is desired, but without costs to the complainant.

PENNSYLVANIA RUBBER CO. v. DREADNAUGHT TIRE & RUBBER CO.

(District Court, D. Delaware. July 24, 1915.)

No. 330.

1. TRADE-MARKS AND TRADE-NAMES ⊂⊃3—TRADE-MARK—WHAT IS—"VACUUM"—"SUCTION."

An automobile tire, the tread of which consisted of four or five circular rows of cup-shaped rubber projections, was called a "vacuum cup" tire, and it was advertised that the suction hold of the vacuum cups would prevent skidding. *Held*, that the name was merely descriptive, meaning no more than suction cups, for the expressions "vacuum" and "suction" are practically synonymous, although suction may be the result of vacuum, and hence there could be no trade-mark either in "vacuum cup" or "vacuum tread."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. ⊂⊃3.

For other definitions, see Words and Phrases, Suction.]

2. TRADE-MARKS AND TRADE-NAMES ⊂⊃70—UNFAIR COMPETITION—WHAT CONSTITUTES.

Complainant's tires had on each side the words "Pennsylvania Vacuum Cup Oil-Proof," preceded and followed by a monogram, consisting of the capital letters "V" and "C," and also the words "Pennsylvania Rubber Co,. Jeannette, Pa.," and numerals indicating the dimensions of the tire. Defendant's tires had on one side the words "Made by the Dreadnaught Tire & Rubber Co., Baltimore, Md., and numerals indicating the dimensions, and on the other side the words "Vacuum Tread" and similar numerals. The wrappers were equally dissimilar, and the color of defendant's tires was different from those of complainant's. *Held*, that defendant was not guilty of attempting to palm off its tires as those of complainant, and hence would not be restrained, though a party not having a trade-mark in a name will be protected, where another attempts to use it to defraud the public into believing his goods were made by the other.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊂⊃70.]

3. TRADE-MARKS AND TRADE-NAMES ⊂⊃70—UNFAIR COMPETITION—WHAT CONSTITUTES.

Defendant sold its "seconds," which were defective tires sold without a guaranty, to a store near complainant's factory, without branding them as seconds and without removing the words "Vacuum Tread," although it removed its name. Complainant's tires were on sale in the same vicinity *Held*, that defendant was guilty of unfair competition, in putting it within the power of the retailer to deceive the public, and hence should either obliterate the words "Vacuum Tread" from its tires, or indicate that the tires were made by defendant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊂⊃70.]

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃70—UNFAIR COMPETITION—LIABILITY.

Where a manufacturer puts it within the power of a dealer to deceive the public, and the public is deceived into believing that the manufacturer's goods were made by another, the manufacturer is guilty of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊂⊃70.]

5. TRADE-MARKS AND TRADE-NAMES ⊂⊃93—UNFAIR COMPETITION—FRAUD—WHAT CONSTITUTES.

Fraud, constituting unfair competition, must be satisfactorily proven.

[Ed. Note.—For other cases, see Trade-Marks, and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. ⊂⊃93.]

6. TRADE-MARKS AND TRADE-NAMES ⟸95—UNFAIR COMPETITION—INJUNCTION —RIGHT TO.

An isolated act of fraud for which the law would furnish an appropriate remedy would not justify a general restraint of a legitimate business under the law of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. ⟸95.]

7. TRADE-MARKS AND TRADE-NAMES ⟸93—UNFAIR COMPETITION—ACTIONS—EVIDENCE.

Evidence *held* insufficient to show that defendant tire company was guilty of fraud and unfair competition in disposing of its tires as those of complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. ⟸93.]

8. TRADE-MARKS AND TRADE-NAMES ⟸98—UNFAIR COMPETITION—ACCOUNTING—RIGHT TO.

In a suit for unfair competition, where it did not appear that any one desiring to obtain complainant's tires was misled into purchasing defendant's, no accounting will be ordered.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⟸98.]

In Equity. Bill by the Pennsylvania Rubber Company against the Dreadnaught Tire & Rubber Company. Decree for complainant in part.

Christy & Christy, of Pittsburg, Pa., and Ward, Gray & Neary, of Wilmington, Del., for complainant.

Harry E. Karr, of Baltimore, Md., and Marvel, Marvel & Wolcott, of Wilmington, Del., for defendant.

BRADFORD, District Judge. The Pennsylvania Rubber Company, a corporation of Pennsylvania, has brought its bill against the Dreadnaught Tire & Rubber Company, of Delaware, charging the defendant with unfair competition in trade, and praying for an injunction and an accounting. The bill avers, in substance, among other things, that the complainant has long been a manufacturer of rubber tires for vehicle wheels; that, among other things, it produces anti-skid tires for automobile service of a peculiar style and calls them Vacuum Cup tires; that such tires are and have long been widely and favorably known as Vacuum Cup tires or Vacuum Cup Tread tires; that the complainant's trade in such rubber tires is large and valuable to it; that the name Vacuum Cup is and long has been established in the rubber tire industry as the name of the complainant's product only; that its rights therein and connected therewith have been universally recognized and respected; that the defendant recently and since the acquisition by the complainant of its rights above referred to has put upon the market anti-skid automobile tires of substantially the same peculiar style as the complainant's above referred to, and marked and advertised and is marking and advertising them as Vacuum Tread tires; that the effect of such action on the part of the defendant is to lead the purchasing public to believe that such tires so called, marked and advertised, are the product of the complainant; that the defendant's agents

and retail dealers in the defendant's tires have sold the same as and for the complainant's Vacuum Cup tires; that the defendant's intention in adopting the words Vacuum Tread as and for its tires has been and is to take advantage of the reputation acquired by the complainant in its manufacture and sale of Vacuum Cup tires, and thereby to represent its tires as the tires made by the complainant; that the complainant has given the defendant written notice of its rights in the premises and requested that defendant's acts herein complained of cease; and that while the defendant has acknowledged the receipt of such notice the acts complained of continue. The complainant prays that the defendant, its officers, etc., be enjoined from selling or offering for sale any vehicle tires under the name Vacuum Tread or under any other name so nearly resembling the name Vacuum Cup as to cause confusion in trade and from selling vehicle tires of the defendant's manufacture in response to orders for Vacuum Cup tires or for tires under any name so closely resembling the name Vacuum Cup as to cause such confusion; that damages be awarded to the complainant to be computed by a master; and that an account thereof be taken. The defendant in its answer denies that the tires made by it are of substantially the same peculiar style as the complainant's tires, or that the purchasing public is being misled in the premises either by the style of the tire or the words used descriptively of them or otherwise, or that the defendant's agents and dealers with its knowledge or consent have sold its tires as and for the tires of the complainant, but on the contrary avers that the defendant's tires are of a pattern, color, design and style so different from those of the complainant as to be easily and readily distinguishable from them; that the color of the complainant's tires is brown while that of the defendant's is light gray; that the defendant's tires are marked, advertised and sold as "Dreadnaught Vacuum Tread Tires"; that they are sold at a lower price than the complainant's tires and are better than them; that while the complainant's tires are guaranteed to give but 4,500 miles of service those of the defendant are guaranteed to give 5,000 miles of service; that the intention of the defendant has been to distinguish its tires from any other tire and to build up a separate trade and a valuable good will, founded upon a superior tire at a lower price; that the use of the word "Vacuum" is not new but has been used descriptively when applied to the various makes of tires wherein the principle of a vacuum or suction is used to prevent skidding; that the word "Tread" is a term universally applied to that portion of a pneumatic tire which comes in contact with the roadway; that automobile tires are known to the purchasing public by the name of the manufacturer thereon and not by the terms descriptive of their various rough treads; that the defendant's tires are advertised and marked in large letters of distinctive design "Dreadnaught"; that the complainant advertises tires bearing the monogram "V C" together with the words "Oil-Proof, Vacuum Cup, Non-Skid," while the defendant's tires bear the words and are advertised as "Dreadnaught Vacuum Tread" tires, the word "Dreadnaught" always appearing prominently and conspicuously; and that the defendant is in good faith engaged in the manufacture and sale of automobile tires in Baltimore,

and the sale of the same throughout the country, and is employing in the said industry large numbers of men.

[1] It is somewhat remarkable that, while the counsel for the complainant, both in their oral argument and in their printed brief, have strenuously insisted that the evidence presents a case of infringement of a common law trade-mark consisting of the words "Vacuum Cup," as well as that of unfair competition in trade, the term "trade-mark" does not once occur in the bill, and from beginning to end there is not the slightest suggestion in it that the words "Vacuum Cup" denote anything of the kind. The case made by the bill and denied by the answer is one of unfair competition in trade pure and simple. The bill does not attempt to set forth the essential elements or prerequisites of a trade-mark. There is not even any allegation that the complainant was the first to adopt and exclusively appropriate the words "Vacuum Cup" in connection with rubber anti-skid tires, or in any other connection. The bill evidently was prepared diverso intuitu, and the claim now made of a trade-mark consisting of the words "Vacuum Cup" strongly impresses this court as an afterthought. There are several facts which confirm this impression. A short time prior to the institution of this suit and as a preliminary to it the counsel for the complainant wrote to the defendant, August 3, 1914:

"Our client, Pennsylvania Rubber Company, lays before us the information that you are advertising and selling tires under the phrase 'Vacuum Tread.' We write to give you notice that the Pennsylvania Company considers the phrase 'Vacuum Tread' such a near resemblance to the phrase 'Vacuum Cup' as to be calculated to deceive, and that they will not countenance other advertisement and sale of tires under the name 'Vacuum Tread.'"

If the counsel for the complainant understood or had been informed that the defendant in using the words "vacuum tread" was infringing any supposed trade-mark right of the complainant in or to the words "vacuum cup" in connection with the manufacture and sale of the complainant's product, it seems unaccountable that in the above letter, written shortly before the filing of the bill and intended to complain of the alleged grievance or wrong suffered by the complainant at the hands of the defendant, there should not have been the slightest reference to trade-mark infringement, and that the communication should have had reference exclusively to unfair competition in trade. Further, it does not appear from the evidence that the complainant in any circular, advertisement, letter or other communication before the court at any time stated directly or indirectly that it had a trade-mark consisting of the words "vacuum cup" in connection with its tires, or in any other connection. It is true that the complainant is the owner of a trade-mark, registered February 20, 1912, which is applied to its tires by being embossed in the substance thereof, and also by being affixed to such tires or the package containing them by means of a printed label bearing it; the trade-mark consisting of a monogram composed of the capital letters V and C arranged in peculiar and characteristic form. But it is not charged or intimated by the complainant that this trade-mark has been infringed by the defendant or through its procurement, or by any other person or persons.

The Vacuum Cup tire has a tread on which there is a series of rubber cups extending in four or five rows around and circumferentially of the periphery of the tire, by means of which when the tire is in use a sucking action is set up tending to prevent skidding. The words "vacuum cup" as applied by the complainant to its anti-skid rubber automobile tires is used purely in a descriptive sense. This is the natural and obvious meaning of the phrase when so applied. That it is employed in such descriptive sense appears, not only from sundry statements made by or on behalf of the complainant, but from the manner in which the words "vacuum" and "suction," and other equivalent expressions, have been used in connection with treads of rubber tires and their construction in patent descriptions and other documents pertinent to the subject-matter of skidding, both before and after the adoption and application of the phrase by the complainant in 1909. A "vacuum cup" is equivalent to a "suction cup." A vacuum, either total or partial, in a rubber cup necessarily results in suction, and no suction exists save through a vacuum, total or partial. The complainant's expert Browne, in answer to the question, "What is the difference between 'vacuum cup' and a 'suction cup'?" answers, "There is no difference;" and further states that "suction is practically the same as vacuum; that is to say, they both of them involve rarefication of air. Perhaps, technically speaking, 'suction' is the effect of 'vacuum,'" and that they are "substantially synonymous." The general manager of the complainant testifies as follows:

"X. Are the words 'Vacuum Cup' descriptive of your tire? A. I should think it was, yes. X. A descriptive name of it? A. Yes, I think it is descriptive. X. Will you kindly explain to the court what the function of the cup is, and what it does? A. In creating a vacuum—I could best explain it, I think, by saying that the action of the cup is exactly the same as the action of the little patented hat holders that were out as novelties. Most every one has seen those. It had a little hook on the end of a little cup, and you placed it against the window, or any smooth surface, and it held. In creating a vacuum the cup grips the surface of the road. X. It must create a vacuum to grip the surface of the road, mustn't it? A. That is the principle, yes."

The Motor for January, 1912 (Complainant's Exhibit No. 9), states with respect to the Vacuum Cup tread manufactured by the complainant:

"This tire obtains its name from the shape of the tread, which is formed from a series of thick rubber cups set close together. These are so designed that they obtain a suction hold on the road surface and prevent any tendency to skid on wet asphalt or other slippery surfaces."

The Motor Age of January 30, 1913, offered in evidence by the complainant (Exhibit No. 11) states:

"In addition to the plain tread, the non-skid tire known as the Vacuum Cup tire, characterizes the Pennsylvania Rubber Co.'s products. The tread of the Vacuum Cup is formed of a series of rubber cups, four in a row, extending around the tire. There is a suction action set up when the tire is in use on a motor car and this is said to prevent any tendency to skid."

Automobile Topics of January 14, 1911 (Complainant's Exhibit No. 5), states:

"Pennsylvania clincher tires in plain and vacuum cup treads as well as aeroplane tires are shown by the Pennsylvania Rubber Company of Jean-

nette, Pa. The vacuum cup tread tire is made of Para rubber reinforced with Sea Island cotton fabric. It gets its name from the series of raised discs on the tread; these are semi-spherical in shape and at the axis they are indented like a cup, hence their name."

Automobile Topics of January 13, 1912 (Complainant's Exhibit No. 8), says of the tread of the Vacuum Cup tires:

"This tread consists of five circular rows of cup-shaped rubber projections surrounding the surface of the tire. The individual cups of adjoining rows are staggered, and each is moulded on a tread of regular thickness so that the amount of rubber used is increased, rather than diminished by the projections and indentations. These cup-shaped projections are designed to hold the road surface with which they come in contact with a suction grip due to the fact that the pressure of the weight forces the air out of the hollow space. This prevents skidding and forward slipping," etc.

So the complainant in an advertisement in the Motor for May, 1913 (Defendant's Exhibit No. 33), relative to its Vacuum Cup tires, says that "the suction hold of the vacuum cups, guaranteed to prevent skidding on wet or greasy pavements," etc. Also in an advertising pamphlet (Defendant's Exhibit No. 29) the complainant says with reference to its Vacuum Cup tread:

"The suction principle of skid prevention, reduced to practice through the massive vacuum cups moulded on the tread, has fully vindicated our original claim for having invented the only genuinely effective non-skid tires."

The descriptive portions of numerous patents, domestic and foreign, furnish convincing evidence of the descriptive character of the phrase "vacuum cup" as applied to the treads of rubber tires; the matter so set forth being required by law to be truly descriptive. In British patent No. 20,669, A. D. 1896, for improvements in covers for pneumatic tires (Defendant's Exhibit No. 13), it is stated:

"Our improved cover effectually prevents slipping, as the ring-like projections form suckers when wet, the center line of them coming in contact with the road, or track when going straight, and the side lines when turning a corner, thus affording the rider perfect safety at all times."

In patent No. 582,194, granted in 1897 (Defendant's Exhibit No. 11), for a pneumatic tire reference is made in the description to "the grip resulting from the rarefied air in the cells due to the compression of the walls of the cells, which causes a partial vacuum to be produced, so that the suction resulting therefrom will establish a firm hold of the tire on the ground, floor, street or other place where it rests, preventing lateral slipping as well as slipping in the direction of travel." In British patent No. 4,790, A. D. 1905, for improvements in tread surfaces for motor car, cycle and like vehicle tires (Defendant's Exhibit No. 12), it is said:

"I adopt a series of cup shaped projections around the periphery of the tyre, the diameter of each projection to be the width of the road tread of the tyre to which it is attached. Each projection to be separated by a space sufficient to allow the expansion of each cup as they come in contact with the road. Each cup acting independently of each other creates a suction or vacuum sufficiently holding to keep the wheel in a straight course."

In patent No. 908,275, granted in 1908 (Defendant's Exhibit No. 18), for improvements in tires, the description contains the following statement:

"This invention relates to non-skid tires which are provided with circular recesses in the tread to act as suction chambers."

In patent No. 917,612, granted in 1909, for an anti-skidding tire (Defendant's Exhibit No. 15), reference is made to recesses in the tread of the tire which "act as suction chambers when coming in contact with the road," etc. In patent No. 928,868 (Defendant's Exhibit No. 17), granted in 1909, it is said:

"The object of the present invention is to provide a pneumatic or other rubber tire with a tread surface possessing the advantages of the continuous flat tread surface, but which avoids the above mentioned disadvantages, and which further enables recesses or the like to be provided in the tread at intervals so that a suction action can be set up to increase the resistances to skidding."

In patent No. 929,632 (Defendant's Exhibit No. 28), granted in 1909, for a tire tread provided with rubber cups, each cup as the tread rolls over the roadway was recognized and claimed as "standing alone and acting independently from the others in creating vacuum and maintaining a suction contact with the road." It is as unnecessary as it would be tedious to refer to other advertisements or patents in support of the plain proposition that the phrase "vacuum cup" as used in connection with the complainant's non-skid rubber tires, is not an arbitrary or fanciful expression or symbol, forming the legitimate subject-matter of a common law trade-mark, nor merely suggestive, but is truly and purely descriptive. It should be sufficient to accept the statement contained in Complainant's Exhibit No. 5 touching the "Vacuum Cup" tread tire:

"It gets its name from a series of raised discs on the tread; these are semi-spherical in shape and at the axis they are indented like a cup, hence their name."

It is admitted that this case is not controlled or affected by the act of February 20, 1905, touching the registration of trade-marks (33 Stat. 725), or any of its amendments, and that the question of trade-mark or no trade-mark is not determined by any statutory enactment. It is further admitted that the defendant has a right to manufacture and sell rubber automobile tires belonging to the same class and substantially the same in construction and operation as the complainant's tire, if it does not use the word "vacuum" in connection with them. In other words, the contention is that while the defendant is at liberty to make and sell the article it cannot designate it by a phrase, not merely suggestive, but truly and peculiarly descriptive of its construction and operation. On the settled principles of trade-mark law this contention, I think, cannot be sustained. The complainant was not entitled to appropriate and monopolize to the exclusion of others descriptive words properly applicable to non-skid rubber tires operating by vacuum or suction. At and before the time the complainant adopted the words "vacuum cup" in 1909 that phrase was and ever since has been merely descriptive as applied by it; and the words "vacuum tread" were and are at least equally descriptive and as such open to use by all manufacturers and vendors of rubber automobile non-skid tires. Those phrases were not arbitrary, fanciful, symbolical or merely suggestive, and were not the

subject of any exclusive proprietary right in them as applied to such tires—an essential and distinguishing feature of a trade-mark proper. An instructive case in this connection is British Vacuum Cleaner Co. v. New Vacuum Cleaner Co., 2 L. R. Ch. Div. (1907) 312, where it was held that the words "Vacuum Cleaner" were descriptive and not the subject of exclusive appropriation. There are a number of cases where words or phrases suggestive of the qualities or characteristics of an article, but not descriptive of it or of its function or operation, have been held to be the subject of exclusive appropriation as trade-marks. In Globe-Wernicke v. Brown (C. C.) 121 Fed. 185, Judge Acheson held that the word "Elastic" was not really descriptive of a bookcase or filing cabinet constructed in sectional parts, saying that "in no true sense is such an article elastic"; that the word was merely "figurative" or "suggestive," and hence was the subject of exclusive appropriation as a valid trade-mark. So in Ludington Novelty Co. v. Leonard (C. C.) 119 Fed. 937, Id., 127 Fed. 155, 62 C. C. A. 269, which is admitted by the counsel for the defendant to be "nearer to the case at bar than any other known to us," it was held by Judge Townsend that the word "carroms" as applied to a game played with disks where the object was not to strike two separate disks, but to drive a single one into a pocket or to some particular position on the board on which such game was played, could be appropriated as a trade-mark—"carroms in the strict sense being the case where one ball strikes another, and then, glancing, strikes a third." The circuit court of appeals for the second circuit in affirming the decree below said:

"It by no means follows that because carroms occur during the progress of a game, it can be fairly or intelligently described as a carrom game. Carroms, in the broad sense, occur in tennis, hockey, croquet, curling, polo, and golf. Even in foot ball carroms of an exceedingly strenuous character are not infrequent. But no one, with the slightest reputation for accuracy, would think of employing the word as descriptive of these or other kindred games."

In the foregoing two and in similar cases descriptive words were used in connection with the article to which they were applied arbitrarily in a non-descriptive or inaccurately descriptive sense, and were, therefore, subject to appropriation as trade-marks on the same ground on which mere symbols, fanciful words and figurative expressions may be sustained as such. But the case in hand is not the case of the use of descriptive words in a non-descriptive sense, but purely descriptive. The words "vacuum cup" and "vacuum tread" must be taken in connection with the rubber automobile non-skid tires to which they are applied, and when so taken can be nothing else than descriptive. They are as purely descriptive as "suction cup" or "suction tread" would be. Whatever bearing the use of "vacuum cup" and "vacuum tread" may have upon the question of unfair competition in trade, it seems clear neither of those phrases can constitute a trade-mark. But even on the assumption of the existence of a trade-mark in either of them, the bill, as before stated, does not, directly or indirectly, set up such trade-mark.

[2] The complainant, however, charges and relies on unfair competition in trade on the part of the defendant. The doctrine of unfair

competition in trade rests upon the ground that it is inequitable that one should palm off his goods on the public as those of another. Such unfair competition as distinguished from infringement of trade-marks does not involve the violation of any exclusive right to the use of a word, mark or symbol. A name or phrase may be purely generic or descriptive or indicative only of style, size, shape or quality, and as such open to the public, yet there may be unfair competition in trade by an improper use of such name or phrase. Two rivals in business competing with each other in the same line of goods may have an equal right to use the same name or phrase in connection with similar articles produced or sold by them respectively; yet if such name or phrase was used by one of them before the other, and by association has come to indicate to the public that the goods to which it is applied are of the production of the former or of superior quality or excellence resulting from care or skill observed in their manufacture, production or selection, the latter will not be permitted, with intent to mislead the public, to use such name or phrase in such manner by trade-dress or otherwise as to deceive or be capable of deceiving the public as to the origin, manufacture, ownership, production or selection of the articles to which it is applied; and he may be required when using such name or phrase to place on articles of his own production or the packages in which they are usually sold something clearly denoting the origin, manufacture, ownership, production or selection of such articles, or negativing any idea that they were produced or sold by the former. In determining the question of unfair competition by a manufacturer in imitating the name, label or dress adopted by a competitor under which the article is sold at retail, the material inquiry is, not so much whether jobbers or dealers would be deceived, but whether the resemblance is such as is calculated and intended to deceive the ultimate purchaser of ordinary intelligence using ordinary care. And it should be borne in mind that while it is a wholesome doctrine that equity will restrain unfair competition in trade, it should, as stated by the circuit court of appeals for this circuit in Lare v. Harper & Bros., 86 Fed. 481, 30 C. C. A. 373, be "applied with caution, lest, through possible misapplication, healthful and honorable competition be defeated." Deferring for the moment the consideration of the disposition of its "seconds," has the defendant otherwise been guilty of unfair competition in trade? The Vacuum Cup tire of the complainant has on each of its sides in raised rubber letters the words "Pennsylvania Vacuum Cup Oil-Proof" preceded and followed by the above mentioned monogram consisting of the capital letters "V" and "C," and also the words "Pennsylvania Rubber Co., Jeannette, Pa.," and numerals indicating the dimensions of the tire. The words "Pennsylvania Vacuum Cup" are in large and prominent letters and are naturally the first to be noticed by any one examining or glancing at the side of the tire. The "Vacuum Tread" tire of the defendant has on one of its sides in raised rubber letters the words "Made by The Dreadnaught Tire & Rubber Co., Baltimore, Md.," and numerals indicating the dimensions of the tire; and on the other side of the tire, also in raised rubber letters, the words "Vacuum Tread" and similar numerals. The words "The Dreadnaught Tire & Rubber Co." and "Vacuum Tread" are in

large and prominent letters and are naturally the first to be noticed by any one examining or glancing at the sides of the tire. Even aside from the evidence in the case I do not perceive how any one not grossly ignorant or careless could be misled by anything appearing on the defendant's tire into a belief that it was the tire of the complainant. Certainly the words "Made by The Dreadnaught Tire & Rubber Co." were not placed on the defendant's tire for the purpose of deceiving. Those words are virtually a bold announcement that the tire is not the tire of the complainant, and are sufficient to so inform any reasonable purchaser who keeps his eyes open when buying a tire not enclosed in its package. The package containing the complainant's tire has on each side in large and unmistakable type the word "Pennsylvania" in connection with the monogram hereinbefore mentioned. The package containing the defendant's tire is of a different color and has running completely around its periphery the words and figures "Dreadnaught Tires 5000 Miles" several times repeated. It is quite as difficult to conceive that any ordinarily intelligent and careful purchaser should be misled by the package of the defendant into a false belief as to its contents as that he should be deceived by seeing the defendant's tire when unwrapped. There is not the slightest evidence so far as the appearance of the defendant's tire or its package is concerned of any design or intention on its part that either of them should be mistaken for the tire or package of the complainant. It is further to be observed that it is reasonable to expect closer attention on the part of a retail purchaser to such articles as automobile tires than to pocket knives or packages of chewing gum. Further, nowhere in the circulars, advertisements or other literature of the defendant is there disclosed anything intended or calculated to deceive or create confusion in the minds of the purchasing public as to the origin or ownership of its tires. Distinguishing words are so used as to prevent deception or misunderstanding. Still further, it does not appear from the evidence that there was any case in which one desiring to purchase the complainant's tire was misled into a belief by the appearance of the defendant's tire or its package that the defendant's tire was that of the complainant. I am satisfied that unless in connection with the sale and disposition of the defendant's "seconds" the bill cannot be sustained.

[3, 4] It appears from the evidence that the defendant sells its "seconds" to "The Tire Store" in Greensburg, Pennsylvania, and that The Tire Store disposes of them to various customers. This store is at the distance of only a few miles from Jeannette where the manufacturing plant of the complainant is situated. On the front of the store there are two large signs, one of them bearing the words "Greensburg's Original Factory Seconds Tire Store," and the other the words "The Tire Store Automobile Tires Factory Seconds Vacuum and Plain Treads Standard Make Guaranteed Tires Some Prices." A "second" is a tire which is defective in manufacture and sold without guarantee. Adjoining The Tire Store and fronting on the same street there is another store where the complainant's Vacuum Cup tires are sold. The building has signs on its front bearing the words "Greensburg Tire & Retreading Co." and "Vacuum Cup Tires." It does not appear that any of the defendant's Dreadnaught Vacuum

Tread Tires, save "seconds," were sold at the above mentioned tire store. The evidence shows that while it was the custom of automobile rubber tire manufacturers in selling or otherwise disposing of their "seconds" either to brand them with the word "Second," or to remove and obliterate from the tires the name of the manufacturer and of the tire, the defendant did neither; but on the contrary omitted to so brand its "seconds," and while removing and obliterating the words "Made by The Dreadnaught" and "Baltimore, Md.," left thereon the words "Tire & Rubber Co." and "Vacuum Tread." The circumstance that the defendant's "seconds" were sold to consumers by The Tire Store, and not by the defendant directly, is immaterial; for it is well settled that on the issue of unfair competition in trade the same liability will exist where the manufacturer puts it within the power of a dealer to deceive the public and the public is deceived as where the manufacturer directly accomplishes that result. In Lever v. Goodwin, L. R. 36 Ch. Div. 1, a decree made by Mr. Justice Chitty in favor of the complainant in a case of unfair competition in trade was affirmed. In his decision he well said:

"Now it has been said more than once in this case, that the manufacturer ought not to be held liable for the fraud of the ultimate seller—that is, the shop keeper or the shop keeper's assistant; but that is not the true view of the case. The question which I have to try is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers."

Notwithstanding certain evidence offered by way of explanation of the course pursued by the defendant in the sale and disposition of its "seconds," I am satisfied that it was calculated, if not designed, to mislead the purchasing public as to their origin, and that the defendant is answerable for unfair competition in trade with respect to them.

[5-8] It is contended, and there is evidence to show, that on a certain occasion a "Vacuum Cup Clincher Casing" was, by the procurement of the complainant, ordered by one Hanse, as a dealer in Long Island, of one Pagani, the general sales agent of the defendant company with an office in New York, and that the order was filled with a Dreadnaught Vacuum Tread tire by the Rubber Tire Accessories Company in that city, a distributor for the defendant company. The complainant attaches to this transaction a degree of importance to which it is by no means entitled. The order did not specify a "Pennsylvania Vacuum Cup" tire. Accompanying the order Hanse sent a card on which he stated that "Arrangements have been made with the Pennsylvania Rubber Co., whereby he can furnish at short notice Pennsylvania Oil Proof Vacuum Cup * * * Casings," etc. There is evidence on the part of the defendant, given by Pagani, that he supposed that the order was given for one of the defendant's tires, for the reason that as Hanse represented himself as having made arrangements, as above quoted, with the complainant, he, Pagani, did not believe that an order would have been given to the defendant or its distributor for any other than one of its own tires. This seems to be a reasonable and natural explanation of the transaction, especially in view of the facts that the order did not mention a Pennsylvania

Vacuum Cup Tire; that the word "clincher" is in raised letters on the defendant's tire as well as on that of the complainant; and that the defendant's tire contains a vacuum cup as well as that of the complainant. Under these circumstances I am unable to find any fraud in this transaction. Fraud is not a matter of mere surmise but must be satisfactorily proved; and here the proof is lacking. Indeed, were it otherwise I should not be prepared to hold that an isolated act of fraud for which the law would furnish an appropriate remedy would justify a general restraint of a legitimate business. So there is evidence upon which the complainant lays great, and, I think, unwarranted stress, tending to show that on a certain occasion a telephonic order was by the procurement of the complainant given by one Painter to The Tire Store for a "Vacuum Cup" tire. This order was given August 4, 1914, and on the same day a letter was written by Painter to The Tire Store in which he ordered a "Pennsylvania Vacuum Cup Second Tier" [Tire]. The letter admittedly related to the same subject as the telephonic order. One of the defendant's Vacuum Tread "seconds" was sent to Painter. There is a serious conflict in the evidence on the point whether the defendant's "second" was sent to Painter pursuant to the telephonic order before the receipt by The Tire Store of the above mentioned letter, and also as to the exact purport of the telephonic order. The testimony of Farr who received that order at The Tire Store substantially differs from that of Painter, who gave it, as before stated, by procurement of the complainant. Farr states that Painter asked him "whether we had a Vacuum Cup Tire," and "I told him we did not, but we had a Vacuum Tread tire, in a second, made in Baltimore"; that "he asked me whether we had a 32 x 3½," and "I told him to hold the phone a minute until I could look"; that "I went to the pile and looked and I returned to the phone and told him we had. I told him the price, and he asked me whether we would ship him one"; that "I told him I would" and "shipped him a 32 x 3½ Q. D. Vacuum Tread second"; and that it was shipped sometime in the afternoon of the same day. It appears from the evidence that none of the complainant's "seconds" were sold at The Tire Store. Under the circumstances, and especially in view of the specific and natural character of Farr's testimony, I am unable to find that fraud was practiced in the furnishing to Painter of one of the defendant's instead of one of the complainant's "seconds." The Hanse and Painter transactions above mentioned are the only instances in which there has been an attempt to establish fraud in fact on the part of the defendant. But for the reasons hereinbefore expressed, although I am unable to discover that actual fraud was practiced by the defendant with respect to the disposition of its "seconds," I am satisfied that the defendant is answerable for unfair competition in trade with respect to them, and that the complainant is entitled to a decree enjoining and restraining the defendant from selling or furnishing for sale, or permitting to be sold, its "seconds" of the Dreadnaught Vacuum Tread tires without the words "Made by The Dreadnaught Tire & Rubber Co." in raised letters on the side of such tires, unless the words "Vacuum Tread" be first removed and obliterated, or from directly or indirectly stating or holding out that its

"seconds" are the "seconds" of the Vacuum Cup tires of the complainant; the costs to be equally divided between the parties. No accounting will be decreed for the reason that it does not appear that any one desiring to obtain the complainant's tire was misled into the purchase of one of the defendant's tires for that of the former.

A decree for the complainant in accordance with this opinion may be prepared and submitted.

AMERICAN SURETY CO. OF NEW YORK v. SANDBERG et ux.

(District Court, W. D. Washington, S. D. July 3, 1915.)

No. 1605.

1. INDEMNITY ⇐11—LIABILITY OF INDEMNITOR—GROUNDS.

A surety, against which a judgment has been rendered for default of the principal, may, without showing payment of the judgment, recover from an indemnitor, who has agreed to save the surety harmless against every demand and judgment, and place the surety in funds to meet every demand.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 21–25; Dec. Dig. ⇐11.]

2. STIPULATIONS ⇐14—OPERATION—AMENDMENT OF PLEADING.

The effect of a stipulation between a surety and its indemnitor as to surety's items of expense incurred in defending a suit against it for default of the principal is to amend the complaint, setting forth the contract of indemnity and averring the rendition of judgment against the surety for a specified sum.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. ⇐14.]

3. EVIDENCE ⇐349—RECORDS OF JUDICIAL PROCEEDINGS—AUTHENTICATION—STATUTORY PROVISIONS—APPLICABILITY.

Rev. St. § 905 (Comp. St. 1913, § 1519), providing for the authentication of the records of judicial proceedings of the courts of any state or territory, applies only to the authentication of records of judicial proceedings in the states and territories, and does not provide for the authentication of judicial proceedings in foreign countries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1384–1387; Dec. Dig. ⇐349.]

4. PLEADING ⇐122—DENIAL OF MATTERS ON INFORMATION AND BELIEF—PRESUMPTIONS.

To deprive a defendant of the right under the Code of Washington to interpose a denial on information and belief, the matter so denied must be presumptively within his knowledge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. ⇐122.]

5. PLEADING ⇐122—DENIAL OF MATTERS ON INFORMATION AND BELIEF—PRESUMPTION—"ACCESS TO PUBLIC RECORDS."

A defendant has such presumptive knowledge of his personal acts or those of his agent, or of public records to which he has access, or allegations of rendition of judgment against him, as to deprive him of the right under the Code of Washington to interpose a denial thereof on information and belief; but a defendant is not presumed to know matters of record in foreign countries, and the existence thereof he may deny on information and belief, the right of "access to public records" including, not only

a legal right of access, but a reasonable opportunity to avail oneself of the same.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 249–252; Dec. Dig. ⊂=122.]

6. PLEADING ⊂=121—DENIAL OF MATTERS ON INFORMATION AND BELIEF—PRESUMPTION.

A citizen and resident of the state of Washington may, on information and belief, deny the existence of a judicial record of the Supreme Court of British Columbia, for, though it may be presumed that they are public records, it is not reasonable to require him to inform himself of the contents thereof, to qualify himself to answer in a suit against him in the United States.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 245–248; Dec. Dig. ⊂=121.]

7. INDEMNITY ⊂=14—LIABILITY OF INDEMNITOR—ESTOPPEL.

An indemnitor of a surety, who has notice of the pendency of an action against the surety on his bond, and who has been called on to defend is estopped, when sued on his indemnity, to deny the conclusiveness of judgment rendered.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. ⊂=14.]

8. INDEMNITY ⊂=15—LIABILITY OF INDEMNITOR—EVIDENCE.

An indemnitor of a surety on a bond of a contractor for work in British Columbia, who was not made a party to an action in British Columbia against the surety on the bond, and who had nothing to do with the conduct of the action, may insist on strict proof of the judgment against the surety relied on as a basis for recovery, for he is not presumed to have knowledge of the records of courts of foreign countries.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36–40, 42–47; Dec. Dig. ⊂=15.]

9. EVIDENCE ⊂=349—JUDICIAL RECORDS—FOREIGN COUNTRIES—AUTHENTICITY.

A certified copy of a judgment rendered by a court in British Columbia, certified as a true copy by the district registrar, and bearing the impress of what purported to be a seal of the court of British Columbia, and certificate of the consul general of the United States in Vancouver, to the effect that the registrar was duly appointed and commissioned registrar of the province of British Columbia, is inadmissible for want of proper authentication.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1384–1387; Dec. Dig. ⊂=349.]

10. HUSBAND AND WIFE ⊂=268—COMMUNITY DEBTS—WHAT ARE.

A husband and wife had no financial interest in a construction company contracting to construct special work. The husband, without consideration and without the knowledge of the wife, agreed to indemnify the surety of the company at a time the company was constructing a building for the husband and wife, but which building was then substantially completed and paid for by the husband. The husband paid, direct, materialmen furnishing supplies to the company for other construction work. A stockholder of the company promised to indemnify the husband, who brought suit to enforce the agreement. About the time the husband agreed to become indemnitor, he became surety on notes of the company, and later stock of the company was delivered to his attorneys pending investigation as to whether he would, in self-protection, undertake to complete the construction company's work, and he also caused certain property to be deeded over to another company, of which he owned stock, to secure the notes on which he was surety. *Held*, that the liability incurred by the husband as indemnitor was not a community debt, and property acquired by the

husband and wife after their marriage was not under the laws of Washington liable therefor, but the husband was alone liable.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 562; Dec. Dig. ⊂=268.]

At Law. Action by the American Surety Company of New York against Peter Sandberg and wife. Conditional judgment for plaintiff.

W. C. Bristol, of Portland, Or., and Ellis Lewis Garretson, of Tacoma, Wash., for plaintiff.

Bates, Peer & Peterson, of Tacoma, Wash., for defendants.

CUSHMAN, District Judge. Plaintiff sues to recover against the defendants on account of an agreement entered into by the defendant Peter Sandberg to indemnify the plaintiff in giving a bond for the performance by the Wells Construction Company of a certain contract for the construction of a dam and canal in British Columbia for the Powell River Paper Company. Plaintiff alleges the bringing of a suit in British Columbia against it upon the bond, that it called upon the defendant Peter Sandberg to defend that action, and that a judgment was obtained in such action against plaintiff in the sum of $13,632.94. It alleges that, by paragraph 10 of the indemnity agreement, set out below, the defendant Peter Sandberg contracted with the plaintiff in the prosecution of the business of the community consisting of the two defendants, and that the community thereby obtained the benefit of the continuance of the business of the Wells Construction Company, and obtained the postponement of payment and discharge of indebtedness of Peter Sandberg and the community estate and business from liability thereon to said Wells Construction Company. Plaintiff asks judgment against Peter Sandberg and Mathilda Sandberg, his wife, to the extent of her interest, whatever it may be, for $25,000 and interest, and the additional sum of $1,449.85 and interest, the latter item on account of plaintiff's expenses in defending the suit against it in British Columbia.

Defendants, by separate answers, deny that either of them or the community formed by them was interested in the Wells Construction Company's contract with the Powell River Paper Company, and aver that Peter Sandberg signed the application for the sole use, benefit, and accommodation of the Wells Construction Company, without consideration to the defendants, or the community, and not in the prosecution of any business of the community. They deny that Peter Sandberg signed the application with any understanding for the postponement of payment or discharge of any debt to the Wells Construction Company. Defendants interpose general denials to other portions of the complaint, and set out the date of their marriage, a description of the community property, and pray for a dismissal of the action, and, in the alternative, that, if judgment be rendered against Peter Sandberg, it be against him individually, and that it be adjudged that the debt is not an obligation of the community, and that it be adjudged that the defendants' property described in the answer is community property not subject to the lien of any judgment rendered.

Plaintiff, in its reply, denies that the defendant Peter Sandberg signed the application for the accommodation of the Wells Construction Company, and avers that he did so for the benefit and profit of both defendants and the community. Plaintiff sets up the recitals of paragraph 10 of the application as representations of the defendant Peter Sandberg that he had an interest in the Wells Construction Company's contract and of the benefit to the defendants of plaintiff's suretyship, by way of estoppel, and alleges that, at the time Peter Sandberg signed the application, the defendants were indebted to the Wells Construction Company to the amount sued for herein. Plaintiff further alleges the giving of notice to Peter Sandberg of the bringing of suit against it in British Columbia, in which notice he was called upon to defend that action, and alleges that the judgment obtained in that action is res adjudicata.

[1] In June, 1910, the Wells Construction Company applied to plaintiff for a surety bond in the amount of $25,000. The application was denied for want of indemnitors. Thereafter, on the 20th of June of the same year, another application was made, signed by the Wells Construction Company and, among other indemnitors, the defendant Peter Sandberg. This application contained the following provisions:

"IV. That the indemnitor will perform all the conditions of said bond, and any and all renewals and extensions thereof, on the part of the indemnitor to be performed, and will at all times indemnify and save the surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the surety deemed necessary), expense, suit, order, judgment, and adjudication whatsoever, and will place the surety in funds to meet every such claim, demand, liability, cost, charge, counsel fee, expense, suit, order, judgment, or adjudication against it by reason of such suretyship, and any and all renewals and extensions thereof, and before it shall be required to pay the same. * * *

"VI. That in the event of the surety deeming it advisable, or of the indemnitor requesting the surety, to prosecute or defend or take part in any action, suit or proceeding, appeal or writ of error, the indemnitor will, on being advised of the surety's intent so to do, or on making such request, place the surety in possession of funds or securities, approved by it, sufficient to defray any costs, charges, or expenses which it may incur in so doing, and to discharge any liability, order, judgment, or adjudication which may result therefrom, or from its said suretyship. The indemnitor will not ask or require the surety to remove, or join in any application for the removal of, any action or proceeding from the state court to the federal court, in any state where such action would in any way affect the surety's license or right to transact business. * * *

"IX. That, should any claim or demand be made upon the surety by reason of such suretyship, the surety shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise, or settlement of any claim, demand, liability, cost, charge, expense, suit, order, judgment, or adjudication by reason of such suretyship, shall be prima facie evidence of the fact and of the extent of the indemnitor's liability therefor to the surety.

"X. That the surety also looks to and relies upon the property of the indemnitor, and the income and earnings thereof, and shall also at all times have the right to rely upon, look to, and follow and recover out of the property which the indemnitor now has or may hereafter have, and the income and earnings thereof, for anything due or to become due it, the surety, under this agreement, such suretyship having been by the surety entered into for the special benefit of the indemnitor and the special benefit and protection of the indemnitor's property, its income and earnings; the indemnitor being substantially and

beneficially interested in the award and performance of such contract and obtaining such suretyship."

This application was upon a printed form, evidently prepared by the plaintiff. Upon this application, plaintiff executed its bond in the sum of $25,000 to the Powell River Paper Company, conditioned for the indemnifying of that company against any failure on the part of the Wells Construction Company to perform its contract. The evidence introduced shows that the defendants were married in 1894; that all of the real property described in their answers is community property. In view of the terms of paragraph VI of the application above set out, it is not necessary for the plaintiff to prove that it has paid or satisfied the judgment obtained against it in order to prevail.

[2] Plaintiff and defendants have stipulated as to plaintiff's items of expense incurred in defending the suit in British Columbia in the amount of $1,556.20. The effect of this stipulation is to amend the complaint to that extent.

[3] A certified copy of the judgment obtained against it in British Columbia was offered by the plaintiff upon the trial. It was objected to as not properly certified or authenticated. The copy purports to be certified as a true copy by A. B. Pottenger, district registrar. There is impressed upon the copy what purports to be the seal of the Supreme Court of British Columbia. A certificate is attached of David L. Wilber, consul general of the United States of America in Vancouver, B. C., to the effect that A. B. Pottenger is a duly appointed and commissioned registrar of the province of British Columbia. The objection made is that there is no certificate by the consul general, or otherwise, that the signature to the copy is that of A. B. Pottenger. Further, that there is no certificate that A. B. Pottenger is the legal custodian of such records and that there is no certificate that the purported seal is the seal of said court.

Section 905, R. S., applies only to the authentication of records of judicial proceedings had in the states and territories. It is conceded that there is no statute providing for the authentication of judicial proceedings in foreign countries. No treaty touching the question has been called to the court's attention. Justice Gray in Hilton v. Guyot, 159 U. S. 113, 228, 16 Sup. Ct. 139, 40 L. Ed. 95, intimates that there is neither statute law nor treaty on the subject of foreign judgments.

[4] The defendants in their answers deny upon information and belief the allegation of the complaint as to the rendition of the judgment by the Supreme Court of British Columbia against the plaintiff. Plaintiff now contends that, the judgment being a matter of public record, the denial is insufficient. Plaintiff did not move against this denial in the answer, but raises the question upon the argument after the introduction of all the evidence.

The authorities are not uniform upon the question of whether it is incumbent upon the plaintiff to move to strike out such denial as sham in order to take advantage of such a situation. The weight of authority appears to be that he must do so. 1 Encyc. Pl. & Pr. 812, note; 31 Cyc. 200, 201, note 8. In the case of Wallace v. Bacon (C. C.) 86 Fed. 553, before Judge Ross, the matter came up on motion to strike

the denials from the answer. Objections of a not dissimilar nature have been held waived by not moving against them as a step preliminary to trial. Shepherd v. Baltimore, etc., R. R. Co., 130 U. S. 426, 433, 9 Sup. Ct. 598, 32 L. Ed. 970; Keator Lbr. Co. v. Thompson, 144 U. S. 434, 12 Sup. Ct. 669, 36 L. Ed. 495; Town of Denver v. Spokane Falls, 7 Wash. 226, 229, 34 Pac. 926; Howard v. Hibbs, 22 Wash. 513, 516, 61 Pac. 159. In Peacock v. United States, 125 Fed. 583, 60 C. C. A. 389, the motion to strike out a denial, where there was presumptive knowledge on the part of the defendant, was held to be the appropriate remedy. Where a motion to strike lies, a failure to interpose it is held to be a waiver. 31 Cyc. 718, 2. In order to deprive the defendants of the right, under the Code, to interpose such denial, the matter so denied must be presumptively within his knowledge. 1 Encyc. Pl. & Pr. 811; 31 Cyc. 200.

[5] The defendant has been held to have such presumptive knowledge, and not allowed to so deny allegations as to his personal acts, or those of his agent, or concerning public records to which he has access, or allegations that a judgment had been rendered against him. 1 Encyc. Pl. & Pr. 813, 814. No case has been called to the court's attention where it has been held that the defendant is presumed to know matters of record in foreign countries, and no persuasive reason has been advanced for so holding. The public record, the existence of which he may not deny upon information and belief, is a public record to which he has access, as the rule is stated in the Encyclopedia of Pleading and Practice above cited. A more exact statement of the rule is found in 31 Cyc. 200:

"Nor can facts which are readily accessible, by reason of being public records, or otherwise, be put in issue by such form of denial."

Having access in the sense in which these words are used includes, not only the legal right of access, but a reasonable opportunity to avail oneself of that right.

[6] In the complaint it is alleged that both of the defendants are, and were at all times in question, citizens and residents of the state of Washington. It may be presumed that the defendants would have the right in British Columbia to examine the records of the Supreme Court—that is, it may be presumed that they are public records of that province; but it is not reasonable to require a citizen of this country to journey to foreign lands to inform himself concerning the contents of public records there in order to qualify himself to answer a suit brought against him in this country.

[7] Having had notice of the pendency of the proceedings and been called upon to defend, defendant Peter Sandberg is now estopped to deny the conclusiveness of any judgment rendered. Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 430; Wash. Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, 719; Compagnie de Navigation Française v. Burley (D. C.) 183 Fed. 168, affirmed 194 Fed. 335, 115 C. C. A. 199.

[8] But, not having been a party to the action in British Columbia, nor shown to have had anything to do with its conduct, he has a right to insist on strict proof of the judgment, unless, in common with all

citizens of this commonwealth, he is presumed to know the contents of the records of the courts of British Columbia. Residents of this country are presumed to have knowledge of its laws and may be presumed to have knowledge of its records, but such does not apply to either the laws or the records of foreign countries. In Wallace v. Bacon (C. C.) 86 Fed. 553, Judge Ross held a defendant in the Southern district of California to have presumptive knowledge of the levying of an assessment by the Comptroller of the Currency against a national bank of the state of Missouri.

It may be said that the records of the Supreme Court of the province of British Columbia are not so distant as the records of which the defendant in that case was presumed to have knowledge; but, unless the fact of their being records of a foreign country is made the test, a party might be held to have presumptive knowledge of the records in Thibet or Patagonia. A party cannot in reason be required to acquaint himself with all the records of the countries of the globe. To draw the line at the boundaries of his own country seems more reasonable than to extend it to the confines of Christendom, or to the countries having the civil or common law, or all. In Oregon Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.) 22 Fed. 245, at pages 247, 248, Judge Deady writing the opinion, it is said:

"Now, upon the facts stated in this case, there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britain, by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding, and there is no evidence that it, or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose. Neither is a party under any obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it positively, unless it be to recall and verify that knowledge or information of the matter which he once had and is still presumed to have, but which may have become dim or confused in his mind by reason of the lapse of time or other circumstances. And if such a denial is improperly made, it may be stricken out as sham—manifestly false, in fact. But it is not for that reason either 'frivolous' or 'immaterial.' That depends wholly on the character of the allegation denied. If that is material, the denial of all knowledge or information concerning it is also material."

This case was reconsidered in (C. C.) 23 Fed. 232. While nothing is said in the latter opinion to indicate a change in the rule as announced in the former case, the defendant was not allowed to question plaintiff's corporate existence; the effect of the ruling being that, having contracted with the plaintiff as a corporation, defendant would be estopped to deny its corporate existence. Cowie v. Ahrenstedt, 1 Wash. 416, 418, 419, 25 Pac. 458; Vassault v. Austin, 32 Cal. 597. The latter case is cited with approval in 1 Wash. 419, 25 Pac. 458.

Having reached the conclusion that defendant's denials were sufficient, it is not necessary to determine whether the plaintiff waived its right to object to the form of denial by not interposing a preliminary motion to strike from the answer.

[9] No case has been cited holding a record of a foreign judgment, certified as in this case, admissible in evidence. The only case found that appears to sustain its admissibility is an early case in Vermont.

Woodbridge v. Austin, 2 Tyler, 364, 4 Am. Dec. 740. It was held in this case that the exemplifications of the record of a foreign judicial proceeding would be considered prima facie as correct. The great weight of authority, however, is to the contrary. 23 Cyc. 1611, 1612, note 54.

"In order that a foreign judgment should be admissible in evidence, it is necessary that the exemplification of it which is produced should be duly authenticated. And this authentication should consist of the seal of the court, if it has one, the certificate of the officer in whose custody the record remains, the attestation of the principal judge of the court to the official character of the person certifying, and the whole fortified by the certificate of the executive department of the state or country and the impress of its great seal." 2 Black on Judgments, p. 849; Cruz v. O'Boyle (D. C.) 197 Fed. 824.

No reason is shown for any exception in the present case to the rule embodied in the foregoing.

[10] The defendant Mathilda Sandberg had no knowledge that Peter Sandberg had signed the application to plaintiff for its execution of the surety bond. All of the evidence is to the effect that neither of the defendants had any financial interest in the Wells Construction Company; that Peter Sandberg signed the application at the request of Simon Mettler, an old friend of his. Joseph Wells, the secretary of the Wells Construction Company, also asked him to sign, but he received nothing for so doing. There was no understanding that he should receive anything. The only matter between the defendants and the Wells Construction Company, at the time of signing this application, was that the Wells Construction Company was then constructing a building for defendants. This building was substantially completed and paid for at the time of the signing of this application. It was paid for entirely in cash by Peter Sandberg, and there was no consideration of value passed to either of the defendants on account of the signing of the application, nor was anything contemplated. The Wells Construction Company was then in good financial standing.

Under these circumstances, it is clear that the mere fact that the defendant Peter Sandberg had, at the time of signing the application, other contractual relations with the Wells Construction Company, would not make him other than an accommodation indemnitor, and, of itself, would not make a debt growing out of the indemnity agreement the debt of his wife or the community. The fact that Peter Sandberg paid, direct, certain materialmen furnishing supplies for the construction of the Kentucky Liquor Company building under a contract with the Wells Construction Company is not unusual conduct under such circumstances. His becoming an indemnitor for the Wells Construction Company is inconsistent with the claim that he then feared or believed the Wells Construction Company was not financially sound, and that, thereby, he would protect any community interest in the completion of the Kentucky Liquor Company building.

The community property statute of the state of Washington provides:

"Property not acquired or owned, as prescribed in sections 2400 and 2408 [by gift, devise, or inheritance] acquired after marriage by either husband

or wife or both, is community-property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

Debts incurred by the husband in the prosecution of any business, which, if successful, will result in profit to the community, are community debts. McDonough v. Craig, 10 Wash. 239, 241, 38 Pac. 1034. If all debts incurred by the husband are prima facie community debts, as indicated in the foregoing decision, that prima facie presumption is conclusively overcome by the evidence in the present case, showing that no profit or benefit could result to the community from the act of Peter Sandberg in signing the application or from the transaction or business with which it was connected. In Milne v. Kane, 64 Wash. 254, 116 Pac. 659, 36 L. R. A. (N. S.) 88, Ann. Cas. 1913A, 318, and Woste v. Rugge, 68 Wash. 90, 122 Pac. 988, where the community was held liable for the tort of the husband, it was only so held upon the finding that the tort committed by him was while engaged in a business conducted for the benefit of the community. In McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022, where the community was held liable for the successful fraud practiced by the husband, it was only so held upon a finding that the wrongful profit from the fraud enured to the benefit of the community.

The community is liable where the husband signs an obligation as surety or accommodation maker for a corporation in which he is a stockholder or director; but if not interested in such corporation at or prior to the time of incurring such obligation, the community is not liable. Horton v. Donohoe Kelly Bank Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435; Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540; Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402. The community will be estopped to deny the husband's debt incurred for the benefit of the community and with the wife's knowledge. McGregor v. Johnson, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. But it will not be estopped where the husband incurs the debt without the wife's knowledge, and it is not in the prosecution of community business, and cannot, in the ordinary course, result in any benefit to the community. Brotton v. Langert, 1 Wash. 73, 23 Pac. 688; Gund v. Parke, 15 Wash. 393, 46 Pac. 408; Bird v. Steele, 74 Wash. 68, 70, 132 Pac. 724; Spinning v. Allen, 10 Wash. 570, 39 Pac. 151.

Another one of the indemnitors, a stockholder in the Wells Construction Company, promised to indemnify Peter Sandberg for signing the application in question. Later Peter Sanberg brought a suit to enforce this provision for indemnity. He also, about the time he signed the application in question, became security on certain notes of the Wells Construction Company. Later, after that company got into financial difficulties, its stock was delivered to the attorneys for Peter Sandberg, pending an investigation by him as to whether he would undertake the completion of the company's work in British Columbia in order to save himself. He also caused certain property to be deeded over to a company of which he owned the stock; the object of such transaction being to secure certain notes upon which he had become security. The result would be an indemnification of himself propor-

tioned to the value of the property as transferred. A large amount of evidence has been taken in connection with these later transactions, but nothing more is shown in any of them than an attempt by Peter Sandberg to save himself, so far as he could, from the liability he had incurred on account of the Wells Construction Company. There is nothing in any of these transactions to show in any way a chance of benefit or gain to the community. The effect of lessening the loss flowing from these obligations would not make community business out of his separate affairs.

Plaintiff is entitled to judgment against Peter Sandberg for its expenses, fixed by the stipulation at $1,556.20 and interest thereon. This case having been tried to the court without a jury, at the time the exemplification of the record of judgment was offered in evidence by the plaintiff, and objection made, the record was admitted tentatively, a final ruling being reserved. Having reached the conclusion that the objection should have been sustained, it is clear that failing to rule finally at the time of the offer, the plaintiff may have been prejudiced in that, if such ruling had then been made, plaintiff could have asked for a continuance in order to supply a legal authentication of the copy. The making of findings and final judgment herein will be delayed 10 days to afford the plaintiff an opportunity to move to reopen the case for such purpose.

It is not necessary to determine whether the recital of interest in paragraph 10 of the application estops Peter Sandberg, as he is bound in any event. No right of recovery has been established against Mathilda Sandberg or the community. The debt established is that of Peter Sandberg, and the community real estate is not subject to any lien on account of the judgment herein.

RICE v. WILSON et al.

(District Court, D. Delaware. June 7, 1915.)

No. 335.

1. EQUITY ⟸141—PLEADING FRAUD—ALLEGATIONS OF FACTS.

A bill in a suit founded on fraud must aver particularly the facts constituting the fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 323–330, 333; Dec. Dig. ⟸141.]

2. EQUITY ⟸348—EVIDENCE—FRAUD.

Fraud justifying relief in equity must be strictly proved.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 20, 728–730; Dec. Dig. ⟸348.]

3. CANCELLATION OF INSTRUMENTS ⟸25—GROUNDS—FRAUD.

A court of equity will not rescind a contract for fraud, where the position of the parties has been so altered by the execution of the contract, in whole or in part, that they cannot be restored approximately to their original position and a rescission would work gross inequity, but the wronged party is usually confined to an action at law.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. ⟸25.]

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4. INJUNCTION ⊜147—TEMPORARY INJUNCTION—EVIDENCE—SUFFICIENCY.
In a suit to restrain a buyer of corporate stock from voting the same, or disposing of it, on the ground that the stock was obtained by fraud, and for a return of the stock, evidence *held* not to show such fraud in the procurement of the transfer as to justify a preliminary injunction.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 320–322; Dec. Dig. ⊜147.]

In Equity. Suit by John V. Rice, Jr., against Joseph R. Wilson and another. Motion for a preliminary injunction denied, and restraining order dissolved.

Andrew C. Gray, of Wilmington, Del., for complainant.
Walter L. Sheppard, of Philadelphia, Pa., for defendants.

BRADFORD, District Judge. The matter now before the court for decision is an application for a preliminary injunction in a suit in equity wherein John V. Rice, Jr., a citizen of New Jersey, is complainant, and Joseph R. Wilson, a citizen of Pennsylvania, and Rice Gasoline Rock Drill Company, a corporation and citizen of Delaware, hereinafter referred to as the drill company, are defendants. Rice seeks to restrain, until the further order of the court, Wilson from voting 2,400 shares of the common stock and 600 shares of the preferred stock of the drill company, alleged to have been fraudulently obtained from him by Wilson, at any of its meetings; from selling or disposing of the said shares of common and preferred stock or transferring or attempting to have transferred the same on the books of the company, or otherwise exercising any right therein as owner thereof, and the company from transferring or allowing to be transferred on its books the said shares of common and preferred stock now standing in Wilson's name, or from receiving, accounting, or in any way considering any votes cast at any meeting of the company by virtue of or representing the said shares of stock. The bill prays, among other things, that Wilson be declared to have received the said shares of common and preferred stock as the property of and for the benefit and use of Rice; that Wilson be decreed to assign, set over and return the same to Rice; that the title of Rice in and to the same be quieted and confirmed; that the same be entered on the company's books in Rice's name; and that the company issue to Rice out of the stockholdings of Wilson in the company certificates representing the said shares of common and preferred stock. Rice alleges in the bill that Wilson obtained from him the shares of stock in question by "fraud, artifice and misrepresentation," and avers in substance, among other things, that on or about December 15, 1912, Rice retained Wilson, who is a practicing attorney at law, as counsel to represent him in certain business disputes with one Harris Hammond; that on or about December 16, 1912, Wilson represented to Rice that it would be advisable and necessary to secure, as associate counsel with him, Morgan J. O'Brien, stating that O'Brien, owing to his eminence at the Bar, would be of great value in securing an advantageous settlement of the matters in dispute between Hammond and himself, and further

that by reason of O'Brien's eminence, skill, learning and ability, his services were in great demand, and of great value, and further that in order to secure O'Brien's services it would be necessary for Rice to agree to pay a fee of $25,000 for the services of Wilson and O'Brien relating to the said matters in dispute, the said fee to be equally divided between Wilson and O'Brien; that on or about December 16, 1912, Wilson requested Rice to go with him to O'Brien's offices for the purpose of inducing Rice to believe in and rely upon representations made by Wilson relative to the employment and remuneration of O'Brien; that Rice believing in and relying upon Wilson's representations, consented that Wilson should retain O'Brien in order to secure the benefit of his skill, learning, ability and professional standing, and agreed to pay Wilson as a fee for services to be rendered to Rice by Wilson and O'Brien, in connection with the said matters in dispute, the said sum of $25,000, one-half thereof to be paid by Wilson to O'Brien; that relying upon and believing in Wilson's representations, Rice accompanied him on or about December 16, 1912, to O'Brien's offices, and on arriving there Wilson requested Rice to remain in the general waiting room of said offices, while he, Wilson, went into an inner office; that Wilson returned in a few minutes with another gentleman to whom Rice was introduced but whose name Rice has forgotten, and who was not O'Brien, and no discussion regarding Rice's business was had between Rice and Wilson and the gentleman so introduced to Rice; that Wilson "at various times and repeatedly from December 16, 1912, down to February 10, 1913, falsely and fraudulently represented to your orator that he had retained the services of and secured the cooperation and assistance" of O'Brien in representing Rice in the adjustment of his differences with Hammond; that between December 16, 1912, and February 10, 1913, Wilson falsely represented to Rice that he was giving him legal advice "not alone upon his own judgment and experience but upon the judgment and experience of his reputed associate counsel" and that the advice which Rice received from Wilson was in fact the legal advice of O'Brien, in which Wilson concurred; that the differences between Rice and Hammond were adjusted and settled and the scheme of such adjustment and settlement was falsely represented to Rice by Wilson at various times during the course of the dealings between Rice and Wilson as the adjustment and settlement which was advised and recommended by O'Brien acting in conjunction with Wilson as counsel and attorney for Rice; that during the negotiations for the settlement of the differences between Rice and Hammond, Wilson requested and induced Rice to assume an indebtedness of $6,500 upon the agreement and promise of Hammond to pay $12,500 of the fee agreed to be paid by Rice to Wilson for his own and O'Brien's services; that it was in consequence of and in reliance upon the misrepresentations and artifices of Wilson and the belief arising therefrom on the part of Rice that O'Brien had been retained and was acting as attorney and counsel for him that Rice agreed to pay Wilson a fee of $25,000 to be equally divided between Wilson and O'Brien; that $12,500 of the fee of $25,000 which was assumed by Hammond has been settled by the latter by the payment by him to

Wilson of $2,500 in cash and the assignment of stock of the drill company of the par value of $50,000; that on or about February 10, 1913, in pursuance of his agreement to pay to Wilson the balance of his part of the fee of $25,000, Rice, fully relying upon the representations of Wilson that O'Brien had been associated as counsel for him, and that O'Brien had been acting as such counsel in the settlement of the business differences between him and Hammond, executed to the order of Wilson a promissory note for $12,000 payable on demand on account of the sum of $12,500 due by Rice to Wilson as his share of the fee of $25,000, the balance of $500 having been previously paid in cash by Rice to Wilson, and to secure the above mentioned note of $12,000 Rice assigned as collateral 12,476 shares of the common and 2,500 shares of the preferred stock of the drill company; that from the day on which Rice delivered to Wilson the above mentioned note for $12,000, the latter repeatedly demanded from Rice payment of the same, and on April 30, 1913, Rice still relying upon and believing the representations of Wilson that O'Brien had represented and acted for him, and that he, Rice, had had the benefit of the services of the former in the settlement of his business differences with Hammond, paid and settled the note for $12,000 by assigning and delivering to Wilson the shares of common and preferred stock in question, the said stock being transferred on the books of the company and standing in the name of Wilson; that Wilson did not retain O'Brien as associate attorney and counsel to represent Rice in his business differences with Hammond, and did not pay to O'Brien any money, stock or other valuable thing for services as counsel for Rice, and O'Brien did not perform or render any services or service as counsel for Rice, and Wilson's representations that O'Brien had been retained and had acted as counsel for Rice were false; that in the summer of 1914 Wilson denied to Rice that O'Brien had ever been retained by him, and that he had ever so stated; that but for the artifices and misrepresentations of Wilson, Rice would not have agreed to pay the former a fee of $25,000 nor would he have delivered to Wilson on account of the fee the shares of common and preferred stock in question. Other allegations in the bill are to the effect that the authorized capital stock of the drill company amounts to $2,500,000 divided into $500,000 of preferred and $2,000,000 of common stock, each share being of the par value of $100 and entitled to one vote at the meetings of the company; that all of the said stock has been issued and is outstanding with the exception of 1,500 shares of preferred and 1,000 shares of common stock which are held in the treasury of the company; that Rice has legal title to three shares of the capital stock of the company, and is the equitable owner of 10,000 shares of its common and preferred stock now standing on its books in the name of William H. Bartlett, the same having been transferred by Rice to him in June, 1913, to be held by the latter in trust, Bartlett agreeing to vote the same together with his own stock at all meetings of the company "for their mutual and joint interest, in order to keep control of the voting power on said stock, and by such joint stockholdings control the selection of the directors and officers of the company"; that Rice is a director and the president of the

drill company, and Wilson intends and proposes to vote the said shares of common and preferred stock fraudulently secured from Rice, or to influence the vote of said stock for the election of directors, other than those who might be selected by or agreeable to Rice with intent "to endeavor to have elected as president of the said company some person other than your orator by which the direction of the business and financial affairs of the company will be entirely lost to your orator, and he will be deprived of the salary and emoluments which he would otherwise have as president," etc.

[1-4] The bill abounds in adjectives imputing fraud to Wilson; but mere adjectives of fraud cannot supply the place of the averment of facts constituting the fraud. Fraud must be not only particularly alleged but strictly proved. Even then it does not follow that it will in all cases justify rescission of the contract touching which fraud has been practiced. It is a general, though not a universal rule, that a court of equity will not rescind a contract even on the ground of fraud where the position of the parties has been so altered by reason of the execution of the contract, in whole or in part, that they cannot be restored fully or approximately to their original position and a rescission would work gross inequity. In such cases the wronged party may generally speaking have recourse to an action at law, based upon deceit or fraud in order to obtain redress. It is, however, unnecessary to pursue the inquiry when or under what circumstances rescission of a contract may be declared and enforced by a court of equity on the ground of fraud; for on the proofs before the court contained in the affidavits in connection with the sworn bill and answer, I am convinced that no fraud on the part of Wilson has been established. It is not denied that Rice retained Wilson as his counsel with respect to the matters in dispute between Hammond and himself, or that Rice agreed to pay Wilson $25,000 as a fee for professional services in that connection; or that the adjustment and settlement of such matters in dispute was not wholly successful; or that the sum of $25,000 was a proper charge for the services rendered. Indeed it was admitted by the solicitor for Rice in open court at the hearing that the adjustment and settlement effected by Wilson were just as satisfactory as if O'Brien had taken an active part in that behalf. But it is alleged and claimed in substance by Rice that Wilson at the time of the fixing of the fee agreed to secure the services of O'Brien, and pay him one-half of it and that Wilson fraudulently omitted to secure such services and fraudulently and repeatedly stated to Rice that he had secured them and that O'Brien was taking an active part in the adjustment of the matters in dispute between Rice and Hammond.

In opposition to the contention of Rice, Wilson claims that it was not at any time understood or agreed between him and Rice that O'Brien should be paid one-half of the $25,000 fee or any part of it, but that in case of litigation growing out of the matters in dispute between Rice and Hammond, Wilson would call upon O'Brien for assistance owing to his ability and professional standing, and that no such litigation having occurred O'Brien was not employed by Wilson except with respect to the giving of advice as to the form of the adjustment and settlement between Rice and Hammond, for which ad-

vice Wilson paid and satisfied O'Brien. Aside from the bill, three affidavits have been filed on behalf of Rice by C. Fisk Thompson, who was bookkeeper and general office manager of the Rice Gas Engine Company, of which Rice was vice-president and general manager, Mary Graham Rice, Rice's sister, and Helen A. Flynn, a director of the drill company and employed by Rice as stenographer. Thompson states in his affidavit:

"One evening about December 1912 Mr. Rice decided to retain Joseph R. Wilson, one of the respondents above mentioned, as counsel to look after his interests in the settlement with Mr. Harris Hammond. Mr. Wilson came to Mr. Rice's house in the evening. There were present Mr. Wilson, Mr. Rice and myself in the livingroom at the Bonaparte Park Mansion. Mr. Rice and I both stated to Mr. Wilson the differences existing between Mr. Rice and Mr. Hammond. Mr. Wilson thereupon stated that this was an important case in his estimation, and that there were two ways in which the matter should be handled, namely, either to file three bills in equity, or to handle it in a diplomatic way, and he said that he knew just the man in New York City to associate with him, and mentioned the name of Morgan J. O'Brien, Esq., a practicing lawyer of New York City, stating that he had been for many years the presiding judge of one of the courts in New York City. A few evenings subsequent to this I saw Mr. Wilson upon his return from New York City, and Mr. Wilson said to me, 'Mr. Thompson, I am so anxious to win this case that I have associated with me Mr. Morgan J. O'Brien, one of the biggest lawyers in New York City, a man who was for thirty years the presiding judge of a court in New York City (the name of which he mentioned but which I have forgotten) and I am going to pay him one-half of my fee.'"

Rice's sister in her affidavit states:

"During the latter part of January, A. D. 1912, I was visiting my brother at the Bonaparte Mansion at Bordentown, New Jersey, and there learned that certain business disputes between my brother, John V. Rice, Jr., and Harris Hammond were approaching a settlement. Joseph R. Wilson, one of the respondents in the above entitled cause, was present and acting as my brother's attorney and discussed with my brother, the said John V. Rice, in my presence, the terms of said settlement. I expressed amazement at the amount of the fee for legal services, it being stated as twenty-five thousand dollars, when the said Joseph R. Wilson stated to me that Morgan J. O'Brien had been associated as counsel with him, and had acted as my brother's counsel in the difficulties between him and the said Harris Hammond, and that because of Mr. O'Brien's great legal learning and standing as a member of the Bar he could not be obtained as counsel except upon the payment of a large amount of money, and that the proposed fee of twenty-five thousand dollars was to be shared between the said Morgan J. O'Brien and the said Joseph R. Wilson."

Helen A. Flynn in her affidavit states that the letter shown in Exhibit E attached to the answer of Wilson was typewritten by her at Wilson's dictation, and at his request signed by Rice. I attach little or no importance to the last mentioned affidavit. Wilson in paragraph 12 of his answer had erroneously stated that the letter disclosed in Exhibit E was in the handwriting of Rice, but subsequently in an amendment to his answer states that the error was occasioned by a mistake on the part of his counsel who drafted the answer, in confusing "the aforesaid letter of February 10, 1913, with the previous letter of January 7, 1913, a copy of which is appended to the answer marked Exhibit C," Wilson failing to notice the error prior to verifying the answer. Rice in the letter contained in Exhibit E, however, and addressed to Wilson, states:

"This is to certify that the settlement made to-day is in complete compliance with the agreement of settlement made by you with Mr. Hammond, January 6, 1913, and is satisfactory in every way to me."

It does not directly or indirectly refer to the contested point whether Wilson agreed with Rice to pay one-half of the stipulated fee to O'Brien. With respect to the affidavit of Mary Graham Rice, it is proper to say first, that she is the sister of Rice, secondly, that she states that the business disputes between Rice and Hammond were approaching a settlement in the latter part of January, 1912, some eleven months before Rice retained Wilson as his counsel, and thirdly, that she does not impute to Wilson any statement that O'Brien was to receive one-half of the agreed fee or any other proportion, but only that the fee was to be shared between O'Brien and Wilson. I am satisfied that the affiant omitted the essential qualification that Wilson would secure the services of O'Brien only with respect to any litigation that might arise in New York. The affidavit of Thompson lends some support to the contention of Rice, but is outweighed and refuted by Wilson's answer in connection with the affidavits of William McK. Morris and Morgan J. O'Brien in connection with documentary evidence in the case. Morris, who is the vice-president of the First National Bank of Bordentown, and secretary and treasurer of Morris and Company of Groveville, New Jersey, states in his affidavit:

"I was present on the night of December 18, 1912, when John V. Rice, Jr., retained Joseph R. Wilson as counsel in his case against Harris Hammond. It took place in the Bonaparte Mansion at Bordentown. Rice sent his car for me, and I arrived at the mansion a little after 8:00 p. m. Rice took me at once into the sitting-room where Mr. Wilson was sitting, and presented me to him. Mr. Wilson and Mr. Rice discussed the case in my presence for nearly four hours, and Mr. Wilson mapped out his plan of action. At the expiration of time, Rice asked me to go into another room, and he told me that he had agreed to pay Mr. Wilson twenty-five thousand dollars to represent him against Hammond. * * * I told Rice that I thought the fee was a big one. He praised Mr. Wilson higher than the skies, and said that he was the man to get him out of his difficulties, as he had done before when his previous cases looked almost hopeless, and that he was willing to pay him that fee. He said, 'Why, if he wins against Hammond, that fee won't be anything.' He said that Mr. Wilson had gone over the case with him thoroughly, and had spent an entire day and a night and until 2:00 o'clock the next morning going over it with him. * * * After this was completed Mr. Wilson said to Rice, 'Our agreement should be in writing,' and Rice said, 'Well, you write it out and I will copy it.' He got a pencil and paper and Mr. Wilson wrote out two forms of letters, in one of which Rice retained him as counsel, and in the other stated that he was to receive a fee of twenty-five thousand dollars. Rice took these two drafts, prepared by Mr. Wilson, and went into another room and came back with them both written in his own handwriting. I know this because Mr. Wilson handed them both to me to read. During the discussion between Mr. Wilson and Mr. Rice, before Rice took me out of the room, Mr. Wilson said that if any Court work was necessary in New York that he knew Judge Morgan J. O'Brien who stood very high, and he could go to him if necessary, but that he had every confidence that he could handle this alone, without the assistance of anybody. He said, 'I may decide to go over the case with Judge O'Brien before seeing Hammond.' This was the only reference made to Judge O'Brien. I have read a bill of complaint by Rice against Wilson in which he says that Morgan J. O'Brien was to have half the fee. Nothing was either said or suggested with respect to Judge O'Brien being associate counsel with Mr. Wilson, or that any part of Mr. Wilson's fee was to go to him."

O'Brien in his affidavit states:

"My first knowledge of the matters recited in the bill of complaint aforesaid was derived through an interview on or about December 20, 1912, in my office with Mr. Wilson. Mr. Wilson first interviewed me alone and explained to me that he had been retained by Mr. Rice to represent him in certain negotiations and litigation if necessary in connection with certain controversies between Rice and Harris Hammond of New York City. He showed me his contract with Rice in writing, whereby Rice undertook to pay him $25,000 for his professional services to be rendered in connection with these matters. He stated to me that in the event of litigation in New York City he might require my assistance in association with him, and would like to feel he could call upon me for such service should it be necessary. He stated to me that whatever service he might require of me in connection with these matters, he would compensate me for on a basis satisfactory to me. Mr. Wilson subsequently called to see me on a number of occasions and advised me of the progress he was making in his negotiations with Mr. Hammond. Mr. Wilson subsequently informed me that he had effected an agreement of adjustment between Messrs. Rice and Hammond that was satisfactory to all parties. I had no part, however, in the negotiations or consummation of this agreement. * * * My relations with the whole matter were personal and professional with Mr. Wilson as his associate, and in no sense did I enter into official relation with Mr. Rice as his counsel. I had no claim for services against Mr. Rice, and have never made any. I look to Mr. Wilson for my compensation and am satisfied with the adjustment which I have made with him respecting the same."

Wilson in his affidavit of March 13, 1915, subsequently denies that he ever had any conversation with Mary Graham Rice respecting the fee which Rice had previously agreed to pay him, or respecting his professional relations with O'Brien, or that he at any time discussed with C. Fisk Thompson either his fee or the association of O'Brien with him in representing Rice against Hammond or that he said to Thompson that he was going to pay O'Brien one-half of his fee or any part thereof.

While, as above appears, there is conflict in this case between the affidavits filed in behalf of the respective parties, and also between the bill and answer, a decided and controlling preponderance of the evidence, including that which is documentary, is against the contention of Rice that Wilson deceived or practiced any fraud upon him touching the employment of O'Brien in connection with the adjustment of the matters in dispute between Rice and Hammond. Exhibit A attached to the answer sets forth a letter of Rice addressed to Wilson dated December 18, 1912, in which Rice says:

"I hereby employ and retain you as chief counsel in all my affairs relating to my business transactions and disputes with Harris Hammond, with full power to compromise, settle and adjust the same as fully as I could do myself, hereby ratifying and confirming anything that you may do in the premises, and binding myself to abide thereby."

In a supplementary letter of Rice addressed to Wilson on the same day (Exhibit B) he said:

"In consideration of your acceptance of my appointment of you as chief counsel, to represent me in all my affairs relating to my business transactions and disputes with Mr. Harris Hammond of New York and Bordentown, son of John Hayes Hammond, I hereby agree to pay you a fee of twenty-five thousand ($25,000.00) dollars, on the settlement of such business transactions and disputes, whether the settlement be effected by suit and judgment or decree of

the court or by compromise, and irrespective of the time consumed, be it short or long."

In a letter signed by Rice and addressed to Wilson January 7, 1913, shown in Exhibit C attached to the answer Rice says:

"It seems impossible for me to express in words my appreciation of your marvelous ability in so quickly and successfully settling all the disputes and difficulties between Mr. Harris Hammond and myself, in connection with the Bonaparte Park property at Bordentown, the Rice Gas Engine Company and the Rice Gasoline Rock Drill patents, involving nearly $4,000,000. You have brilliantly earned your fee of twenty-five thousand dollars, and this is not the limit of my appreciation. Among other things, I offer you a directorship in the Rice Gasoline Rock Drill Company and also invite you to be its chief counsel, and again expressing my eternal gratitude for your great achievement in my behalf, I am always your friend and debtor."

It appears that this letter was the result of a request on the part of Wilson that Rice should give him a letter of appreciation of what he had done for him; that Rice began to write such a letter and that Wilson interrupted him and said it would not do; that Rice asked Wilson what he wanted him to say and Wilson told him he must write a strong letter; that Rice then asked Wilson if he would write it, stating that he, Rice, would copy it; that thereupon Wilson wrote the letter and Rice copied it as written by the former for Rice's signature. In reference to this letter Rice in the same affidavit says:

"I had been under a considerable strain owing to business worries at the time, and on the night in question was extremely nervous and upset, owing to such business strain, and also to excessive drinking, in which I had been indulging for some time on account of the strain I was under. I was so relieved when Mr. Wilson told me that all my business disputes with the said Hammond had been settled advantageously to me, that I was glad to sign, in my then condition, any letter that Mr. Wilson presented to me."

Whatever may be said or thought of the taste displayed by Wilson in thus securing from Rice the above letter, the fact remains that there is no denial by Rice of the truthfulness of its statements; nor is there any claim made by Rice that he did not know or fully appreciate the contents of the letter he thus signed. Further whatever may have been the nervous condition of Rice on that occasion it is to be observed that in his affidavit made over two years afterwards he expressly recognizes that "all my business disputes with the said Hammond had been settled advantageously to me." In that letter there is not a hint or suggestion as to the association of O'Brien with Wilson in the settlement of the matters in dispute or of any right on the part of O'Brien to receive any portion of the $25,000 fee. On the contrary the tenor and spirit of the letter are inconsistent with such an idea, Rice saying, "You have brilliantly earned your fee of twenty-five thousand dollars." But in whatever light the letter of January 7, 1913, might be viewed, aside from other documentary evidence, it must be taken in connection with the letters contained in Exhibits A and B and in affidavits on behalf of Wilson. No documentary evidence is disclosed in the case, other than that contained in Exhibits A, B, and C, touching the employment by Rice of counsel to adjust his matters in dispute with Hammond. If it be true that Rice had been led to believe that the employment by Wilson of O'Brien was a matter of

such moment as Rice now contends it was, and if there was an oral understanding that one-half of the total fee of $25,000 was to go to O'Brien, and Wilson was to have only the remaining half, it is remarkable and unaccountable that there should be a total omission of any stipulation to that effect in either of the two above mentioned letters, Exhibits A and B. Rice was of full age and a man of intelligence on his own showing and there is no evidence that he was at the time these letters were written either intoxicated or insane. He does not anywhere state that he did not know what he was doing when he signed them, nor has he produced any evidence on the part of any friend, relative or other person to show that he was not capable of fully understanding and appreciating the purport of the letters written by him. Further, if it be true that Rice was led by Wilson to believe that O'Brien had taken an active, efficient and principal part in the eminently successful and satisfactory adjustment of the matters in dispute between Hammond and himself, it is also remarkable and unaccountable that he should wholly have omitted to testify to Hammond his high appreciation of his valuable services. Rice states in the bill that during the period between December 16, 1912, and February 10, 1913, Wilson represented to him that he was advising him not alone upon his own judgment and experience, but upon the judgment and experience of O'Brien, and that the advice which Rice received was in point of fact the advice of O'Brien in which Wilson concurred, and further that Wilson represented to Rice during that period covering the date of Rice's letter of appreciation to Wilson that the adjustment and settlement agreed upon with Hammond was advised and recommended by O'Brien in conjunction with Wilson; and further, that it was not until long after, namely, in the midsummer of 1914 that Rice received any definite information that O'Brien had not been retained by Wilson. Under these circumstances if the statement by Rice is correct, it is difficult, if not impossible, to conceive of any reason why he should have wholly omitted while writing eulogistically to Wilson to say a word of commendation or recognition of what according to his own statement he was led to believe had been vitally important professional service on the part of O'Brien of which he had had the benefit. That it does not appear that Rice in any manner or to the slightest extent recognized directly or indirectly that the result with which he was so well pleased was the work in whole or in part of O'Brien, while in full accord with the contention of Wilson, serves to render the correctness of the statements of Rice as to his alleged understanding of the professional relationship of O'Brien to himself too improbable for acceptance. The principal object of this suit is evidently the control by Rice of the management and direction of the affairs of the drill company. Aside from such an intention no sufficient reason appears for this litigation. It seems the height of unreason that Rice after obtaining all he had considered himself entitled to should complain because the lawyer who rendered the service, clearly shown by the admission of Rice to have been worth the $25,000 fee, actively conducted the negotiations himself instead of employing some other attorney to help him; and this court cannot assume and does not believe

that, even if a false representation had been made by Wilson as to the employment of O'Brien, Rice would have brought this suit for the recovery of the shares of stock in question, aside from the securing of control over the management and direction of the affairs of the company. The evidence taken as a whole has satisfied me beyond reasonable doubt that the contention made by Rice in this case cannot be sustained.

The motion for a preliminary injunction must be denied, and the restraining order dissolved, with costs.

THE CUZCO.

(District Court, W. D. Washington, N. D. June 19, 1915.)

No. 2832.

1. SHIPPING ⟸73—LIABILITY FOR TORTS—LAW GOVERNING—"HIGH SEA."
The term "high sea" does not apply to the waters of a port or harbor, and while a tort committed on the high sea is amenable to the law of the ship's flag, one committed on a vessel in the port or harbor of another country is governed, as to the rights of the person injured, exclusively by the law of such country.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. ⟸73.

For other definitions, see Words and Phrases, First and Second Series, High Seas.]

2. MARITIME LIENS ⟸1—LAW CREATING.
A maritime lien is a matter of substantive law and not of procedure, and cannot be created by the courts.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 1; Dec. Dig. ⟸1.]

3. SHIPPING ⟸73—SUIT IN REM FOR MARITIME TORT—LAW GOVERNING.
A stevedore, injured through the fault of those in charge of a vessel which he was helping to discharge in a port of British Columbia, the laws of which country do not give a lien for such injury, cannot maintain a suit in rem against the vessel therefor in a court of admiralty of the United States.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. ⟸73.]

In Admiralty. Suit by Joseph H. O'Brien, by his guardian Henry J. Gorin, against the steamship Cuzco, Aktieselskabet Cuzco, claimant, On exceptions to special plea. Overruled.

The amended libel alleges, in substance, that the libelant, Joseph H. O'Brien, is a citizen of the United States of America, a resident of this district, and on the 3d of March, 1913, was adjudged by the state court to be non compos mentis, and Henry J. Gorin was appointed his guardian, and that this action is commenced by authorization of the state court; that the steamship Cuzco is engaged in navigating the high seas and waters of Puget Sound, and was at the time of filing the libel, lying in the harbor of Seattle, and further alleges (paragraph 3): "That on or about the 10th day of October, 1912, the said steamship was lying at the chemical docks at Victoria, British Columbia, discharging a cargo of niter, and libelant, Joseph O'Brien was, with other laborers or stevedores, assisting in discharging said cargo from said ship under the supervision of the captain and mate of said ship and under the immediate direction of one John Hanley, hatch tender, whose said orders libelant was compelled to obey. That at about the hour of 2:30 o'clock p. m. of said

10th day of October, 1912, the said cargo had been fully discharged, and under the orders and direction of said Hanley and one John Doe, the mate of the steamship Cuzco, whose name is now unknown to libelant, this libelant and other stevedores began to prepare the said steamship for sailing, and while this was being done, as aforesaid, libelant was ordered by the said hatch tender, John Hanley, and said mate to hurriedly replace the No. 3 hatch. That libelant, to the best of his ability, using all necessary care, skill, and caution, immediately attempted to carry this order into execution, but while so doing, without any fault or negligence on his part, he fell through the said hatchway, a distance of approximately 30 feet, striking upon his head and shoulder. That libelant thereafter suffered a deep gash upon the head and a fracture of the skull, all of which injuries were treated at the Sisters' Hospital, Victoria, B. C., until said Joseph O'Brien was removed to the asylum for the insane at New Westminster, British Columbia for treatment, at which latter place he remained for a period of 15 months, during all of said time being wholly non compos mentis as a result of the said fall. That said Joseph O'Brien's mind is not now clear, nor is he yet rational and sane, nor will he ever be, and his mind and memory are permanently impaired; that said Joseph O'Brien will be prevented forever from doing any manner of work or labor whatsoever to support himself, and will always be helpless and dependent upon others, or upon charity as a result of said injuries sustained by him, as aforesaid. That at the time libelant was injured he was working as a stevedore for a stevedoring company known as the Empire Stevedoring Company, and which libelant believes to have been a corporation. That said stevedoring company was employed by the master of said steamship Cuzco and had a contract with said master and the owners of said vessel to discharge freight therefrom, and the work of replacing said hatch was a part of the work contemplated by the employment of said stevedoring company by said master and the owners of said ship, and libelant was at a place where he was required to be and where the master and owners of said ship expected him and others would be, pursuant to and under the authority of said employment and contract, whereby said stevedoring company was to employ and use men in discharging the cargo from said ship"—and then alleges acts of negligence on the part of the ship which resulted in his injury, and asks damages in the sum of $25,000, and prays that monition issue against the steamer by attachment, etc., and the vessel be condemned and sold to pay libelant's claim and costs. Claimant has filed a plea and answer to the amended libel, stating, in substance, that it is the sole owner of the Cuzco, her tackle, machinery, etc., that claimant is a corporation of the kingdom of Norway, and that the tort set forth did take place on board the steamship Cuzco at a time when the said steamship was lying at the docks in the city of Victoria, province of British Columbia, Dominion of Canada, and that by the law of the province of British Columbia, Dominion of Canada, in force at the time of the tort complained of, no maritive lien against the steamship Cuzco existed for the tort set forth, if any such tort did take place, and "that this honorable court, by reason of the matters and things so above propounded and articulated, has not jurisdiction, and ought not to proceed to enforce the claim alleged in the amended libel;" and then, without waiving any of its rights under the plea, answers the libel and denies the allegations contained therein. It is stipulated that the issue raised by the sufficiency of the plea shall be determined by the court without prejudice to the answer of claimant, and before further proceedings are taken, so that if sustained, expense incident to the taking of testimony would not be incurred.

George Olson and J. Grattan O'Bryan, both of Seattle, Wash., for libelant.

Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp, all of Seattle, Wash., for claimant.

NETERER, District Judge (after stating the facts as above). The record is conclusive that at the time of the injury libelant was en-

gaged as a stevedore in discharging the cargo from a vessel owned by a Norwegian corporation, while the vessel was lying at the docks at Victoria, British Columbia. The exceptions, for the purposes of this issue, admit that no maritime lien existed against the Cuzco under the law of British Columbia. The question for the court now is to determine whether the rights of the parties are governed by the lex loci delicti or by the lex fori, and whether an action in rem is of the substantive law of British Columbia, or only a form of procedure or process of the court of the United States.

Attention is first directed as to what law determines the right of the parties. Proctors for claimant have learnedly elaborated upon the issue, and have called attention to comment of eminent jurists, from Bartolus, the Italian jurist of the fourteenth century, who declared that an action for tort is governed by the law of the place where the tort arose (Bartolus on Conflict of Laws, c. 2, Oxford Univ. Press Ed. 1914, p. 23) as well as the contrary view held by Savigny and his followers, and the fact that the doctrine laid down by Savigny is not unchallenged even in Germany, and have quoted from the monumental work on Private International Law, by Dr. Bar, the assessor to the Royal Court of Hanover, a jurist of eminence, who, after saying that Wachter and Savigny are the only authorities who challenge the rule announced by Bartolus, says:

"This reasoning, however, overlooks the fact that a state can make no claim to rule men's conduct and behavior except within its own boundaries, and that a rule of conduct, which may be quite proper within our territory, may possibly be unsuitable for any other. The result is: First, that in any case conduct which does not give a right to damages or penalty by the law of the place where the act is committed cannot have this effect if the action be raised in another country. The opposite view plainly implies an invasion of the sovereign power of the state within whose territory the act in question has taken place. * * * To determine the matter by the lex fori, where the lex loci actus gives no claim, or one that does not go so far, is utterly unjust, and all the more that it rests on the good pleasure of the pursuer in many cases whether the action shall be raised at this or at that place. * * * The great balance of opinion at the present time on the continent of Europe is in favor of determining obligations ex delictis by the lex loci actus, at least in so far as the question of damages is concerned. Whereas the law of England and that of the United States seem only to sanction claims upon delicts or quasi delicts, in so far as these claims are good both by the lex fori and the lex loci actus." Bar's Private International Law, par. 286 (translation by G. R. Gillespie [2d Ed.] Edinborough, 1892).

Many sayings by recognized commentators are cited by claimant in support of its contention.

"There is no doubt of the general rule that when an action is brought in one country for acts which have taken place in another, the rights and merits of the case are to be decided by the law of the place where the acts occurred." Wheaton on International Law, pt. 2, c. 2, par. 144a (4th English Ed. p. 229).

"The reciprocal rights and duties of the parties and the defenses that may be invoked to escape liability for a breach of duty are governed by the law of the place where the tort occurred, rather than by the law of the forum." Wharton on Conflict of Laws (3d Ed.) par. 478b.

"Whether an act done in a foreign country is or is not a tort (i. e., a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (lex loci delicti com-

missi) and of the law of England (lex fori). Dicey on Conflict of Laws (2d Ed. 1908) p. 645.

"The wrongfulness of the conduct complained of as a cause of action in tort is determined: (a) By the lex loci, and not by the lex fori; and ordinarily (b) by the state of facts existing at the commencement of the action." Jaggard on Torts, p. 102.

Whatever the rule may be in other civilized countries of the world, the Supreme Court of the United States, in 1838, through Chief Justice Taney, in Smith et al. v. Condry, 1 How. 28, 11 L. Ed. 35, held that the question of whether there is a legal liability for the consequences of a collision in an English port must be determined by the law of England. Libelant contends that the tort is a maritime tort, committed while the vessel was "on navigable waters (at the wharf at Victoria, B. C.)" and therefore within the jurisdiction of this court as a court of admiralty, and that the admiralty law of the United States, or the lex fori, should control, and cites The Brantford City (D. C.) 29 Fed. 383; Elder Dempster Shipping Co. v. Pouppirt, 125 Fed. 732, 60 C. C. A. 500; Panama Ry. Co. v. Napier Shipping Co., 166 U. S. 285, 17 Sup. Ct. 572, 41 L. Ed. 1004; The Scotland, 105 U. S. 30, 26 L. Ed. 1001; The Belgenland v. Jensen, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152—and cites in support of the right of a stevedore to recover damages for injuries received in loading a ship through the negligence of the vessel or its master or officers in charge, while in the employ of a master stevedore, The Anaces, 93 Fed. 240, 34 C. C. A. 558; The Troop, 128 Fed. 856, 63 C. C. A. 584; The Brookby (D. C.) 165 Fed. 95, and The General De Sonis (D. C.) 179 Fed. 126. This court has held that a stevedore injured through the negligence of the vessel while engaged in loading or unloading a ship is entitled to recover damages sustained. The Rupert City (D. C.) 213 Fed. 263.

Judge Brown, in The Brantford (D. C.) supra, at page 382 of 29 Fed., said:

"It is well settled, however, that responsibility for torts committed within the exclusive jurisdiction of the country of the forum, and affecting its own citizens, are determined according to its own laws"

—and further says:

"It is only as respects tortious acts committed beyond its jurisdiction that any doubt has existed as to the remedy to be afforded. In the latter cases, the principle generally accepted is that, to entitle the suitor to recover in a foreign forum, the act must have been tortious according to the law of the jurisdiction wherein it was committed, as well as by the law of the forum. West. Int. Law, par. 186; Whart. Confl. Laws, pars. 475–478; Foote, Priv. Int. Law, 393, 410; Phillips v. Eyre, L. R. 4 Q. B. 225. But inasmuch as the high seas are the common ground of all nations, and are not governed by the merely municipal laws of either, the quality of acts committed on the high seas, as between persons or ships belonging to different nations, whose laws are different, is determined by the maritime law as accepted and administered in the forum where the suit is prosecuted. Hence acts, tortious by the law of England, if committed on the high seas, are actionable in England, though not tortious by the municipal law of the defendant's domicile, or of the ship's flag; and, in general, the law of the flag has no application to torts committed on the high seas, as between persons or ships of different countries having different laws. Foote, Priv. Int. Law, 398, 403; Mars. Coll. (2d Ed.) 208, 209, 212. The point was distinctly presented and so adjudged, in the

case of The Leon, 6 Prob. Div. 148. The same rule in this country has been repeatedly affirmed by the Supreme Court. The Scotland, 105 U. S. 24, 29 [26 L. Ed. 1001]; The Belgenland, 114 U. S. 355 [5 Sup. Ct. 860, 29 L. Ed. 152]."

This was an action to recover for the loss of cattle through negligence of the ship, in that they were improperly stowed, and that the fittings for the cattle and ventilation were insufficient, and the navigation unskillful and negligent. Acts of negligence were denied and stipulations in the bill of lading were set up as a further defense. The conclusion of Justice Brown in that case upon which he retained jurisdiction was based, not upon any negligence upon the high seas, but rather upon the contract made in the United States, as well as the recitation in the bill of lading. The negligence, it was found, arose within the United States and in part upon the high seas, and Judge Brown held that since acts complained against were committed in the United States and upon the high seas, this court should retain jurisdiction.

In Elder Dempster Shipping Co. v. Pouppirt, supra, libelant was an American citizen shipping from an American port, and was injured upon the high seas.

In The Egyptian (D. C.) 36 Fed. 773, it was held that the jurisdiction of the high court of admiralty of England does not extend to a claim for damages by a seaman for personal injuries received on board an English ship while within the body of a county of England, and that an American citizen could not maintain a proceeding in rem for personal injuries received on board an English ship while within the English territorial waters, but was governed by the law of England.

The issue here is not as to the jurisdiction of this court as an admiralty court to entertain the complaint made, but rather as to the law which should govern, there being a difference between the law of British Columbia and the law of the United States with relation to such a complaint. The authorities cited by libelant are not convincing, and therefore not controlling, and while the decisions upon issues raised upon the enforcement of common-law rights are not taken as precedents in admiralty, yet where the principle involved is with relation to the law which should control or govern an alleged wrong, I think the same principle applies in the determination of common-law liabilities as obtains with relation to rights enforceable in admiralty. The Supreme Court of the United States does not seem to have departed from the rule laid down in Smith v. Condry, supra, and while expression of a different tendency may be found in some of the English cases, the court has not deviated from the rule. And it would seem that reason would justify such a conclusion. In Slater v. Mexican Ry. Co., 194 U. S. 120–126, 24 Sup. Ct. 581, 582 (48 L. Ed. 900), the widow and children of Slater, who was killed in Mexico through the negligence of the railway company, sought to recover damages under the provisions of the statute of Texas, and Justice Holmes, for the court, said:

"As Texas has statues which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. Stewart v. Baltimore &

Ohio R. R., 168 U. S. 445 [18 Sup. Ct. 105, 42 L. Ed. 537]. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside of its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout v. Wood, 1 Blackf. (Ind.) 71; Dennick v. Railroad Co., 103 U. S. 11, 18 [26 L. Ed. 439]. But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation (Smith v. Condry, 1 How. 28 [11 L. Ed. 35]), but equally determines its extent."

In Western Union Tel. Co. v. Brown, 234 U. S. 542, 546, 34 Sup. Ct. 955, 956 (58 L. Ed. 1457), Mr. Justice Holmes again said:

"Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground, but the measure, of the maximum recovery."

Chief Justice Taney, in Smith v. Condry, supra, said:

"The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes, then in force; and if doubts exist as to their true construction, we must of course adopt that which is sanctioned by their own courts."

Judge Thomas, in The Lamington (D. C.) 87 Fed. 752, said:

"The action is founded in tort; hence the liability must be determined by the law of the place where the alleged tortious act was committed or suffered."

The Court of Appeals of New York, in McDonald v. Mallory, 77 N. Y. 546, 550 (33 Am. Rep. 664), said:

"The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one state or country for a personal injury may be enforced in another to which the parties may remove or where they may be found, yet the right or liability must exist under the laws of the place where the act was done."

[1, 2] This is not a common-law action for the recovery of damages. It being a proceeding in rem, the process of procedure in a jurisdiction where a lien is created by local laws or recognized by the admiralty courts within their special jurisdiction cannot create a lien; but it must be a lien which is created by the admiralty law, or by the local laws in which the wrong complained of occurred.

"No process nor procedure of the court gives life to the lien, but the lien, of its own force, justifies the procedure in rem. * * * In the case of The Bold Buccleugh, 7 Moore, P. C. 267, Sir John Jervis, delivering the opinion, says: 'A maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon the thing to be carried into effect by legal process, and Mr. Justice Story (The Nestor, 1 Sumn. 73, Fed. Cas. No. 10,126) explains that process to be a proceeding in rem, * * * and, indeed, is the only court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and, whilst it must be admitted that where such a lien exists a

proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by legal process.'" The Lamington (D. C.) 87 Fed. 755.

The Buccleugh has received indorsement in The Rock Island Bridge, 6 Wall. 213, 215 (18 L. Ed. 753), in which Mr. Justice Field, speaking for the court, said:

"The lien and the proceeding in rem are therefore correlative—where one exists, the other can be taken, and not otherwise. Such is the language of the Privy Council in the decision of the case of The Bold Buccleugh."

The decision in The Bold Buccleugh would seem to reverse or modify the prior decision of the Privy Council of England, in which it refused to follow the American case of Smith v. Condry, supra.

"The decision in The Bold Buccleugh has never been departed from in England, but has been constantly recognized as sound law in the courts exercising admiralty jurisdiction (citing cases). And in a very recent case in the House of Lords, that decision has been deliberately and finally declared to have established beyond dispute, in the maritime law of Great Britain, that a collision between two vessels by the fault of one of them creates a maritime lien on her for the damage done to the other. Currie v. McKnight (1897) App. Cas. 97." Mr. Justice Gray in The John G. Stevens, 170 U. S. 113, 116, 18 Sup. Ct. 544, 545 (42 L. Ed. 969).

"A lien being a right of property and not a matter of procedure" (The J. E. Rumbell, 148 U. S. 1, 11, 13 Sup. Ct. 498, 500 [37 L. Ed. 345]; Beane v. Mayurka, 2 Curt. 72, 76, Fed. Cas. No. 1,175), it would appear that the rights of the parties must be determined by the lex loci delicti. It is admitted by the record that no maritime lien existed against the Cuzco for the alleged injury, by the laws of British Columbia, and it is concluded that by the law of this jurisdiction the question of a lien or no lien is a part of the substantive law, and not a mere matter of process or procedure.

The exception of the libelant that claimant is a corporation of the kingdom of Norway and the steamship Cuzco was flying the flag of Norway at the time of the injury complained of, cannot be well taken. While no argument was presented by libelant upon this exception, or authority cited, it appears that the Norwegian Maritime Code, July 20, 1893, does not give a maritime lien for personal injuries suffered by a stevedore; hence the fact, as claimed by libelant, that the law of the country is supposed to follow its ships upon the high seas—"is a detached floating portion of the country whose flag it flies and under whose laws it is registered" (The Lamington, supra)—does not afford him relief. Ships are regarded as floating portions of the nation to which they belong, and whose flag they fly, and while they are upon the high seas, the jurisdiction of the flag obtains, and the law and rule of decision of the flag's jurisdiction obtain, and all on board are regarded as being on the soil of the vessel's nation (1 Calvo, Droit Int. [4th Ed.] 552, book vi, § 3); Bluntschli, par. 317; 1 Vattel, c. 19, par. 216; 2 Rutherford, c. 9, pars. 18,19; 1 Kent, p. 26; Wheaton [8th Ed.] par. 106; 1 Wharton, Int. Law Dig. par. 26), and a tort committed upon the high seas is therefore amenable to the law of the ship's flag.

"The law of the flag is the lex loci delicti." Minor, Conflict of Laws, par. 195; Crapo v. Kelly, 16 Wall. 610, 624, 625, 626, 21 L. Ed. 430; International Nav. Co. v. Lindstrom, 123 Fed. 475, 60 C. C. A. 649; La Bourgogne, 139 Fed. 433, 71 C. C. A. 489; Viscount de Valle Da Costa v. Southern Pac. Co., 176 Fed. 843, 100 C. C. A. 313; Beyer v. Hamburg-American S. S. Co. (C. C.) 171 Fed. 582; Wharton on Conflict of Laws (3d Ed.) par. 480b; Webster's Works (Natl. Ed.) vol. 2, p. 306.

"A ship in port, however, is subject to the law of the port." Wharton on Conflict of Laws (3d Ed.) p. 786; Woolsey on International Law, par. 64; Webster's Works (Natl. Ed.) vol. 2, p. 307.

The Cuzco was lying at the dock in Victoria, in the waters of the harbor of British Columbia. The tort complained of was therefore not committed on the high seas.

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same state. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore along all the coasts of the state. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." Wheaton on International Law (4th Eng. Ed.) p. 275.

"The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands, and also to the distance of a marine league, or as far as a cannon shot will reach from the shore along all its coasts." Mr. Buchanan, Sec. of State, to Mr. Jordan, January 23, 1849.

See to same effect Gallatin's Writings, II, 186.

"The term 'high seas' does not, in either case, indicate any separate and distinct body of water, but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters, the latter being termed the high seas." United States v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071.

"The high sea, the open sea, are phrases used to distinguish the expanse and mass of any great body of water, from its margin or coast, its harbors, bays, creeks, inlets." Benedict's Admiralty (4th Ed.) par. 160.

The court, in United States v. Morel, Fed. Cas. No. 15,807, says:

"Writers of high authority on this subject make a clear distinction between the main sea or the high sea, and roads, harbors, and ports, and we shall see that Congress had these distinctions in view in framing the act in question. Lord Hale, in the fourth chapter De Juris Maris, says: 'That part of the sea which lies not within the body of a country is called the main sea or ocean.' In the second chapter of the second part he describes a road to be 'an open passage of the sea, which, though it lies out at sea, yet in respect of the situation of the land adjacent, and the depth and wideness of the place, is a safe place for the common riding or anchoring of ships.' 'A haven is a place of a large receipt and safe riding of ships, so situate and secured by the lands circumjacent that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds.' 'A port is a haven, and somewhat more,' that is, for arriving and unloading ships, etc. * * * Mr. Webster, in his argument of Bevans' Case, Fed. Cas. No. 14,589, says there is a distinction between the meaning of the terms 'high sea' and 'sea'; that the high seas import the open, uninclosed ocean without the fauces terræ, and he is not contradicted by the opposite counsel. Certainly ports and harbors which lie within the body of a country are not part of the high seas according

to Lord Hale's definitions. This learned lawyer further says, and we think with good reason, that 'the common and obvious meaning of the expression "high seas" is also its true legal meaning. The expression describes the open ocean where the dominion of the winds and waves prevails without check or control. Ports and harbors, on the contrary, are places of refuge in which protection and shelter are sought, within the inclosures and projections of land.'"

Justice McKenna, in Humboldt Lumber Mnfrs. Assn' v. Christopherson, 73 Fed. 242, at page 247, 19 C. C. A. 481, at page 489 (46 L. R. A. 264), quotes from Judge Hopkinson's charge in U. S. v. Kessler, Baldw. 15, Fed. Cas. No. 15,528, and for its validity the case of The Ann (decided by Judge Story), 1 Gall. 62, Fed. Cas. No. 397, in which the learned judge said:

"All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores; and this doctrine has been recognized by the Supreme Court of the United States. Indeed, such waters are considered as a part of the territory of the sovereign"

—and for the court said that the law of California in force at the time of the casualty furnished to the court the rule of decision applicable to the question as to the rights of the widow and children to recover for the death of the husband and father through the negligence of the defendant corporation. In that case the act complained of took place about two miles from shore. The Cuzco I do not think was upon the high seas. In the instant case libelant was not a seaman. The ship was not his home. The casualty did not occur on the high seas. He was engaged as a stevedore, discharging the ship's cargo at the dock in Victoria, B. C. At the time of the alleged injury neither the law of British Columbia nor the law of the ship's flag allowed a lien on the ship for damage occasioned by such injury. The law not giving it, this court cannot create it. The fact that he was a citizen of the United States does not enlarge his right (Slater v. Mexican Ry., supra), nor give this court power to extend the laws of this jurisdiction over a foreign country.

The Scotland, 105 U. S. 24, 26 L. Ed. 1001, cited by libelant, does not elucidate his claim. In that case, Justice Bradley, for the court, said:

"In administering justice between parties it is essential to know by what law, or code, or system of laws, their mutual rights are to be determined. When they arise in a particular country or state, they are generally to be determined by the laws of that state. Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect. Hence, if a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same. But, if a collision occurs on the high seas where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation, carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein, would

properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. And it will do this without respect of persons, to the stranger as well as to the citizen. If it be the legislative will that any particular privilege should be enjoyed by its own citizens alone, express provision will be made to that effect. Some laws, it is true, are necessarily special in their application to domestic ships, such as those relating to the forms of ownership, charter party, and nationality; others follow the vessel wherever she goes, as the law of the flag, such as those which regulate the mutual relations of master and crew, and the power of the master to bind the ship or her owners. But the great mass of the laws are, or are intended to be, expressive of the rules of justice and right applicable alike to all."

Justice Holmes emphasizes the thought of the court, in Cuba Ry. Co. v. Crosby, 222 U. S. 473–478, 32 Sup. Ct. 132 (56 L. Ed. 274, 38 L. R. A. [N. S.] 40), when he says:

"The language of Mr. Justice Bradley in The Scotland, 105 U. S. 24 [26 L. Ed. 1001], with regard to the application of the lex fori to a case of collision between vessels belonging to different nations and so subject to no common law, referred to that class of cases and no others, and was used only in coming to the conclusion that foreign vessels might take advantage of our Limited Liability Act. * * * But as to causes of action arising in a civilized country the disregard of the foreign law occasionally indicated by some English judges before the theory to be applied was quite worked out must be disregarded in its turn. The principle adopted by the decisions of this court is clear. See, also, Dicey, Confl. of Laws (2d Ed.) 647 et seq."

[3] All of the cases cited by libelant are readily distinguished from the issue at bar. The lex loci delicti determines the rights and liabilities. The act complained of taking place in the territorial waters of British Columbia, and under that law no maritime lien being given for personal injuries suffered by a stevedore, the exceptions to the special plea are denied.

THE JEANNIE.

(District Court, W. D. Washington, N. D. June 25, 1915.)

No. 2570.

1. SHIPPING ⟸132—DAMAGE TO CARGO—PRESUMPTION OF NEGLIGENCE.
   Where goods were received by a ship in good condition and delivered in a damaged condition, and seaworthiness is shown, there is a presumption that the damage was due to negligence of the master and crew in caring for them.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. ⟸132.]

2. SHIPPING ⟸121—CARRIAGE OF GOODS—IMPLIED WARRANTY OF SEAWORTHINESS.
   The implied warranty of seaworthiness of a ship at the commencement of a voyage, which accompanies every contract of affreightment, extends not only to hull and equipment, but also to proper stowage and the fitness of the ship, with reference to the season and waters to be navigated, to carry the cargo undertaken to be transported in safety and without injury.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 449–451, 466; Dec. Dig. ⟸121.]

3. SHIPPING ⊂=140—CONTRACT OF AFFREIGHTMENT—BILLS OF LADING.

Where a ship before sailing engaged orally to bring a cargo on her return voyage, she could not limit her liability by bills of lading delivered after loading to employés of the shipper having no authority to represent it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493–495; Dec. Dig. ⊂=140.]

4. SHIPPING ⊂=137—LIABILITY FOR INJURY TO CARGO—HARTER ACT.

The Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 (Comp. St. 1913, § 8029 et seq.) does not exempt a ship from liability for damage to cargo due to unseaworthiness at the commencement of the voyage, or to failure to exercise due diligence in loading, stowage, or care of the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⊂=137.]

5. SHIPPING ⊂=120—LIABILITY FOR DAMAGE TO CARGO—NEGLIGENCE IN CARING FOR CARGO.

Respondent vessel, before leaving Seattle on a voyage to Alaskan ports, contracted to bring a cargo of salmon for libelant on her return voyage. The salmon was in cans, labeled for market and packed in cases. On the outward voyage the ship carried a cargo of coal. On the return voyage, by reason of the insufficiency of the tarpaulins over the hatches and the breaking loose of a plank in the hull, water entered the hold and the cargo was damaged by the water and coal dust. *Held*, that the damage was due to the negligence of the master and crew in failing to put the ship in fit condition for such cargo, and to exercise proper care to protect it from the coal dust and water, and that the ship was liable therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 440–448, 466; Dec. Dig. ⊂=120.]

6. SHIPPING ⊂=131—DAMAGE TO CARGO—MEASURE OF DAMAGES.

The damage in such case having been to the cans and labels, which were reconditioned by libelant after delivery, it was entitled to recover as damages the cost of such reconditioning, with legal interest, and any depreciation in the market value of the salmon during the time necessarily taken therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 467; Dec. Dig. ⊂=131.]

In Admiralty. Suit by the Alaska Pacific Fisheries Company against the steamship Jeannie, Alaska Coast Company, claimant. Decree for libelant.

Libelant commenced an action against the steamship Jeannie, a wooden vessel of about 800 tons, and 22 years old, 12 to 14 years of which time she had been plying the Alaskan and north Pacific Coast waters, and chartered in the spring of 1912 by W. F. Swan and W. C. Dawson for trade between Seattle and Alaskan points, for loss sustained to a cargo of salmon shipped from various points in Alaska to the city of Seattle, for damage occasioned to the salmon on account of improper dunnage and unseaworthy condition of the vessel, by reason of which the hold of the vessel was flooded. It appears that in the early part of December, 1912, the Jeannie left Seattle with a cargo of 500 or 600 tons of coal and some merchandise for southern Alaskan ports. While north-bound she was detained for several hours, on December 12th or 13th, in Wrangell Narrows, off the southeastern coast of Alaska, where she was anchored in shallow water and sank into about four feet of mud, but floated again with the return of the tide, and proceeded to Juneau, where she arrived on or about the 15th of December. The coal was to be delivered at Juneau, Gypsum, Sulzer, Sitka, and Ketchikan. Owing to bad weather no stop was made at Gypsum or Sulzer. About 150 tons were delivered at Sitka, some at Juneau, and some at Ketchikan. After leaving Juneau the vessel

proceeded to Chilcoot where a portion of libelant's salmon was loaded. The Jeannie then attempted to go to Gypsum, but owing to bad weather was compelled to go on to Sitka without stopping at Gypsum. From Sitka the vessel tried to go to Sulzer, but was unable to stop there because of unusual weather, and proceeded to Ketchikan, where the balance of the coal was unloaded, and from there to Yes Bay and Chomley, where the balance of libelant's salmon was loaded, returning from there to Ketchikan, from which port she proceeded on her homeward voyage, January 3, 1913, and arrived in Seattle, January 8, 1913, after an unusually tempestuous voyage. The Jeannie received, on this trip, from libelant's canneries, 10,747 cases of canned salmon at Chilcoot, 13,972 cases at Yes Bay, and 4,737 cases at Chomley, aggregating 29,657 cases, for transportation to Seattle. The Jeannie had made frequent trips to and from Alaska. No survey or inspection of the vessel was made between the time of her arrival in Seattle on her last preceding voyage and her departure from Seattle on the voyage in question. Her master and pilot, as well as the charterers, testified that they believed she was in good condition. A preliminary survey of the Jeannie was made June 22, 1912, and a thorough survey made July 26, 1912, in dry dock. Certain repairs were recommended and made, and the vessel certified to be in a good seaworthy condition and fit to carry dry and perishable cargo. No further repairs were made until September following, when some caulking was done around the steam winches on the deck, and other minor repairs made. The tarpaulins were insufficient to prevent leakage. Some of the coal was discharged before salmon was taken on. After coal was taken out of the hold, the hold was scrubbed, scraped, rubbed, and made as clean as they thought it was necessary. There was no bulkhead between the salmon and the coal remaining on the vessel when the first salmon was taken on. A loose plank was discovered in the forward part of the ship, in the middle of the hatch in the clear space between the salmon and the coal, that had been lifted up by the force of the water and was lying to one side, which caused the water to wash the bilges and flood the salmon. The spikes in the plank had been driven into the knees or cross-beams of the ship which were not rotten, and the plank was again spiked to position and held. The plank was of soft wood, and the only way the witness accounted for the loosening of the plank was that the water "just hammered underneath it until it lifted it up." The space in which the bilge water could accumulate underneath the plank and the outside planking on the bottom of the ship was about nine inches, and the witness thought the water in that space, working from side to side, would have enough force to loosen the plank, although he had never seen it happen to any other ship he was on, and he thought the only way the water got in to damage the cargo was through the seams of the ship opened by the straining of the vessel in the heavy seas. On redirect examination he stated that the plank that was loosened was about 1½ feet from where the salmon was, and that it was apparently the same age, size, and construction as the other planks of the ship. Upon arrival at the port of Seattle, it was found that the entire cargo was damaged from coal dust and water. A special examination and survey of the cargo was made and notice of damage given to claimant, and with the knowledge and approval of the owners, and in order to reduce the loss to a minimum, libelant caused the salmon to be overhauled and reconditioned.

Two amended libels were filed in this case; the first to conform to the testimony, and the last in the nature of a reply in conformity to Admiralty Rule 51 (29 Sup. Ct. xliv).

C. H. Hanford and Kerr & McCord, all of Seattle, Wash., for libelant.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for claimant.

NETERER, District Judge (after stating the facts as above). [1] Recovery in this case, if it is to be had, must be upon the unseaworthy condition of the vessel, improper dunnage, or negligence in caring for the cargo. It is contended by claimant that the ship was seaworthy,

and that if it was not actually seaworthy, it was operated with due diligence to make it so, and that it is exempted from liability by the stipulations of the bills of lading; that damage, if any, was due to the extraordinarily rough weather, bringing the damage within the excepted perils of the sea; that the damage, if any, caused by coal dust, was without fault or negligence on the part of the owners; and that if there is any liability, it is not nearly the amount claimed. I think the testimony in this case abundantly establishes the fact that the vessel was not in a seaworthy condition, especially in view of the presumptions of law which obtain in favor of libelant. The Patria (D. C.) 125 Fed. 425; Id., 132 Fed. 971, 68 C. C. A. 397; Wright v. Grace & Co. (D. C.) 203 Fed. 360. The fact that damage was occasioned by reason of water coming in contact with coal dust is conclusive, to my mind, that the proper diligence had not been exercised to place the hold of the ship in the condition that it should have been in to receive the salmon after the coal was taken out, or proper care taken in removing coal after some of the salmon had been loaded. Parties must exercise the diligence which the circumstances demand, and while it would not have been necessary to have taken greater precaution in cleaning the hold of the ship from the coal dust than the sweeping, brushing, and scrubbing which the testimony shows was done, or placing such covering over the salmon as shown, when taking coal out, to make the vessel fit to carry some cargoes, the officers of the ship must, at their peril, when they store a cargo of salmon which is labeled ready for the market, and which must be exposed for sale, and where the contact of water and coal dust would be destructive of the attractibility of the prepared eatables, exercise a greater degree of care than otherwise, and the fact that the complaint was made with relation to the tarpaulins as being inadequate and insufficient and the loosening of the keelson plank underneath the hold, and the fact that water did get into the hold of the ship in the quantities which the evidence shows, are all conclusive, to my mind, that, taking into consideration the character of the cargo, the parties did not exercise that degree of care which the circumstances demanded, and unless they are excused for some other reason, that liability attaches. I think, it being established that the salmon was in good condition when it was received, the legal presumption would be that any damage which was occasioned was occasioned through the negligence of the officers of the vessel. The Queen (D. C.) 78 Fed. 156, and The Rappahannock, 184 Fed. 291, 107 C. C. A. 74. Nor is the presumption of unseaworthiness the only presumption arising where goods are shown to have been received by a carrier in good condition and delivered in a damaged condition. Negligence is presumed on the part of the master and crew in caring for the goods which are damaged during the progress of the voyage. In the Queen, supra, 78 Fed. at pages 165, 166, the court said:

"In the present case, the claimant has introduced testimony to establish the seaworthy condition of the vessel when she set out on her voyage, and this testimony has not been contradicted. Now, if the only presumption of negligence arising out of the damaged condition of the merchandise was that the voyage had been commenced with a vessel in an unseaworthy condition, the court would be compelled to hold that the claimant had sufficiently answered

the prima facie case made out by the libelants; but this does not appear to be the full scope of the presumption of negligence attributable to the carrier under this aspect of the case. Underlying the contract is the implied warranty, on the part of the carrier, to use due care and skill in navigating the vessel and in carrying goods, and it may be that, through some carelessness or negligence on the part of the carrier during the voyage, goods laden on board the vessel may suffer damage."

[2] As to the seaworthiness of the vessel the claimant is an insurer, and can only escape liability for water damage by reason of perils of the sea; that is—

"those perils which are peculiar to the sea, and which are of an extraordinary nature, or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." The Giulia, 218 Fed. 744, — C. C. A. —.

While the evidence shows that the sea upon this voyage was tempestuous even for Alaskan waters, it was not such a condition as to bring it within this exception. As to the cargo, of course the same degree of diligence does not apply. A vessel, to be seaworthy, must be tight, staunch, strong, well furnished, manned, and vitualed, and in all respects equipped in the usual manner for the merchandise service in such trade. 3 Kent's Commentaries, 205; The Lillie Hamilton (D. C.) 18 Fed. 327. It must be fit and competent to carry the particular cargo which it engages to carry (The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012), and able to resist all ordinary action of the sea in the particular zone or sea which it engages to sail (Dupont de Nemours v. Vance, 19 How. 162, 15 L. Ed. 584), and as said by Justice Gray in The Silvia, 171 U. S. 464, 19 Sup. Ct. 8, 43 L. Ed. 241:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport"

—and again, in The Southwark, 191 U. S. 9, 24 Sup. Ct. 3, 48 L. Ed. 65:

"As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that the vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect."

It could not be reasonably contended that a vessel engaging to sail the Alaskan waters and carrying canned salmon could do so in a vessel which was not able to ride the seas in these particular waters during the particular season of the year in which the voyage was made, unless within the excepted sea perils, which is not shown, nor that canned salmon, as was this, to be sold to some extent because of the attractive appearance it would make upon exposition, could be stored in a hold of a ship in which coal had been carried, without taking every precaution to remove the particles of coal dust that were lodged there, and likewise to fortify against the waters of the sea and coal dust coming in contact with the cargo. The Lizzie W. Virden (C. C.) 8 Fed. 624, and Id., 11 Fed. 903; The Hudson (D. C.) 122 Fed. 96; The Florida (D. C.) 69 Fed. 159; The Mississippi (D. C.) 113 Fed. 985; and Id., 120 Fed.

1020, 56 C. C. A. 525. The only evidence to rebut the presumptions is merely the statement of the master and some members of the crew and one of the charterers, in which they say that the vessel was in apparently good condition, and that precautions had been taken to take away the coal dust which they knew was lodged there. In Corsar v. Spreckels, 141 Fed. 260, at page 269, 72 C. C. A. 378, Circuit Judge Ross, said:

"Indeed, unless otherwise expressly stipulated, an implied warranty of seaworthiness of the ship at the time of commencing the voyage accompanies every contract of affreightment. The Caledonia, 157 U. S. 130 [15 Sup. Ct. 537, 39 L. Ed. 644]. And this includes, not only a ship seaworthy in hull and equipment, which conditions it is conceded the Musselcrag met, but also seaworthy in respect to the stowage of the cargo. The Edwin I. Morrison, 153 U. S. 211 [14 Sup. Ct. 823, 38 L. Ed. 688] (and other cases cited)."

[3] In that case a ship was held liable for damage to a cargo of cement, where the ship, though not unseaworthy as to hull and equipment, was held unseaworthy as to stowage of cargo. The tarpaulins or hatch covers were not sufficient to prevent leakage (The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421), in view of the voyage and the season of the year; nor is the ship released by reason of the stipulations in the bills of lading. The testimony, I think, is conclusive that these bills of lading were not delivered to any of the officers of the libelant company. If they were issued, they were delivered to the watchmen at libelant's canneries, persons who were not connected with the libelant company in any official relation, and who were not in a capacity to negotiate with relation to the transportation. The record shows that there was an oral understanding between the parties with relation to the shipment of this cargo, and while no terms appear to have been detailed or specially understood, liability could not be limited except by mutual consent, and if the bills of lading were not issued to any authoritative persons and there was no understanding with relation to them, then the libelant could not be bound by their stipulations. Mr. Justice Grey, in The Caledonia (C. C.) 43 Fed. 681, where there was a preliminary agreement for transportation service and subsequently a bill of lading containing exemption clauses was signed and accepted by the libelant, and there was a loss in the market value of the cargo during the delay in reaching destination, said:

"When the parties have made such a contract, the shipowner cannot, without the shipper's consent, vary its terms by inserting new provisions in a bill of lading. * * * In the case at bar, the unseaworthiness of the vessel consisted in the unfitness of her shaft when she left port. * * * The exception of 'steam boilers and machinery, or defects therein,' inserted * * * in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of the voyage, must, by elementary rules of construction, and according to the great weight of authority, be held to be equally limited in its scope, and not to affect the warranty of seaworthiness at the time of leaving port upon her voyage. * * * A common carrier, receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the same place afterwards, and when their market value is less, is responsible to the owner of the goods for such difference in value. * * * The same general rule has been often recognized as applying to carriers by sea in this circuit as well as in the second circuit."

And the Supreme Court of the United States, in 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, in affirmance said:

"In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

In Pacific Coast Co. v. Yukon Independent Transportation Co. (this circuit) 155 Fed. 29, at page 37, 83 C. C. A. 625, the court said:

"But if, indeed, the parol testimony so admitted in evidence did have the effect to modify some of the provisions of the bills of lading, it was, under the circumstances disclosed in this case, admissible for that purpose, for the bills of lading were issued after the goods had been delivered on board the Senator, and after they had passed from the control of the shipper, and the vessel was about to go on her way. The burden was then upon the carrier to show that its agents directed attention to the terms of the bills of lading, and that the shipper assented to them. The Arctic Bird (D. C.) 109 Fed. 167; Bostwick v. B. & O. R. Co., 45 N. Y. 712; Strohn v. Detroit & M. Ry. Co., 21 Wis. 554 [94 Am. Dec. 564]; Mo. Pac. Ry. Co. v. Beeson, 30 Kan. 298, 2 Pac. 496; Mich. Cen. R. R. Co. v. Boyd, 91 Ill. 268."

In this case, not only were the bills of lading not delivered to, and their stipulations called to the attention of, any officer or authorized agent of libelant, but they were delivered to watchmen at the canneries, utter strangers to any responsible or authoritative head of libelant company.

[4] Respondent contends that it is exempted from liability because of the Harter Act, and that there is no evidence that the master and crew of the vessel did not use due diligence to make the vessel seaworthy. Under section 1 of the Harter Act (27 Stat. at L. 445) it is unlawful for any vessel transporting merchandise to insert in any bill of lading or shipping document any clause relieving it from liability—

"for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all merchandise or property committed to its * * * charge."

By the terms of section 2 of this act the owners, or agents cannot insert in any bill of lading or shipping document, any clause lessening, weakening, or avoiding the obligations of the owners, to exercise due diligence to properly equip, man, provision, and outfit the vessel. Section 3 of this act exempts vessels from liability for loss or damage resulting from faults or errors in navigation or in the management of the vessel, or from losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or inherent defect in the thing carried, etc., provided the owner shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied. This act, from the conclusion we have arrived at from the testimony, cannot avail anything to the respondent. The Supreme Court of the United States in The Carib Prince, 170 U. S. 655, at page 660, 18 Sup. Ct. 753, at page 755, 42 L. Ed. 1181, says:

"Now, it is patent that the foregoing provisions (section 2, Harter Act) deal not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by contract, when the particu-

lar conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used cannot, by any sound rule of construction, be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist. The fallacy of the construction relied on consists in assuming that because the statute has forbidden the shipowner from contracting against the duty to furnish a seaworthy ship unless he has been diligent, thereby the statute has declared that without contract no obligation to furnish a seaworthy ship obtains in the event due diligence has been used. And the same fallacy is involved in the contention that this construction is supported by the third section of the act."

It follows that, the bills of lading being inoperative, respondent must not only show that due diligence was exercised in furnishing a seaworthy vessel, but that it was in fact seaworthy. It is contended by the respondent that the coal dust damage, if any, was occasioned by an error in management or navigation, and within the protection of the third section of the Harter Act, and in support of this contention cites Corsar v. Spreckles, supra. An examination of the case, I do not think, supports the contention. Judge Ross (pages 262, 263, of 141 Fed., 72 C. C. A. 378) says:

"It will be thus seen that by virtue of the Harter Act the ship is still held, as theretofore, responsible for loss or damage arising from negligence, fault, or failure in the proper custody, care, or delivery of the cargo, and at the same time is exonerated from damage or loss resulting from faults or errors in navigation or in the management of the vessel, where due diligence has been exercised to properly man, equip, and supply it, and to make it in all respects seaworthy. It will not do to so construe these provisions as to make them nullify each other. On the contrary, they must be so read as to give effect to each, if possible. Undoubtedly a fault or error in the navigation or management of a vessel carrying cargo may, and often does, result in injury to the 'custody, care and delivery' of the cargo. * * * But, if the owner of the vessel has performed his duty by making the vessel in all respects seaworthy for the voyage it undertakes, it is plain that neither he nor the vessel can be held responsible from any merely incidental damage resulting to the cargo from a fault or error in its subsequent navigation or management, if section 3 of the act is to be given any force. * * * In the case in hand, the record shows that for about seven weeks the ship in question struggled with wind and wave in an effort to round Cape Horn. * * * The question confronting him (the master) was primarily and essentially one of navigation—how best, in view of the trying circumstances in which he was placed, to deal with the elements and get his ship, with her crew and cargo, to the place of destination. That his action in determining that question was primarily and essentially one of navigation does not, in our opinion, admit of the slightest doubt; and, being such, neither the ship nor her owner is responsible for incidental damage sustained by the cargo, because of the provision of the third section of the act of Congress above referred to."

In that case the question was one of navigation and clearly within the third section of the act. In this case the damage was occasioned by the water and coal dust, by reason of the ship's officers' failure to properly prepare the hold and in handling or caring for the cargo, and not because of any error in management or navigation. In The Jean Bart (D. C.) 197 Fed. 1002, at page 1005, the court said:

"The question therefore is whether the failure to properly use the ventilating equipment is a fault or error 'in navigation or in the management of the ship,' under the third section; or whether it is 'negligence, fault, or failure in proper * * * care of * * * merchandise or property committed' to the charge of the claimant. It sometimes happens that the duty of the ship's officers may relate both to the management of the ship and to the care of the cargo, and the rule has therefore become established that the proper classification in law of such a duty depends upon the purpose to which it primarily relates. * * * I am of the opinion that here the failure of the officers primarily related to the care of the cargo, and only incidentally, if at all, to navigation or the management of the ship."

[5] The master and crew, I do not think, used due care in protecting the cargo from the coal dust and water, and respondent cannot find refuge within the provisions of section 3 of the Harter Act.

[6] Finally it is contended that should a liability exist against the ship for any damage to the cargo, the full charge for reconditioning the salmon should not be allowed, and that no damage should be allowed for the difference in the market value of the salmon as claimed, for the reason that the libelant at all times had sufficient salmon in stock to supply all of the orders received during the delay in the delivery, and quotes the following from Moore on Carriers (2d Ed.) p. 623:

"Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable"

—and on page 624:

"Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages."

No issue can be taken to that as the basic principle underlying the law of damages, generally speaking. The testimony discloses that the charge made for reconditioning the salmon was a reasonable and ordinary charge; that the work done was necessary to place the salmon in as good condition as that in which it was received by the steamship Jeannie. The claim was paid by the libelant. It is contended by respondent that the so-called "market price" of salmon was not the price it could be sold for, but an arbitrary price at which the owners and dealers of salmon were willing to sell, and that the price was fixed by the Alaska Packers' Association, the largest producer of canned salmon on the coast, arbitrarily, irrespective of supply and demand, and this quotation adopted by the other packers, and the subsequent reduction of price was fixed in the same arbitrary manner and that Kelley-Clarke Company handled practically all of the salmon sold in the Seattle market, and all of libelant's pack for that year, and that when it received orders for salmon it apportioned the orders among its various members, taking into consideration kind, quantity, brands, etc., and that during this period of delay there were few orders for salmon at prices they were willing to accept, and that they had quantities of salmon of all brands belonging to libelant with which orders could be filled. This contention, I do not think, can be sustained by the evidence. There is no testimony upon which the court would be justified in basing a conclusion of market value other than that contended for by the libelant. While there is some evidence upon which to base argument that the market price was merely

an arbitrary price, bearing no relation to supply and demand, I think that a fair consideration of all of the testimony, bearing in mind the relation to the issue, does not justify the court in adopting this as a conclusion. The market value is the price at which a commodity can be purchased in the open market, and there is no testimony of any other market value than that contended for. The measure of damages is stated by Moore on Carriers, at page 410, as follows:

"In an action against a carrier of goods for failure to deliver the same within a reasonable time, the measure of damages is the difference in value of the merchandise at the time and place it ought to have been delivered in the usual course of transportation and at the time of its actual delivery or tender, whether the difference in value was occasioned by injury to the goods or was due to a decline in the market value, with interest added, and freight charges, if any unpaid, deducted."

It was the duty of the parties to this litigation, upon discovery of damage, to lessen, if possible, the damage, and having chosen to recondition the salmon and thus diminish the claim, libelant is entitled to recover the cost and charges of reconditioning, as well as the depreciation of the market price of the salmon during the reconditioning period, the delay in marketing being directly caused by the carrier. The law presumes a loss equal to the depreciation in market value during the period of detention, and from the evidence, taking the market price as disclosed by the record as a basis which must be adopted by the court, we find a loss in depreciation of $7,935. The cost or value of reconditioning is $4,283.06. I think that interest should be allowed at the legal rate upon the moneys expended by the libelant in reconditioning the salmon. Judge Deady, in The Nith (D. C.) 36 Fed. 96 (Dist. Court Ore.), said:

"Some of the authorities say that the allowance of interest should depend on circumstances. But I do not see why it should be disallowed in any case where the shipper is entitled to damages for nondelivery. From the date of such nondelivery the owner, by the fault of the carrier, is deprived of the use of the money or capital invested in the goods, and should have redress by being allowed legal interest thereon."

The decision of the District Court in that case was affirmed in (C. C.) 36 Fed. 383. From this expression, approved by the Circuit Court of this circuit, having found that libelant is entitled to recover, I think that it must also recover interest at the legal rate covering the period of detention.

The shipper having a right to resort to the vessel for damages growing out of failure to fulfill the contract for the carrying of merchandise, by the maritime law, The Belfast, 7 Wall. 642, 19 L. Ed. 266, and Dupont de Nemours v. Vance, supra, a decree may be presented in accordance with this opinion.

In re UNION DREDGING CO.

(District Court, D. Delaware. March 19, 1915.)

No. 254.

1. BANKRUPTCY ⟸272—COSTS AND FEES—CLAIM FOR SERVICES.

A claim of one employed by the executive committee of a company, three weeks before it filed its petition in bankruptcy, to go to California on behalf of the company and investigate its operations there, with power to take charge of them, and who, after the petition was filed and receivers were appointed of all the bankrupt's assets, was instructed by the directors to continue his investigations and report, irrespective of the receivership proceedings, and who reported to the directors, was properly disallowed by the referee as a claim for compensation for services rendered in the administration of the bankrupt estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. ⟸272.]

2. BANKRUPTCY ⟸482—COSTS AND FEES—ATTORNEY FOR BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (Comp. St. 1913, § 9644), providing that if a debtor, in contemplation of the filing of a petition by or against it, pay money to an attorney for services to be rendered, the transaction shall be re-examined by the court, and held valid only to the extent of a reasonable amount, and that any excess may be recovered by the trustee, the petition for a re-examination is a condition precedent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. ⟸482.]

3. BANKRUPTCY ⟸482—COSTS AND FEES—ATTORNEY FOR TRUSTEE.

Under Bankr. Act, § 62, providing that expenses incurred by officers in the administration of estates shall be reported in detail and examined by the court, an allowance should not be made to a trustee in bankruptcy for an attorney employed for services for the estate not requiring professional skill, but within the ability of one of ordinary business capacity; but a proper compensation may be allowed for necessary legal services to a trustee, and where the trustee of a gold dredging company received $63,000, an attorney's claim of $1,500 for successfully overcoming special difficulties in the administration relating to insurance was properly allowed, and an allowance for traveling expenses should be increased to the amount expended, but the claim of another attorney, whose only difficult service related to the issuance of trustee's certificates, and whose other services related to ordinary matters of insurance, taxes, rents, water supply, etc., was properly reduced from $4,000 to $2,575, but his allowance for traveling expenses increased.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. ⟸482.]

In Bankruptcy. Petition, in the matter of the Union Dredging Company, bankrupt, for review of orders of the referee disallowing claims for compensation for services rendered in the course of the administration of the bankrupt estate. Modified.

Ward, Gray & Neary, of Wilmington, Del., for Wilmington Trust Co., Trustee, Sylvester D. Townsend, Jr., and Pillsbury, Madison & Sutro.

Hugh M. Morris, of Wilmington, Del., for Richard H. Vail.

Philip S. Hill, of New York City, for Griggs, Baldwin & Baldwin

John Biggs and Armon D. Chaytor, both of Wilmington, Del., for creditors.

BRADFORD, District Judge. This case is before the court on petitions of review of certain orders made by the referee disallowing in whole or in part claims for compensation for alleged services rendered in the course of the administration of the bankrupt estate. It appears from the summary of evidence certified by him to the judge, among other things, that prior to the adjudication in bankruptcy April 10, 1913, the Union Dredging Company was engaged in gold dredging in California; that its plant and property situated in Sacramento County about two miles from Folsom and twenty two miles from Sacramento, consisted of six hundred and seventy two acres of land, approximately, with an office building and appurtenances thereon, and also a placer dredge, with its equipment and Keystone drill, mining tools and implements, and office furniture, books and supplies; that the placer dredge had been purchased under a contract of conditional sale, from the Bucyrus Company, of Milwaukee, Wisconsin, which provided that the title to the dredge was to remain in the vendor until the full purchase price and any and all notes given therefor or renewals thereof should be paid; that as an additional security for the payment of such purchase price a mortgage was given to the Bucyrus Company, covering practically all of the real estate of the bankrupt; that at the time of the filing of the petition in bankruptcy title to the dredge had not been acquired by the bankrupt, there then being owing of the purchase price thereof upwards of $16,000; that from April 12, 1913, until June 12 next following the said plant and property were in charge of Charles J. Cull and Wilmington Trust Company as receivers; that the latter was appointed trustee and as such took charge of the bankrupt estate June 12, 1913; that the real estate and personal property of the bankrupt were sold April 28, 1914, for $60,000; that the sale was confirmed May 28, 1914; that the receivers filed their account together with a petition for their discharge June 25, 1914, and a supplemental report November 23, 1914; that the first and final account of the trustee was also filed at the last mentioned date; that the total amount received by the trustee from all sources applicable to the costs and expenses of administration and to the claims of creditors, not taking into consideration the sum of $16,500, proceeds of trustee's certificates, issued and sold under order of court, and the further sum of $600, loaned for insurance on dredge, was the sum of $63,062.99; that the last mentioned sum includes $1,007.12, being the net balance, paid to the trustee, of the sum of $1,958.72, which came into the possession of the receivers; that of the above mentioned sum of $63,062.99 received by the trustee, $32,063.31 has been applied by it to the costs and expenses of administration, leaving a balance of $31,019.68 in the hands of the trustee applicable to further costs and expenses of administration and the claims of creditors. This balance should, in the opinion of the referee, be increased by the sum of $369.92, hereinafter particularly referred to, which has been directed to be turned over to the trustee by those to whom it was paid.

The matters in controversy covered by the petitions for review are: First, the disallowance of an alleged claim of Richard H. Vail, amounting to $943.25, representing an unpaid balance of moneys due

him for services and expenses rendered and incurred by him on account of the bankrupt estate. Second, the allowance to Griggs, Baldwin & Baldwin of the sum of only $130.08 as a set-off against the sum of $500 paid by the bankrupt to them before bankruptcy, and directing that law firm to turn over to the trustee the difference, namely, $369.92. Third, the disallowance of compensation claimed by Griggs, Baldwin & Baldwin to be due them as attorneys for Charles J. Cull, one of the receivers. Fourth, the allowance to the trustee for Pillsbury, Madison & Sutro of the sum of only $500 instead of $1,500, alleged to have been due to that firm for services as attorneys for the trustee. Fifth, the allowance to the trustee of only the sum of $41.95, instead of $83.90, to cover the traveling expenses of Pillsbury, Madison & Sutro in connection with the settlement of the estate. Sixth, the allowance to the trustee for Sylvester D. Townsend, Jr., Esq., of only the sum of $2,575 as compensation for services as attorney for the trustee, instead of $4,000 as alleged by him to be due. Seventh, the allowance to the trustee of only $202.70 to cover the traveling expenses of Mr. Townsend, attorney for the trustee, on his trip to California, instead of $405.40, as claimed by him.

[1] The referee properly disallowed the alleged claim of Vail for services and expenses. In the supplemental report of the Wilmington Trust Company, one of the receivers, made under oath November 20, 1914, it is stated that June 10, 1914, that company received a certain bill and claim from Vail reading as follows:

"22 May, 1913.

"Charles J. Cull and Wilmington Trust Co., Receivers Union Dredging Co., to Richard H. Vail, 68 Washing Square South, New York, Dr.

To railroad and Pullman	$ 133.85
To expenses	59.40
To services, 10 days	1,000.00
	1,193.25
By cash	250.00
To balance	$ 943.25"

In its supplemental report reference was also made to the claim asserted by Vail, as follows:

"With respect to said claim, Wilmington Trust Company reports that until said tenth day of June it had no knowledge whatever that the said Richard H. Vail had been employed to perform any services for the said Receivership Estate; that it never was consulted with reference to the employment of the said Richard H. Vail; that it has never at any time ratified the employment of the said Vail or the validity and sufficiency of said claim; that upon information and belief it avers that the services so rendered by the said Vail were useless and valueless to said Receivership Estate, and that the said employment of the said Richard H. Vail was without authority of law."

The supplemental report of Cull, one of the receivers, made under oath November 17, 1914, states:

"At a meeting of the executive committee of the Union Dredging Company, held March 20th, 1913, at which all the members thereof were present, the following resolution was adopted:

" 'Resolved that Mr. Richard H. Vail be employed and authorized on behalf of the company to go to Folsom to investigate the operations of the company

there, with full power to assume charge of operations, discharge or suspend the superintendent, employees and working men, and engage others on behalf of the company.'

"Mr. Vail started on his trip about the 5th of April, and on the 11th of April the company went into the hands of receivers. The directors of the company (Messrs. Griggs, Gillinder, Gorgas and Cull) thought it would be best for Mr. Vail to continue to Folsom and make his report on conditions there, irrespective of the receivership proceedings, and I accordingly telegraphed Mr. Vail as follows:

"'Jersey City, N. J. April 11th, 1913.

"'Mr. Richard H. Vail, Care of Tennessee Copper Co., Copper Hill, Tennessee.

"'Dredging company filed petition voluntary bankruptcy yesterday. Court appointed me receiver. Will start for Folsom tomorrow evening. Would like you to come earliest possible. Wire me when you will be there.'

"Mr. Vail arrived in Folsom early in May and made an examination of the property there, copies of which report were forwarded by Mr. Vail to Messrs. Griggs, Gillinder and myself. Mr. Vail's bill for services was filed with Messrs. Griggs, Baldwin and Baldwin, who were attorneys for the receiver, and I assumed the same had been transmitted by them to the referee for consideration. It was not until early in June, 1914, when the Wilmington Trust Company sent me for signature a 'report of the receivers' that I learned that Mr. Vail's bill had not been filed with the referee. I then mailed the bill to the Wilmington Trust Company."

The circumstances under which Vail went to Folsom exclude any reasonable idea of his having been employed by the receivers or either of them acting as receiver. By the order of April 10, 1913, appointing the receivers it was provided that they should "take charge of all the assets of said bankrupt and preserve the same, pending the election and qualification of the trustee herein, or until the further order of the court. * * * And that said receivers be and they are hereby authorized to take such proceedings as may be necessary in the District Court of the United States for the Northern District of California to secure the appointment of an ancillary receiver in bankruptcy by said court, to take charge of and preserve the assets of the bankrupt in said district until the election and qualification of the trustee herein or until the further order of said court." It is evident for several reasons that Vail was not authorized to visit Folsom and do what he did in connection with that trip by anything contained in the order of appointment, even if, under any circumstances, that order could be treated as broad enough in its terms to cover such an authority. In the first place the resolution of the executive committee of the Union Dredging Company, of which committee Cull was a member, was adopted March 20, 1913, some three weeks before that company filed its petition in bankruptcy and the receivers were appointed. In the next place, the authority conferred upon Vail under the resolution was wholly inconsistent with any power, express or implied, contained in the order appointing the receivers; for by that resolution Vail was "employed and authorized on behalf of the company to go to Folsom to investigate the operations of the company there, with full power to assume charge of operations, discharge or suspend the superintendent, employees and working men and engage others on behalf of the company." Again, Vail "started on his trip about the 5th of April, and on the 11th of April the company went into the hands of receivers," and the directors of the company, including John W. Griggs and Cull

"thought it would be best for Mr. Vail to continue to Folsom and make his report on conditions there, irrespective of the receivership proceedings." These circumstances clearly indicate that Vail was not employed by the receivers, or either of them acting as receiver, but was employed by and on behalf of the company "irrespective of the receivership proceedings," and satisfactorily account for the fact that the Wilmington Trust Company had not as trustee or receiver notice of any alleged claim for so long a time. Further, and as confirmatory of the above conclusion, Cull swears that Vail arrived in Folsom early in May, made an examination of the property there, and forwarded copies of his report to "Messrs. Griggs, Gillinder and myself," all directors of the bankrupt, but not to the Wilmington Trust Company, which had qualified as a receiver April 12, 1913. It is suggested by counsel for Vail that it does not appear that the latter was ever notified or had an opportunity to be heard; but Vail's alleged claim was filed with the referee November 23, 1914, more than two weeks before the referee made his order thereon, and it does not appear that Vail made any application to adduce testimony or be heard; nor in his petition for review is any such point raised. * * *

[2] The order of the referee allowing Griggs, Baldwin & Baldwin only $130.08 as a set-off against the sum of $500, received by them from the Union Dredging Company before bankruptcy, and directing that the difference be turned over to the trustee, must be modified. In their petition for compensation as attorneys for the bankrupt Griggs, Baldwin & Baldwin set forth that "April 8, 1913, they were consulted by the officers and directors of the bankrupt with respect to the filing of a petition in voluntary bankruptcy"; that they "prepared a form of resolution to be passed by the board of directors, authorizing such action, and thereafter prepared and had verified a petition for the adjudication of the above named bankrupt as a bankrupt, schedules of its debts and assets, and also a petition for the appointment of a temporary receiver of its property"; that they placed themselves in communication with the clerk of this court to ascertain whether the District Judge would be in Wilmington on the next following day; that on that day they sent a representative to Wilmington for the purpose of filing the said petitions; that April 10, 1913, they again sent a representative to Wilmington to file the petitions for the adjudication and the appointment of a receiver respectively; that the District Judge being absent from the district application was made to the referee, who made the adjudication, appointed the receivers and fixed the amount of their bonds; that the petitioners secured the bond for Cull as one of the receivers and filed the same in this court; that they successfully resisted an application to vacate the adjudication in bankruptcy; that they sent a representative to attend the first meeting of creditors June 12, 1913; that in connection with their services they made disbursements as follows: Blanks for schedules, $1.50; amount paid clerk for filing papers and other expenses to Wilmington on six trips, $79.68; amount paid referee, $17; and telegrams, $3.90; aggregating $102.80; and that "prior to the filing of the petition in bankruptcy your petitioners received from the bankrupt $500 on account of services to be

rendered and disbursements made in these proceedings." Section 60d of the Bankruptcy Act provides:

"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be reexamined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

It does not appear that any petition for the reexamination of the $500 transaction has been presented by the trustee or any creditor of the bankrupt estate. Such a petition is a condition precedent to any determination by the referee that any portion of the amount paid to an attorney, as specified in the section, may be recovered by the trustee for the benefit of the estate as an excess over and above what is reasonable. But while the circumstances do not present a case in which, under section 60d, an order in invitum for the payment to the trustee of such excess may be made, the fact nevertheless remains that, in the opinion of this court, the sum of $500 received by Griggs, Baldwin & Baldwin was ample compensation for any and all proper and legitimate services and disbursements on account of which they allege they received that sum. The order of the referee for the repayment of the excess must be set aside. But the petitioners, having on their own showing, been fully paid, if not overpaid, for their services and disbursements for which they claim an allowance, are not entitled to receive the sum of $102.08 above mentioned or any part of it, and the same is disallowed. The principles of equity as administered by courts of bankruptcy will not justify any other conclusion.

The order of the referee disallowing compensation claimed by Griggs, Baldwin & Baldwin to be due them as attorneys for Cull, one of the receivers, and for disbursements, must be approved and confirmed. The referee holding the court of bankruptcy appointed the Wilmington Trust Company and Cull as co-receivers, to co-operate as joint receivers, without conferring upon either of them authority to act independently of the other. The receivers did not employ Griggs, Baldwin & Baldwin as their attorneys. They do not claim that such was the fact, but state that their firm was retained only by Cull. Further, no proper proof has been adduced as to the nature and extent of their alleged services or disbursements. Their alleged claim rests wholly upon the bare statement in their petition. In addition to what has been said, the court is strongly impressed with the idea that, in view of the above mentioned payment of $500 to that firm prior to the bankruptcy, the confirmation of the order of the referee cannot work an injustice to its members.

[3] The order of the referee allowing to the trustee for Pillsbury, Madison & Sutro only $500, instead of $1,500, alleged to have been due to that firm for services as attorneys for the trustee, must be modified. I am satisfied they should be allowed $1,500, as claimed by them. That they were competent to and did render valuable services to a large amount to the trustee abundantly appears in the case. Their services related to two classes of subjects: First, those which

do not call for the professional skill of a lawyer and ordinarily would not justify his employment; and, secondly, those which necessitate or reasonably require legal advice. As a general rule an allowance should not be made to a trustee in bankruptcy for compensation for an attorney employed by him for doing such things for the protection and benefit of the estate as do not require professional skill but are well within the ability of a person possessing ordinary intelligence and business capacity. Such things it is incumbent upon the trustee in the discharge of his duty to attend to without burdening and depleting the estate committed to his charge. The determinative question is not whether it is agreeable and convenient to the trustee to have attorneys to act for him, but whether it is reasonably necessary for the welfare of the estate that counsel should be so employed. This rule, in the absence of special elements of difficulty, has general application with respect to such matters as the payment of taxes, the collection of rents, the payment for water and electricity, and the continuance of insurance in force. But it appears from the record that there were special difficulties in successfully attending to these matters, which could be overcome through the personality of Pillsbury, but probably would have proved insurmountable without his intervention. Sylvester D. Townsend, the vice-president of the trustee, testified to the effect that the insurance on the property of the bankrupt in California was in bad shape; that he was informed by Harlan G. Scott, a director of the trustee, that Pillsbury "was considered one of the ablest men on the coast and, probably, a man who could accomplish what we wanted him to do"; that the reason for the selection of counsel in San Francisco was because "all of the companies that we were insured in had their agents there"; that "the water company, upon whom we were entirely dependent, had their office there, and the electric light company who furnished us the electricity, had their office there"; that Mr. Pillsbury "took up with these insurance agents out there the matter of insurance, and by reason of his standing in the community, prevailed upon them to extend this insurance temporarily"; that "if it had not been for his services in San Francisco it would have been impossible for us to have continued this insurance, because it was the kind of insurance that nobody wanted"; that "we were satisfied that Mr. Pillsbury was a man whom we could place entire confidence in, having known him so well and so favorably"; that he "was a big enough man out there to get anything that anybody else could get"; that "we realized that it was almost entirely a matter of his personality in securing a continuation of this insurance"; that "that was equally true as regards the water company there"; that "it was absolutely necessary that we have a supply of water, otherwise the dredge would depreciate very rapidly, if not kept in water"; that "it was a continual effort on the part of Mr. Pillsbury to keep the insurance on the dredge"; and that "only his personal equation and standing in that community enabled him to keep the insurance in force." In view of the foregoing considerations I think it was reasonable and proper that Pillsbury should render and be fairly compensated for the services with respect to those items which, aside from special difficulty, should have been attended to by

the trustee without the expense of professional advice. But the services of Pillsbury, Madison & Sutro were not confined to such details of ordinary business management but extended to important matters arising under the laws of California and involving professional knowledge and skill. Without going more minutely into the subject, I am satisfied that the sum of $1,500 claimed by and for them for compensation should be allowed.

The order of the referee allowing to the trustee only $41.95 to cover the traveling expenses of Pillsbury, Madison & Sutro, instead of $83.90, the amount claimed by them, is disapproved. I can perceive no reason why the full amount claimed should not have been allowed, and the order of the referee is modified accordingly.

The order of the referee allowing to the trustee the sum of $2,575 as compensation to Sylvester D. Townsend, Jr., as its attorney, instead of $4,000 as claimed, must be approved and confirmed. The bankruptcy act intends and contemplates for the benefit of creditors an economical settlement of bankrupt estates, and pursuant to this policy section 62 provides that "the actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court." Among the legitimate expenses of administration is proper and moderate compensation for legal services rendered to a trustee in bankruptcy in so far as such professional aid is necessary. If there be no necessity for the employment of counsel neither the court nor the trustee should direct or provide for it. And if there be such necessity and one or two attorneys be sufficient it would be an abuse to secure three or four. There were but few matters presented to the counsel for the trustee involving questions of any difficulty or delicacy. Among them probably the most prominent was the issue of trustee's certificates in order to raise sufficient money to pay the balance due on the conditional sale of the placer dredge, and thereby acquire title to it. But it appears not only from the accounts rendered by Pillsbury, Madison & Sutro, but from his own account, that on the question of the issuance of trustee's certificates as well as on other questions involving professional knowledge, he was in conference or correspondence with Pillsbury, Madison & Sutro, and was largely guided and assisted by them in the consideration of the points involved. And with respect to the questions raised by the application for the issuance of trustee's certificates, as the same was presented and argued before this court, counsel other than Mr. Townsend, representing creditors, took a very leading and important part. A very large number of items of charge made by Mr. Townsend for alleged professional services rendered to the trustee relate to insurance, taxes, collection of rents, and water and electrical supply, involving no legal question, or consideration other than could be had from ordinarily well-informed business men. Items of insurance form a large proportion of the services for which compensation is demanded. These were matters which required and received attention from Pillsbury, Madison & Sutro in California, and compensation is allowed to them as above indicated, because the personality of Mr. Pillsbury was

a necessary element of success. But that consideration does not apply to Mr. Townsend. These matters were merely part of the essentially non-professional management of the estate which the trustee should not have called on Mr. Townsend to attend to personally and on a professional basis. And if under any circumstances they might have been otherwise viewed by the trustee there was and could have been no reason or justification for the employment of both Mr. Townsend and the firm of Pillsbury, Madison & Sutro to attend to them. There was no litigation of any importance in which Mr. Townsend took part. Nothing, however, that is here said is intended to convey the impression that he did not render meritorious legal services to the trustee. He certainly did in connection with the issuance of trustee's certificates and also in other respects. But for such services he will be liberally compensated by the allowance of $2,575 made him by the referee. I attach but little weight to the opinions of the several lawyers who testified in favor of Mr. Townsend's claim for compensation for two reasons. First, with two exceptions, without having actual knowledge upon the subject, they based their testimony upon Mr. Townsend's statements of the nature and amount of his services; and, secondly, and not of less importance, it does not appear that any of the lawyers knew or took into consideration the extent of the assistance received by Mr. Townsend from other lawyers as above stated. After a careful examination of the record and proceedings transmitted by the referee to this court it does not appear to me that Mr. Townsend has suffered any injustice at the hands of the referee.

The order of the referee allowing to the trustee only $202.70 to cover the traveling expenses of Mr. Townsend, attorney for the trustee, instead of $405.40 as claimed by him, must be modified. I have grave doubt whether, in view of the professional standing and skill of Mr. Pillsbury, as testified to by the vice-president of the trustee, it was necessary that Mr. Townsend should go to California. I do not perceive that he accomplished anything in California which could not have been effected by Pillsbury, Madison & Sutro, under instructions by mail from the trustee or its local attorney. But evidently the trustee thought it desirable that Mr. Townsend should go to California in behalf of the estate, and it also appears that Pillsbury, Madison & Sutro desired his presence there. Under these circumstances whatever doubt there may be on the subject should be resolved in Mr. Townsend's favor. And that doubt having been so resolved, I fail to perceive any consistency in disallowing one-half of his traveling expenses. The order of the referee must, therefore, be modified to the extent of allowing to the trustee the sum of $405.40, the amount claimed.

The receivers, the trustee, and their counsel have not given sufficient attention or weight to the fact that it is the function of the court, and not of the receivers, the trustee, or their counsel, independently of the court, to "cause the estates of bankrupts to be collected, reduced to money and distributed" and "to make such orders * * * as may be necessary for the enforcement of the provisions of this act." Had they taken a different and correct view of the scope of their authority much of the embarrassment and expense which mark the

administration of the bankrupt estate before the court would have been avoided, and a simpler and more economical course have been pursued to the advantage of the creditors, for whose benefit, and not for that of the receivers, trustee and their counsel, the adjudication in bankruptcy was mainly intended.

An order and decree in conformity with this opinion may be prepared and submitted.

UNITED STATES v. SOUTHERN PAC. CO. et al.

(District Court, S. D. California, N. D. June 7, 1915.)

Nos. 46, A-16, A-24, A-25, A-26, A-28.

1. PUBLIC LANDS ⇐120—SUIT FOR CANCELLATION OF PATENTS—SUFFICIENCY OF BILL.

A bill by the United States against a railroad company, which sets out an act of Congress making a grant of lands to defendant within designated place limits with reference to the railroad as constructed, but expressly reserving therefrom all mineral lands, and which alleges that defendant made application for patent thereunder, that with knowledge that certain of the lands included in its application were mineral, and valuable for their mineral, it caused its agent to make affidavit that they were not mineral, for the purpose and with the effect of preventing an examination of the same by agents of the government, by means of which false and fraudulent representations it procured the issuance of a patent for such mineral lands, and that by means set out defendant concealed the fraud until within three years prior to the commencement of the suit, *held* to state a cause of action.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ⇐120.]

2. PUBLIC LANDS ⇐120—SUIT FOR CANCELLATION OF PATENTS—LIMITATION.

The provision of Act March 2, 1896, c. 39, § 1, 29 Stat. 42 (Comp. St. 1913, § 4901), limiting the time within which suits may be brought for the cancellation of patents to lands thereafter issued under railroad grants to six years from issuance of the patent, does not bar a suit to cancel such a suit on the ground of fraud, where the fraud was successfully concealed by defendant until within six years prior to the bringing of the suit.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. ⇐120.]

In Equity. Suit by the United States against the Southern Pacific Company and others. On motion to dismiss the bill. Denied.

Thos. W. Gregory, Atty. Gen., and E. J. Justice, Sp. Asst. Atty. Gen., for the United States.

Chas. R. Lewers and Peter F. Dunne, both of San Francisco, Cal., for defendant Southern Pac. Co.

Samuel Shortridge, of San Francisco, Cal., and J. W. Wiley and George A. Whitaker, both of Bakersfield, Cal., for other defendants.

BLEDSOE, District Judge. The original bill of complaint in the case above entitled, No. 46 Civil, was filed in December, 1912. It came on for hearing thereafter on numerous motions to dismiss, and was amended pursuant to order of court after the submission of the motions to dismiss and while the same were under consideration by Judge Dooling of the Northern district of this court, whereupon new

motions to dismiss were made, which were argued and submitted to this court at the November term thereof, held in Fresno in last year. The bill in this one case states that the value of the property in controversy exceeds $250,000,000. The aggregate in all the suits exceeds $320,000,000. Because of that fact, and also because of the tremendous importance of the controversy, both to the government and to the various defendants, the court has endeavored to give all the matters submitted to it in the case above entitled, and in the others similar thereto, and which are decided herewith, its most careful consideration, and it has examined with particular care each point advanced by the various parties.

Owing to the great length of time that has elapsed since the submission of these cases, and while the court has had them under consideration, all of which has been due in a large measure to the very congested condition of the calendar of this court, the court feels that it ought not to indulge itself in the additional time necessary to prepare a comprehensive opinion, which would set forth its views in detail upon the various contentions which have been made. If the matters alleged by the government in its bill are true, there is stern and urgent necessity that opportunity should be accorded the government at the earliest possible time to adduce the proper proof in support thereof, and this court feels that it ought not, therefore, for any reason, permit further time to elapse without announcing its conclusions and making the appropriate orders in the premises. Because of this situation, therefore, the court will content itself with a very brief statement of its reasons for its rulings herein.

[1] The suit is brought to cancel a patent issued by the complainant, the United States government, to the Southern Pacific Railroad Company, in 1894, and concerns approximately 45,000 acres of land, situate in the San Joaquin valley. The patent was issued to the railroad company in consummation of the grant made by Congress in 1866, granting to the defendant company, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of * * * 10 alternate sections of land per mile on each side of said railroad," through the state, etc. It was also provided in said grant "that all mineral lands be and the same are hereby excluded from the operations of this act," and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections within 20 miles of the railroad were to be selected. It was also in said act provided, further, "that the word 'mineral' when it occurs in this act shall not be held to include iron or coal."

It is alleged that the defendant Southern Pacific Railroad Company, through its land agent, and in compliance with the act of Congress above referred to, made application for the land in question, and concurrently therewith made affidavit that "said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant," etc.; that thereafter appropriate action was taken by the officers of the Interior Department, resulting in the issuance of a patent for the lands in question. This patent as issued, and as received and accepted by the defendant, it is alleged, contained the usual mineral exception clause to the effect

that "all mineral lands, should any such be found in the tracts granted," were excluded and excepted from the operation of the patent. It is then alleged that the complainant was induced by the fraud of the defendant not to actually examine the lands described in the application for the patent, but to rely upon the said affidavit and the fraudulent representation of the said defendant that it would not question the validity of the said exception of mineral land above mentioned; that the defendant intended, however, thereafter to assert the invalidity of this exception in the patent, and to fraudulently acquire title to the mineral lands in controversy, which it knew at the said time of acquiring patent were mineral, but fraudulently concealed from the plaintiff this knowledge and all the information thereof. It is further alleged that during the past three years the plaintiff has ascertained, and alleges the fact to be, that of the lands described in said patent, approximately 45,000 acres thereof are valuable mineral lands, and contain rich deposits, in commercially paying quantities, of petroleum, and other valuable minerals; that they were well known to be mineral lands as aforesaid, prior to May 9, 1892, and that they had no appreciable value for agricultural purposes, or for other purposes than for the mineral contained therein, "all of which facts concerning the mineral character of said lands, and the existence of mineral locations affecting the same, have been well known to the said Southern Pacific Railroad Company and its officers and agents since long prior to May 9, 1892." It is also alleged that at the time of the application for the patent above mentioned it was well known to the said Southern Pacific Railroad Company, and the officers and agents thereof, that the lands in controversy herein contained valuable minerals and were mineral lands within the meaning of the provisions of the act of Congress above mentioned; that at the time said company caused said application to be made it and its officers and agents well knew that the officers of the Department of the Interior, being induced by the affidavit of the land agent of the defendant, which affidavit falsely represented said lands were not mineral lands and were of the character contemplated by the grant above mentioned, would cause patent to be issued for all of said lands without any furthur examination, consideration, or adjudication of the question whether any of said lands were mineral or nonmineral in character, and without actual knowledge upon the subject, and that in lieu thereof the said officers of the Department of the Interior would act upon the allegation in said affidavit, and would be misled and deceived thereby. It is further alleged that the said Southern Pacific Railroad Company caused its said land agent to support its application for patent as aforesaid, knowing at the time that the said lands were mineral, and falsely representing that they were not mineral, with the secret and fraudulent intention of inducing the Department of the Interior to issue a patent therefor, without any actual or further examination, consideration, or adjudication as to the mineral character of said lands, and in actual ignorance of their mineral character.

It is then alleged that all of the officers of the United States having authority in all proceedings with reference to said patent were, until long after its issuance, ignorant of the fact that any of the lands de-

scribed were mineral in character, and were also ignorant of the aforesaid fraudulent and secret intention, purposes, and acts of the said Southern Pacific Railroad Company, in consequence of which, and because of the false representations of the said defendant and of its land agent, which representations were known to be false, were calculated and intended to deceive said officers of the plaintiff, and which did actually deceive them, no finding, decision, or adjudication as to the mineral or nonmineral character of the said lands was ever made by them. It is also charged that, in addition to the secret and fraudulent purpose and intent of the defendant company and its officers and agents above referred to, it was also the secret and fraudulent purpose and intent of the said Southern Pacific Railroad Company, its officers and agents, to conceal from the plaintiff the true facts in the premises until more than six years had elapsed from the time of the issuance of the patent, to the end that plaintiff should thereby be delayed in the institution of judicial proceedings to enforce its rights, in order that the defendant might successfully plead the statute of limitations to any suit which might thereafter be brought. Thereafter, at some considerable length, allegations are made showing the means and devices adopted by the defendant to conceal and keep from the officers of the United States government the facts and the perpetration of the frauds hereinabove referred to.

The bill of complaint comprises some 135 pages of printed matter, and it is obvious, of course, that the above is but the merest skeleton of the allegations contained therein. It suffices, however, in my judgment, in determining the substantial features of the matters pressed upon me for consideration, to suggest that the bill shows, in apt language, that upon the performance of certain conditions the Southern Pacific Railroad Company was entitled to receive a grant of certain lands from the government; that in no event was it entitled to receive any so-called mineral lands, they being expressly reserved from grant by Congress; that nevertheless defendant company, knowing that the lands in controversy herein were, and were well known to be, mineral, falsely and with the intention to deceive the United States government, made claim to the lands in question herein, and made affidavit that they were not mineral, and were therefore comprehended within the terms of the grant; that the officers of the United States government relied, without making any actual investigation or examination of the lands in controversy, upon the representations made in that behalf by defendant company, and that, acting thereon, being influenced solely thereby, patents were directed to and did issue covering the interdicted lands in question; and that thereafter, and until within three years previous to the commencement of the action, defendant company, desiring to cover up its fraud, so as to enable it ultimately to secure a valid title to the lands which would be impregnable to attack because of the fraud thus committed, contrived to conceal both the character of the land, in so far as it was enabled so to do, and contrived effectually to conceal the fact of the existence of its own fraud previously consummated. Such are the facts alleged by the United States government. Upon their proof in the cogent

and pursuasive manner and to the degree required in cases where fraud is charged, it would seem without question that the relief prayed for should be accorded to the complainant.

A number of reasons, fortified by able and instructive arguments made in their behalf, have been urged by the defendants to the effect that the court should, in spite of the clear, and to me certain and unambiguous, allegations of the bill of complaint, dismiss the proceeding and declare to the complainant, the government of the United States, that it has made no case which comes within the purview or consideration of this court. In this behalf it is urged, first and most insistently, that the action is barred by virtue of certain statutes of limitation enacted by the Congress of the United States. Act March 3, 1891, c. 559, 26 Stat. 1093; Act March 2, 1896, c. 39, 29 Stat. 42, Comp. St. 1913, § 4901.

[2] The argument in support of the plea of these statutes covers hundreds of pages of the briefs of counsel herein. In the determination of this plea the court ought perhaps to indicate at some considerable length the reasons why it is constrained to hold it untenable, but the lack of time and the pressure of other duties, hereinabove referred to, inhibits such a course. Suffice it to say that in the first place it has been determined by the Circuit Courts of Appeals, both in the Eighth and Ninth Circuits, that the act of Congress of March 3, 1891, relied upon by defendants, has no application in such a proceeding as this. Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; same case, 203 Fed. 394, 121 C. C. A. 498; United States v. Exploration Co., 203 Fed. 387, 121 C. C. A. 491. It has been suggested that this court is not bound to, and should not, follow these decisions, and that they do not correctly state the law. Disregarding the rather manifest impropriety of refusing to follow a decision of the Court of Appeals of this Circuit, even if I should conclude that such decision did not, in my own judgment, enunciate the law, in the present instance, my own conclusion is in thorough accord with that of the Circuit Court of Appeals, and there can therefore be no possible reason why its conclusion should not be followed.

It was determined by the Supreme Court of the United States, apparently as the unanimous expression of the views of that court, and speaking through one of the most profound lawyers who ever sat upon that exalted bench, Mr. Justice Miller, in Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636, that, in a suit based upon fraud, the statute of limitations otherwise operative does not commence to run until the fraud has been discovered by the party aggrieved thereby. In so holding Mr. Justice Miller said:

"We are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

I can find no case involving the question of fraud which detracts from or impairs the reasoning of this sound and salutary declaration of the principles of morals and philosophy which should control the action of a court of equity.

The counsel for defendants seek to differentiate the ruling in Bailey v. Glover because of the fact that there the statute of limitations began to run "from the time the cause of action accrued," while in the acts of Congress in question herein the statutes began to run from the date of the issuance of patents by the government. I can see nothing, however, in this suggestion, of benefit to defendants. In the case at bar the cause of action as for the fraud alleged accrued—that is, arose—at the time of the issuance of the patent, in consequence of the fraudulent representations. Counsel advance the suggestion that:

"It is not illogical and does no violence to the language of the statute involved in Bailey v. Glover to say that an action 'accrues' to a plaintiff when he discovers that he has one."

I can discover, however, no authority which supports this suggestion, and the use and definition of the word "accrues," as found in the books, do not lend countenance to it. 25 Cyc. 997, 1066. So, also, counsel advance the argument that the equitable rules recognized and enunciated in Bailey v. Glover arise out of the application of the doctrine of laches by courts of equity, and that because thereof, in a suit in which the government is a party plaintiff, the usual and ordinary rules followed as between private individuals, where the statutes of limitation are held in restraint in cases involving fraud, are not applicable. I confess to an inability to follow counsel in this deduction, and know of no reason, and my attention has been directed to no authority announcing one, why the government of the United States, when it brings a suit as a private individual with respect to its own property and of which it has been unlawfully deprived, should be subject to any harsher rule than that applicable to a private individual in a like exigency. In addition, as above indicated, the Supreme Court of the United States, in Bailey v. Glover, do not announce the rule there as emanating from, or being at all likened to, the disposition of courts of equity to recognize the general doctrine of laches, but rather base their conclusion upon the emphatic and obvious proposition that a court of equity will not, in the face of plaintiff's ignorance of the fraud, permit a continuing fraud to consummate its own fraudulent intent by the plea of the Statute of Limitations. Were the rule otherwise, fraud would be encouraged to feed upon itself; a premium would be placed upon the doing of added wrong, in order that the original wrong might be made immune merely through the passage of time. In addition, and in conclusion, upon this branch of the case, it may be said that all of these arguments were passed upon unfavorably by the Circuit Courts of Appeals in the cases hereinabove referred to.

Complaint is also made that the bill presents a double aspect, in that it is a suit to quiet the government's title to the land involved and also a suit to cancel the patent heretofore issued to the defendant; that there is an insufficient allegation of the fraud alleged against the defendant with respect to the mineral character of the lands involved

and of the concealment of the fraudulent acts and conduct of the defendant, subsequent to the reception by it of its patent. It will have to suffice in this behalf to state that I have gone over all of these matters carefully and can come to no conclusion other than that the contentions of the defendants are untenable. It is not the fact, of course, that the lands are, or were at the time of the patents, mineral lands, which gave the goverment a right of action. It is the fact alleged by the government that the defendant railroad company, at the time of its application for, and the receipt of, the patent, knew that the lands incorporated therein were mineral lands, and were not comprehended within the terms of the congressional grant, which gives the government its right of action at this time. In other words, it is the *fraud,* and not the fact with respect to the mineral character of the lands, which authorizes the government to ask for the cancellation of its patent. To me there is no ambiguity in the bill of complaint with respect to the relief which is asked, nor the ground upon which such relief is based. Doubtless some of the allegations in the complaint could be polished up and made to show less of verbiage and more of brief and unqualified allegation of fact. Doubtless, also, however, this is unnecessary in order that the defendants may have a proper and sufficient understanding of the charge which is made, and which they are called upon to meet, if they would successfully defend their title to the lands now held by them.

The case comes now before the court merely upon the assertions of the government of the United States with respect to matters of fact which it alleges it can prove. In the event, of course, that it fails to prove to the proper and sufficient degree the facts which it alleges, its case must fail and the defendants will go hence. It must be assumed, however, that the government is acting in entire good faith in the prosecution of this litigation, and any slight verbal inaccuracies in the statement of its case, which do not detract from the substantial feature of the serious charge which it makes, ought not to be considered of sufficient importance to justify further delay in the presentation of the proofs in this case, which delay, through loss of witnesses on the one side or the other, might prove of substantial detriment to all parties in this important controversy.

Objection is also made that necessary defendants are omitted in one of the cases. There is no suggestion, however, apparent upon the face of the complaint, that such parties are at all necessary parties within the meaning of the rule requiring their presence in the case. Non constat they are innocent purchasers for value, and therefore their rights are protected and confirmed by the very statute defendants have pleaded by way of limitation herein. Act March 2, 1896, 29 Stat. 42.

I have considered all of the motions to strike out and make more certain, and will state, generally, that none of them, in my opinion, require affirmative action on the part of the court, or justify further mention herein. In each case the motions to dismiss, strike out, and make more certain are denied.

EVANSVILLE BREWING ASS'N v. EXCISE COMMISSION OF JEFFERSON COUNTY, ALA., et al.

(District Court, N. D. Alabama, S. D. May 31, 1915.)

No. 224.

1. INJUNCTION ⟸105—RESTRAINING CRIMINAL PROSECUTIONS—INVALIDITY OF STATUTE—INVASION OF PROPERTY RIGHTS.

The jurisdiction of a court of equity to enjoin the enforcement of a void statute is not affected by the fact that the statute is of a criminal or penal nature, if its enforcement will destroy property rights, to the irreparable injury of complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. ⟸105.]

2. INJUNCTION ⟸85—SUBJECTS OF PROTECTION—CONSTITUTIONAL RIGHTS.

That a state Legislature has vested a commission with discretionary power to do certain acts constitutes no defense to a suit to enjoin such acts, if they would be in violation of the rights of complainant under the Constitution of the United States.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⟸85.]

3. COMMERCE ⟸60—CONSTITUTIONAL LAW ⟸240—INTOXICATING LIQUORS ⟸15—STATE LICENSE LAW.

Act Ala. April 6, 1911, regulating the sale of liquors, and known as the "Smith Law" (Acts Ala. 1911, p. 249), by section 12, imposes a license tax of $1,500 on breweries, which also entitles them to sell their product at wholesale without additional license. It further provides that "each agency of a brewery of another state doing business in this state shall pay an annual license tax of $1,500, and any person, whether retail dealer or not, selling the goods or product of any brewery of another state, shall be deemed and held an agent thereof, unless such brewery shall have an established agency in this state." *Held* that, under Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 (Comp. St. 1913, § 8738), subjecting liquors shipped in interstate commerce to the laws of the state after their delivery to the consignee, such act is not invalid as imposing a tax on interstate commerce, nor is it unjustly discriminatory as against the foreign manufacturer, but as to him is a valid exercise of the police power of the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 91–95; Dec. Dig. ⟸60; Constitutional Law, Cent. Dig. §§ 688, 693, 697–699; Dec. Dig. ⟸240; Intoxicating Liquors, Cent. Dig. §§ 17, 18; Dec. Dig. ⟸15.]

In Equity. Suit by the Evansville Brewing Association against the Excise Commission of Jefferson County, Ala., and others. On motion of defendants to dismiss bill. Motion granted.

London & Fitts, of Birmingham, Ala., for complainant.

Frank S. White & Sons, of Birmingham, Ala., for defendants.

GRUBB, District Judge. This cause is submitted on a motion to dismiss the bill because of want of equity. The bill was filed by the complainant, a corporation and a citizen of Indiana, engaged in the business of operating a brewery in that state, against the defendants, who constitute the excise commission of Jefferson county, Ala. Its purpose was to restrain the defendants from requiring licensed liquor dealers in Jefferson county to abstain from selling the product of complainant's brewery until a license of $1,500 had been paid, and

from canceling and annulling the license of such liquor dealers because of their alleged resale of the product of the complainant's brewery while said license of $1,500 remained unpaid.

The material part of section 12 of the act known as the "Smith Law," approved April 6, 1911, which regulates the sale of liquor in Alabama, where liquors are permitted to be sold, is as follows:

"That the following license taxes shall be paid: Each retail dealer in spirituous, vinous or malt liquors shall pay an annual tax of fifteen hundred dollars, except that such license tax in cities of class A shall be three thousand ($3,000.00) and in towns of less than one thousand population nine hundred dollars ($900.00). Each wholesale dealer in spirituous, vinous and malt liquors shall pay an annual tax of fifteen hundred dollars ($1,500.00). Each distillery manufacturing spirituous liquors and each brewery manufacturing beer shall pay an annual license tax of fifteen hundred dollars, but any brewery or distillery may sell its own products at wholesale without taking additional license if it has paid for a license as such brewery or distillery. Each agency of a brewery of another state doing business in this state shall pay an annual license tax of fifteen hundred dollars, and any person, whether retail dealer or not, selling the goods or product of any brewery of another state, shall be deemed and held an agent thereof, unless such brewery shall have an established agency in this state." Acts 1911, p. 257.

This section requires breweries of foreign states doing business in Alabama to pay an annual license tax of $1,500 for each agency in the state, and declares that any retail or wholesale dealer in Alabama, selling the products of any brewery of another state, would be deemed and held an agent thereof, unless the brewery had itself established an agency in the state. The complainant had no established agency in the state, but was making shipments of its products from Indiana into this state to fill its orders. It had not paid the $1,500 license.

The bill avers that the excise commission had threatened to and would cancel the wholesale or retail licenses of liquor dealers in Jefferson county unless there was paid an additional sum of $1,500 to the state, in lieu of the license not paid by the complainant. The bill asserts that this provision of section 12 of the act approved April 6, 1911, is obnoxious to section 8, art. 1, of the Constitution of the United States, and to the fourteenth amendment thereto, and void for that reason, and that irreparable injury will be done the plaintiff's business in Jefferson county, Ala., unless the defendants are restrained from the acts complained of.

The defendants base their motion to dismiss upon these grounds:

(1) They assert that the bill is without equity, because it seeks to restrain the enforcement of a criminal or penal statute of the state, and that no property rights of complainant are involved.

(2) They assert that the excise commission is a quasi judicial body, and is given unrestricted discretion with relation to the suspending or canceling of any liquor license by section 24 of the act of April 6, 1911, and that a court of equity cannot, therefore, interfere with the exercise of such discretion.

(3) They assert that section 12 of that act is valid.

[1] First. The general rule is well settled that courts of equity will not restrain threatened prosecutions for the commission of alleged crimes. Old Dominion Telegraph Co. v. Powers, 140 Ala. 220, 37

South. 195, 1 Ann. Cas. 119; Brown v. Mayor and Aldermen of Birmingham, 140 Ala. 590, 37 South. 173; Davis v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778. There is an equally well settled exception to the general rule, viz., when the injunction is sought to restrain criminal prosecutions, which would result in the invasion of the rights of property through the enforcement of an unconstitutional law, to the irreparable injury of the plaintiff. In the case of Brown v. Mayor and Aldermen of Birmingham, 140 Ala. 590–595, 37 South. 173, the Alabama Supreme Court said:

"It has been expressly decided that 'the mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of the property rights, and the party aggrieved has no other adequate remedy for the prevention of irreparable injury which will result from the failure or inability of a court of law to redress such rights.'"

In the case of Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, it was held that:

"Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law * * * may be reached and controlled by a court of equity."

The defendants' contention that the bill seeks to restrain prosecutions or threatened prosecutions for violation of state or municipal laws does not appear from the face of the bill. The only relief asked in the prayer of the bill is that the defendants be enjoined from requiring the liquor dealers of Jefferson county to abstain from selling complainant's products until the $1,500 license had been paid, and from canceling or threatening to cancel the licenses of such dealers as dealt in the product of the plaintiff while such license remained unpaid. No criminal prosecutions of the complainant or its agents are feared, or asked to be enjoined, so far as appears from the bill. It is true that the dealers, after cancellation of their licenses, if they persisted in selling liquor, would be subject to prosecutions therefor; but no such state of facts is relied upon in the bill, nor is relief against such consequences prayed for therein.

The bill shows that the wrongs complained of, if consummated by the defendants, would destroy complainant's business with the retail and wholesale liquor dealers of Jefferson county. The right to make contracts for the sale of complainant's products in Alabama is a property right, protected by section 8, art. 1, of the Constitution of the United States, and by the fourteenth amendment. The unlawful invasion of this right by a state board, though by criminal prosecutions, under color of an unconstitutional law, would, under the mentioned exception to the general rule, justify the interposition of a court of equity by an injunction, if irreparable injury was alleged as a result thereof.

The defendants further contend that a liquor license, under the laws of Alabama, is not property, but a mere privilege, citing State ex rel. Crumpton v. Excise Commission, 177 Ala. 212, 59 South. 294. However, the property right asserted by the plaintiff in this case is not based on a license, but on the right of the owner of property to

dispose of it by contract to any purchaser he may select, unimpeded by illegal restriction.

[2] Second. It is also contended by defendants that the excise commission of Jefferson county is vested by the law creating it with discretion to suspend or cancel licenses, and that their action in so doing is not appealable or reviewable in the courts. However competent it may have been for the Legislature of Alabama to have vested this power in the excise commission, free from the control of the courts of the state, it is clear that nothing that the Alabama Legislature could do would avail to make an act of the defendants, which was violative of the rights of the complainant under the Constitution of the United States, a valid one. If the canceling by the defendants of the license of dealers, because of their selling the product of the complainant, is an interference with interstate commerce, or a taking of property without due process, or a denial of the equal protection of the laws, then the Legislature of Alabama could not make it the less so by vesting in the commission the unlimited and unaccountable authority to cancel or suspend licenses. To hold otherwise would be to make the state authority paramount to the federal Constitution in matters within the exclusive jurisdiction of the federal government. That this cannot be done requires no argument.

[3] Third. The question remains whether the canceling of the licenses of wholesale liquor dealers by the excise commission because of their selling complainant's product, the agency license of $1,500 not having been paid, and as a means of compelling its payment, is violative of section 8, art. 1, of the Constitution of the United States and the fourteenth amendment to it.

The complaint is not that a license is exacted of the complainant for an agency in this state. It has no such agency, and is not, therefore, directly subjected to the license tax. The complaint is against the threatened action of the defendants in requiring an additional license of the plaintiff's Alabama customers for selling its beer after its arrival in Alabama. The effect of this section, of course, is to require the complainant either to establish an agency in Alabama itself, and pay the license tax therefor, and so relieve its customers from paying any license for selling its beer, or to pay or reimburse one of its customers for the amount of the license, thereby constituting such customer its agency, and relieving him and all others selling its product in Alabama from taking out a license. The payment of the prescribed license by complainant or any one of its customers in this state would entitle its beer to be sold by all other persons in this state free from the obligation to pay an additional agency license. The right of the state to tax an agency of a foreign brewery established in this state, if the tax does not operate as a discrimination, is not disputed.

The complaint is directed against the threatened exaction of a license from a customer of the complainant for selling its beer in Alabama. The complainant's contention is that this amounts to a tax on interstate commerce, and conflicts with section 8, art. 1, of the federal Constitution. The claim is that it is a tax on the plaintiff's right to sell its beer in Indiana to customers in Alabama, and is there-

fore a tax on its Indiana or interstate business. The license, however, is not imposed on the plaintiff at all, unless it voluntarily establishes an agency in Alabama. It is not imposed on the transaction by which the beer is sold in Indiana to the customer in Alabama. The Smith Law neither prohibits nor taxes the right of plaintiff to sell and deliver its Indiana beer to an Alabama customer. The part of section 12 of the Smith Law assailed by the bill is as follows:

"And any person, whether retail dealer or not, *selling the goods or product of any brewery of another state,* shall be deemed and held an agent thereof, unless such brewery shall have an established agency in this state."

The constructive agency does not arise unless and until the complainant's beer is resold by its Alabama customer in that state. It does not come into existence because of the Alabama customer's purchase of the complainant's Indiana beer. It becomes operative only after delivery of the Indiana beer to the Alabama customer, and upon his resale of the Indiana beer in Alabama. The Alabama customer is constituted a constructive agent only for "selling the goods or product of any brewery of another state."

It is clear that the Alabama customer could not resell the Indiana beer until it had been delivered to him by the complainant, since sale includes delivery, and the customer could not deliver to his customer until delivery had been made to him by the complainant. The question, therefore, is whether it is competent for Alabama to tax the resale in Alabama of beer shipped from Indiana after its delivery to the seller in Alabama. That this could not have been done before the passage of the Wilson and Webb-Kenyon Laws is certain. Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Robbins v. Shelby Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

The Wilson Law (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [Comp. St. 1913, § 8738]) permits the state to tax the sale of intoxicating liquors after their arrival in the state, though in the original package. Arrival in the state has been construed to be delivery to the consignee. Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. The Wilson Law gives the state the right to license the resale of liquors, imported from one state into another, after delivery to the consignee, though the original package be unbroken. There are but two qualifications to the exercise of this right: (1) The tax must be imposed for police purposes; and (2) it must not discriminate against the products of other states.

The Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. 1913, § 8739]) prohibits the transportation of intoxicating liquors from one state to another, if intended to be used to violate a valid state law, whether a police regulation or not. Under this law the liquor is amenable to the state law before delivery to the consignee.

The case of Phillips v. Mobile, 208 U. S. 472, 28 Sup. Ct. 370, 52 L. Ed. 578, is authority for the right of the state or its municipal corporation, since the passage of the Wilson Law, to impose a nondiscriminating license tax on the seller of intoxicating liquors, made and sold to him in another state, after delivery to him in Alabama and in the original package. It is also authority for the proposition that a

license tax, imposed on the seller of intoxicating liquors, though in amount greatly in excess of the cost of administering the law, may yet be a tax imposed in the exercise of the police power of the state, and not the taxing power. Laying aside the question of discrimination, the Phillips Case is identical with this case in principle, and should control it.

That the Wilson Act applies in favor of regulatory, as well as prohibitory, state legislation, and that state legislation that would be construed as an exercise of the revenue power of the state, when relating to a subject-matter other than intoxicating liquors, will be construed as an exercise of its police power, when it relates to intoxicating liquors, has been held, also, in the cases of Vance v. Vandercook, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, Pabst Brewing Company v. Crenshaw, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925, and Reymann Brewing Co. v. Brister, 179 U. S. 445, 21 Sup. Ct. 201, 45 L. Ed. 269. Under these cases, and since the passage of the Wilson Law and the Webb-Kenyon Law, the state of Alabama has the power to exact a license from the Alabama seller of beer made in another state and shipped into this state, if the license is for police purposes and works no unjust discrimination against the foreign made beer. That a license of the kind exacted of the domestic dealer in intoxicating liquors in this case may be for police purposes, is clear from the cases cited. There remains the inquiry as to whether it operates as an unjust discrimination against beer made in states other than Alabama.

The exaction of an additional license of the Alabama wholesale dealer for the privilege of selling foreign made beer, when a like license is not exacted for the sale of beer of domestic manufacture, is an evident discrimination against the seller of the foreign made beer. Welton v. State of Missouri, 91 U. S. 275, 23 L. Ed. 347; Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382; Tierman v. Rinker, 102 U. S. 123, 26 L. Ed. 103; Kehrer v. Stewart, 197 U. S. 61, 25 Sup. Ct. 403, 49 L. Ed. 663; Powell v. State, 69 Ala. 10; McCreary v. State, 73 Ala. 480. If the Alabama wholesale dealer was the complainant, and there was no more in the case, his right to relief would be clear. However, in this case the complainant is the foreign brewer, and the question of discrimination is therefore to be determined with reference to it rather than to the local dealer.

The right of the state to impose a license tax on the agencies of foreign breweries established in Alabama is incidentally involved, in the question of discrimination, as it relates to the complainant. If the imposition of such a license is legal and nondiscriminatory, then the complainant, by establishing the agency and paying the license, can put the sale of its beer on a parity with all beer wherever made. It can either establish an agency of its own, or by paying the agency license for one of its customers, constitute such customer its agent, and so comply with the statute, and free the sale of its beer by others of license obligations. It is conceded that the doing of business by complainant in Alabama through a resident agent is an occupation that may be taxed by Alabama, if it works no unjust discrimination against the for-

eign, as compared with the domestic, business. The question is whether the exaction of a license of $1,500 for the privilege of selling its foreign-made beer in Alabama, whether through its own agency, or the constructive agency of its customer, created by the statute, is unjustly discriminatory to complainant.

The gist of the statutory requirement is the payment of a license tax of $1,500. The question is whether the complainant, not its customers, is unjustly discriminated against by the exaction of such a license tax. Section 12 of the Smith Law imposes a tax on domestic brewers of $1,500 for the privilege of making and selling their beer in Alabama. The purpose of the exaction of the $1,500 license tax on agencies of foreign breweries seems to have been to put them on a parity, as to amount of license paid for marketing their product, with domestic brewers. Each is required to pay the state $1,500 for the privilege of marketing their product. It is in the power of the complainant to obtain the privilege of having its beer sold anywhere in Alabama by any person by paying the state that amount. The domestic brewer is required to pay to the state the same amount before selling its product in Alabama. There is, therefore, no discrimination against beer produced in other states, or against the person who produces it, in the license requirement. It is true that, if a wholesale dealer is required to pay the additional license of $1,500 for selling foreign-made beer, he suffers a discrimination as against the dealer who sells domestic beer only, and might be entitled to complain of the exaction as a discriminatory one. The complainant in this case, however, suffers no discrimination, since it is open to it to market its product in Alabama on the same terms, as respects license, as does the domestic brewer.

It is true that the complainant may be compelled to pay a tax in the state where its beer is manufactured for the privilege of making it. It is true that the domestic brewer in Alabama acquires by the payment of the license the privilege of making the beer in Alabama as well as that of selling it, which the foreign brewer does not avail of. Each is privileged to market its beer in Alabama for a license fee of $1,500.

In the case of Reymann Brewing Co. v. Brister, 179 U. S. 445, 21 Sup. Ct. 201, 45 L. Ed. 269, the Supreme Court held a license tax of Ohio a valid exercise of the police power and nondiscriminatory. The Ohio statute taxed the business of selling beer at each place where the business was carried on, while permitting the manufacturer to sell at the place of manufacture, upon paying only the manufacturer's license. The court said (179 U. S. 451, 452, 21 Sup. Ct. 203, 45 L. Ed. 269):

"The effect of this is claimed to be that the domestic manufacturer may sell liquor, in quantities of one gallon or more, at the place of manufacture without being subjected to the tax, and that thus he has an advantage over the foreign manufacturer, who can only sell, in Ohio, at some other place than the place of manufacture, and is thereby subjected to the tax. In other words, while the domestic manufacturer must pay the tax if he sells at other places than the place of manufacture, yet as he is declared not to be within the act in selling at the place of manufacture in quantities of not less than one gallon at any one time, such a provision operates as an illegal discrimination against the foreign competitor, who must necessarily sell at places other than the place of manufacture."

The court disposed of this contention in these words (179 U. S. 452, 21 Sup. Ct. 203, 45 L. Ed. 269):

"Under this provision, the manufacturers, whether within or without the state, may sell at the manufactory and ship to any part of the state of Ohio, and the incidental disadvantage that the foreign manufacturer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the state of Ohio, he is obliged to pay the tax, does not appear to arise out of any intention on the part of the state Legislature to make a hostile discrimination against foreign manufacturers."

So, in this case, the incidental disadvantage the foreign brewer may be under by reason of having to pay a manufacturer's tax in another state "does not appear to arise out of any intention on the part of the state Legislature to make a hostile discrimination against foreign manufacturers." On the contrary, the purpose appears to be to equalize the license in Alabama as to each class for the sale of its product. Applying the test applied by the Supreme Court in the Reymann Brewing Company Case, 179 U. S. 452, 21 Sup. Ct. 201, 45 L. Ed. 269, the foreign brewer, by establishing a brewery in Alabama, can both manufacture and sell for a $1,500 license fee, and, if the Alabama brewer locates its brewery out of Alabama, it suffers the same incidental disadvantage as does the foreign brewer.

I conclude that the portion of section 12 of the Smith Law assailed is not unjustly discriminatory as against the foreign manufacturer, with whose interest this case is only concerned, and that it is a valid exercise of the police power of the state of Alabama and a permissible regulation by the state of the sale of intoxicating liquors shipped from other states under the Wilson and Webb-Kenyon Laws.

If the license fee is exacted of the wholesale dealer unjustly, the complaint should be presented in a suit in which the person who suffers the unjust discrimination is the complainant. The present complainant, suffering no unjust discrimination, has no cause of complaint.

For these reasons, the bill is ordered dismissed for want of equity, and the plaintiff is taxed with the costs.

CLEMENT v. WHITTAKER et al.

(District Court, D. New Jersey. July 16, 1915.)

No. 776.

1. WILLS ⟸683—CONSTRUCTION—PROPERTY DEVISED.

Testator gave his residuary estate to trustees, to pay the income to the directors of a hospital. A brother of testator predeceased testator, and left a will making gifts to testator. Testator instituted suits, resulting in decrees adjudging that the enjoyment of the gifts was postponed. There was nothing to indicate that testator believed he had no interest in his brother's estate, but, on the contrary, it was fair to assume that he knew he had an interest therein, of which the right to possession was merely postponed. *Held*, that testator intended that the residuary clause should include whatever interest he acquired under the will of his brother.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1603–1606; Dec. Dig. ⟸683.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. WILLS ⟸683—CONSTRUCTION—PROPERTY DEVISED.
The words "all the rest, residue and remainder of my estate," in a residuary clause, are broad enough to include any interest testator had under the will of his predeceased brother, whether he believed he had any interest or not.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1603–1606; Dec. Dig. ⟸683.]

3. WILLS ⟸449—CONSTRUCTION—ESTATE DEVISED—KNOWLEDGE OF TESTATOR.
The mere fact that a testator may not have knowledge of his estate does not cause intestacy, unless he lacked capacity to know of what his estate consisted.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. ⟸449.]

4. WILLS ⟸683—CONSTRUCTION—TESTAMENTARY TRUST.
Testator gave his residuary estate to trustees, to lend, invest, and reinvest the same, and to pay the income and interest arising therefrom to a hospital, for the purposes for which the hospital was incorporated, and authorized the trustees, on conditions specified, to divide the principal sum of the trust estate and unused accumulations of interest or income among charitable institutions and hospitals they might select. *Held*, that the words "invest," "interest," "income," and "principal sum," did not qualify the nature of the residuary estate, but expressed merely the duties to be performed by the trustees, and the residuary clause was sufficient to include any interest testator had in the estate of his predeceased brother.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1603–1606; Dec. Dig. ⟸683.]

5. WILLS ⟸452—CONSTRUCTION—DISTRIBUTION IN CONFORMITY TO RULES OF INHERITANCE AND DISTRIBUTION.
The rule that the law favors a distribution as nearly as possible in conformity to the general rules of inheritance and distribution is entitled to weight in construing a will, when the language thereof is obscure, and when it appears that next of kin have been dependent on testator, but is not of great value where the language is not obscure, and it is not shown that any of the next of kin have been dependent on him.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 968–970; Dec. Dig. ⟸452.]

6. TRUSTS ⟸147—RIGHTS OF BENEFICIARIES—ESTOPPEL.
A release executed by a beneficiary under a testamentary trust does not operate by way of estoppel, since no one has been or can be affected by it to his injury.
[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. ⟸147.]

In Equity. Suit by Cornelia E. Clement against Mary Ann Whittaker, personally and as executrix of Wesley E. Whittaker, deceased, and others. Bill dismissed.

McCarter & English, of Newark, N. J., for complainants.

Peter Backes and Gardner H. Cain, both of Trenton, N. J., for Mary A. Whittaker, personally and as executrix and G. H. Cain, executor.

Aaron V. Dawes, of Hightstown, N. J., for Mary J. Rellstab and Emily E. Whittaker.

Collins & Corbin, for Anna M. E. Creveling.

J. Warren Davis, of Trenton, N. J., for Mary Camp Blair and Isabella Camp.

Selick J. Mindes, of Newark, N. J., for Fred Camp.

Bayard Stockton, of Trenton, N. J., for Mercer Hospital.

ORR, District Judge (specially presiding). This is a bill in equity whereby the plaintiff seeks such a construction of the will of Wesley E. Whittaker, deceased, as will result in a decree that said testator died intestate as to a large portion of his estate; that the plaintiff and others are proper persons to whom such portion should be ultimately distributed; and that the Mercer Hospital, which is named as residuary legatee in such will, should be excluded in such distribution. The parties defendant are numerous. Most of them will be directly benefited if the plaintiff has a decree in her favor. Some of them have permitted the bill to be taken pro confesso. Others have appeared and filed brief answers admitting the allegations of the bill. Answers at length to the merits of the bill were filed by Mary A. Whittaker, personally and as executrix of the will of Wesley E. Whittaker, deceased, by Gardner H. Cain, executor of the will of John Henry Whittaker, and by the Mercer Hospital. The case came on for hearing upon bill and answers.

Because of the views of the court upon the main questions involved, it is unnecessary to determine the exact relationship of all the parties to the testator, Wesley E. Whittaker, deceased. The facts material to a determination of the questions involved are as follows:

Wesley E. Whittaker died unmarried and without issue December 6, 1897, having first made his last will and testament and a certain codicil thereto, which will and codicil were subsequently duly admitted to probate by the proper court, which issued letters testamentary to the executors therein named. Said will and codicil are in language following:

"In the name of God, Amen.

"I, Wesley E. Whittaker, of the city of Trenton, in the county of Mercer and state of New Jersey, being of sound mind, memory and understanding, do hereby make, publish and declare this present writing to be my last will and testament, and I do hereby revoke all former wills by me at any time before made.

"First. I do hereby order my executors hereinafter named to pay all my just debts and funeral expenses as soon as practicable after my decease.

"Second. I give and bequeath unto my friend Charles H. Hall, of the city of Trenton, my diamond stud.

"Third. I give and bequeath unto Frank E. Ellison, of Jersey City, my gold watch and chain.

"Fourth. I give and bequeath unto John W. Ellison, of Jersey City, the gold watch left to me by my father, John Whittaker.

"Fifth. I give and bequeath unto by sister-in-law Mary A. Whittaker (wife of John Henry Whittaker) all of my household goods and furniture, all my wearing apparel, books, silver ware, pictures, engravings, also all my jewelry of all kinds (not hereinbefore disposed of). Also the sum of three thousand dollars.

"Sixth. I give unto the Riverview Cemetery at Trenton the sum of three hundred dollars as permanent fund to invest securely and to apply and use the interest or income therefrom from time to time toward keeping in repair and proper condition my burial lot in said cemetery.

"Seventh. I give and bequeath unto my sister, Anna W. Ellison, of Jersey City, the sum of five thousand dollars, and in case she shall not be living, I give and bequeath the said sum of five thousand dollars to her daughter, Anna M. E. Creveling.

"I give and bequeath unto the said Anna M. E. Creveling the further sum of two thousand dollars.

"I give and bequeath unto John W. Ellison the sum of one thousand dollars.

"I give and bequeath unto Frank E. Ellison, Harry B. Ellison, Percy Ellison and Roy Ellison (children of John W. Ellison) the sum of one thousand dollars to be divided equally among them, and in case of the decease of any of them, his share shall be equally divided among his surviving brothers.

"I give and bequeath unto my brother, John Henry Whittaker, the sum of one thousand dollars, also the library of mine now in his possession, also the case of minerals and the autograph letters formerly belonging to my brother, Albert J. Whittaker, also such other cases and books of mine now in his possession.

"I give and bequeath unto my brother, George R. Whittaker, the sum of one thousand dollars.

"Eighth. I give and bequeath unto my sister-in-law Attie E. Williams (wife of John H. Williams) the sum of one thousand dollars as a token of my regard for her.

"I give and bequeath unto my housekeeper, Annie Hart, the sum of one thousand dollars in remembrance of her long and faithful services in my family.

"Ninth. I give and bequeath unto 'The Union Industrial Home Association for Destitute Children of Trenton, New Jersey,' located on Chestnut avenue, near Greenwood avenue, the sum of one thousand dollars. And also I give and bequeath unto the 'Saint Francis Hospital,' located on Chambers street, near Hamilton avenue, in said city of Trenton, the sum of one thousand dollars.

"Tenth. I hereby authorize and empower my executors (and the survivor of them) to sell and convey all my real estate at either public or private sale and to execute good and lawful conveyances for the same.

"Eleventh. All the rest, residue and remainder of my estate, I do hereby give unto my brother, George R. Whittaker, and my sister-in-law, Mary A. Whittaker (wife of my brother John Henry Whittaker), and to the survivor of them, to have and to hold as trustees, to rent, invest and reinvest the same, and to pay the income and interest arising therefrom (first deducting all taxes, insurances, repairs and all other costs, assessments and impositions whatsoever) to the board of directors of 'The Mercer Hospital' at Trenton, to be used by said board of directors for the uses and purposes mentioned as the object for which said hospital was incorporated in the certificate of incorporation now on record in the Mercer county clerk's office for the term of nine years from the date of their accounting as such executors in yearly payments: Provided, however, that if at any time within said term my said trustees (or the survivor of them) shall decide that said income is not being properly applied (of which fact I hereby direct my said trustees, or the survivor of them shall be the sole and only judge, and whose judgment and decision shall be final and conclusive) I hereby direct, require and empower them (or the survivor of them) to withhold all further payments of said income, without any notices to said board of trustees or to said 'The Mercer Hospital' and therefrom and thereafter to divide the whole of the principal sum of said trust estate and all unused accumulations of interest or income thereon (less all costs, charges and expenses incident to the final settlement of my estate) equally among any, and as many charitable institutions and hospitals located in the state of New Jersey as they (or the survivor of them) may choose and select: Provided further, if however my said trustees (or the survivor of them) shall continue to pay said income to the board of directors of the said 'The Mercer Hospital' for the entire term above stated, then in that case, it is my will, and I do hereby order, that at the expiration of the said term, my said trustees (or the survivor of them) shall pay the whole of the principal sum of said trust estate and all unused accumulations of interest or income thereon (less all costs, charges and expenses incident to the final settlement of my estate) to the said 'The Mercer Hospital' absolutely for its use and benefit forever.

"Lastly, I do hereby nominate, constitute and appoint my brother, George R. Whittaker, and my said sister-in-law, Mary A. Whittaker (and the survivor of them) the executors of this my last will and testament.

"In witness whereof, I have hereunto set my hand and seal this twenty-seventh day of February, eighteen hundred and ninety five.

"Wesley E. Whittaker. [L. S.]

"Signed, sealed, published and declared by the above named testator to be his last will and testament in our presence and we, in his presence, at his request, and in the presence of each other, have hereunto set our hands and seals this twenty seventh day of February, eighten hundred and ninety five as attesting witnesses. J. Judson Rue, 111 E. State St.

"John M. Crouch, 111 E. State St.

"I, Wesley E. Whittaker, of the city of Trenton in the county of Mercer and state of New Jersey, being of sound mind, memory and understanding, do hereby make this a codicil to my last will and testament, dated February the twenty-seventh, A. D. eighteen hundred and ninety-five, and I hereby revoke said will so far as this codicil shall affect the same.

"First. I do hereby revoke the fourth clause in my said will and testament and hereby give and bequeath unto my nephew, John T. Whittaker, the gold watch left to me by my father, John Whittaker.

"Second. I give and bequeath unto my brother, George E. Whittaker, the sum of four (4) thousand dollars out of the residue of my estate in addition to the sum of one thousand dollars given to him in clause seventh of my said will and testament.

"Third. I give and bequeath unto my housekeeper, Annie Hart, out of the residue of my estate, the sum of one thousand dollars in addition to the one thousand dollars given to her in clause eighth of my said will and testament.

"Lastly, I hereby confirm my said last will and testament in all respects except so far as this codicil shall alter the same. And I direct my said executors named therein to carry out the provisions of this codicil thereto.

"In witness whereof, I have hereunto set my hand and seal this first day of December, A. D., eighteen hundred and ninety-seven.

"Wesley E. Whittaker. [L. S.]

"Signed, sealed, pronounced and delivered and declared by the said Wesley E. Whittaker, as a codicil to his last will and testament, and to be taken as part thereof in our presence, and we in his presence and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

"Margaret A. Whittaker.

"John M. Crouch."

The executors assumed the trusts imposed upon them by said will, settled the estate according to its provisions and according to law, and exercised the discretion given to them in the residuary clause in favor of "The Mercer Hospital" in all respects. Immediately after the death of the testator there came into the hands of the executors certain real estate and personal estate of the value of $34,841.01. The balance of corpus and net accumulations of interest which were distributed to the Mercer Hospital at the end of the nine-year period together amounted to $27,947.46, for which the said residuary legatee then gave to said executors and trustees an absolute release and discharge in writing, under date of January 17, 1908.

Shortly after July 28, 1914, there came into the hands of Mary A. Whittaker, as surviving executor of Wesley E. Whittaker, deceased, $123,801.45. This sum is claimed by the Mercer Hospital in reliance upon the provisions of the residuary clause in the will above mentioned. To restrain the said surviving executor from acceding to said claim this bill is filed; it being the contention of the plaintiff that said sum was not intended to come within the operation of said residuary clause, and that with respect to said sum said Wesley E. Whittaker died intestate.

The source from which that large sum of money was derived and the title of Wesley E. Whittaker and his executors thereto require explanation. On March 28, 1884, Albert J. Whittaker, who was a brother of said Wesley, died seised of real and personal estate of the then aggregate value of $308,067.88, having first made his last will and testament, which was duly admitted to probate in Mercer county, in this district, on April 7, 1884, and of which the following are the material provisions as they appear in the bill:

"First. I give to my wife, Margaret A. Whittaker, the use and possession of my residence during her natural life, all the taxes, insurance and repairs thereof to be paid out of my estate. I give to my said wife all my furniture, pictures, silverware, piano, and all other articles of use or ornament in said residence. I further give and bequeath to my said wife in lieu of dower, for and during the term of her natural life, without any power to sell or transfer the same, six hundred shares of the capital stock of the United New Jersey Railroad and Canal Company now standing in my name, with full power and authority to collect and receive to and for her own use and benefit all dividends and interest declared thereon after my death, and I do hereby order and direct that said stock shall not be sold, transferred or exchanged by my executors, or by any other person or persons whatever, during the life of my said wife, but shall be left and remain standing in my name on the company's books, and the dividends thereon paid to my wife alone, or her order, and not to my executors. Out of said dividends and interest I request my said wife to pay to her niece, Emma Chambers, for and during the natural life of the said Emma Chambers, six hundred dollars per annum.

"In case of the decease of my said wife before that of Emma Chambers, I direct and require my executors to retain sixty shares of the said stock and to pay the interest thereon to said Emma Chambers during her natural life.

"Second. I give to my oldest brother who may survive me the gold watch which I now carry, and to my brother, Wesley E. Whittaker, my office safe and furniture, and the coins, autographs, etc., etc., in said office.

"Third. I give to Albert Whittaker Moore, son of Randolph H. Moore, one thousand dollars and to Albert J. Whittaker McGuire, son of James H. McGuire, one thousand dollars.

"Fourth. I give to my brother Wesley E. Whittaker, fifteen thousand dollars; to my brother John H. Whittaker, fifteen thousand dollars; to my sister Ann W. Ellison, fifteen thousand dollars, and to my brother George R. Whittaker, twenty thousand dollars because he has a large family to support, the lawful child or children of them who may have died to take the share of the deceased parent.

"Fifth. I authorize and empower my executors to sell and convey my real estate, at their discretion, except my residence, which said residence I authorize them to sell after the decease of my wife.

"Sixth. After the decease of my said wife and niece, I give my estate to my lawful heirs, to be divided equally among them, share and share alike, the lawful child or children of any of them who may have died to take the share of their deceased parent.

"Lastly. I nominate, constitute and appoint my said brothers, Wesley E. Whittaker and George R. Whittaker, executors of this my will, and hereby revoking all wills by me heretofore made, I declare this alone to be my last will and testament.

"In witness whereof, I have hereunto set my hand and seal this seventeenth day of July, in the year of our Lord eighteen hundred and eighty-two.

"Albert J. Whittaker. [L. S.]"

Of the foregoing will, the second paragraph, creating the life estate for his widow and her niece, the sixth paragraph, providing for distribution subject to the rights of such widow and niece, and the last paragraph, appointing his brother, Wesley E. Whittaker, as one of his executors, are the most important parts.

The estate of Albert J. Whittaker was duly settled by the executors therein named, who had in their hands, after setting aside the 600 shares of stock of the United New Jersey Railroad & Canal Company for the benefit of the life tenants, and after paying the pecuniary legacies, a large residue of personal estate. It was doubted by the executors whether such residue was presently distributable. To secure a judicial determination of the question the executors (including the said Wesley E. Whittaker) in the year 1885 instituted proceedings in the Court of Chancery of New Jersey, which were so proceeded with that on June 16, 1885, a final decree was entered by the then Chancellor, sustaining the validity of the trusts and other provisions of the will, including the disposition of the residuary estate, but holding that by the terms of the will distribution of the entire residuary estate should be suspended until the death of both the widow and her niece. The opinion of the court in said proceeding may be found at length in Whittaker v. Whittaker, 40 N. J. Eq. 33, and the conclusion arrived at is briefly stated in that part of the opinion which follows, with one word italicized by this court:

"It follows that the persons who, at his death, were his heirs at law or next of kin, are not entitled to take *now*, as their property, that part of the estate which is not needed for the purpose of paying debts and legacies and providing for the widow and her niece, according to the will."

No appeal was taken from that decree, which therefore remained the law of the case and governed the construction of said will for some years, during which Wesley E. Whittaker made his will and died. At the date of said decree, the widow, Margaret A. Whittaker, was 52 years of age, and her niece, Emma Chambers, was 25 years old. Margaret A. Whittaker died in 1908. On May 25, 1912, after the death of both the executors of Albert J. Whittaker, deceased, and the substitution of their successor, the plaintiff in this case and others filed their bill in the Court of Chancery of New Jersey, praying that the trust created and existing under the will of Albert J. Whittaker, deceased, should be terminated, and such proceedings were had that, although the Court of Chancery followed the decree of that court entered June 16, 1885, hereinabove referred to, yet upon appeal to the Court of Errors and Appeals of the state of New Jersey the appellate court reversed the decree of the lower court and remitted the proceedings, with the result that a final decree was entered adjudging that the residuary estate of said Albert J. Whittaker, deceased, be distributed (except as to stock necessary to protect the rights of said Emma Chambers) to persons named, including Mary A. Whittaker, executrix of Wesley E. Whittaker, deceased, whose share was the aforementioned sum of $123,801.45. The opinion of the Court of Errors and Appeals is found in Clement v. Creveling, 83 N. J. Eq. 318, 91 Atl. 89.

Discussion.

[1] It is urged upon behalf of the plaintiff that, in ascertaining the intention of Wesley E. Whittaker with respect to his residuary estate, it must be assumed that at the time he wrote his will he had in mind

the first decision of the Court of Chancery giving a construction to his brother's will. This assumption, however, is coupled with the suggestion that he must have regarded that decision as practically denying to him any interest in his brother's estate. Little weight, if any, should be given to this for the following reasons: Wesley E. Whittaker was perhaps a man of some business experience, else he would not have been intrusted with the management (even in conjunction with another) of the large estate of his brother, Albert J. Whittaker. Although this may not have been so at the time of his appointment, yet before his death he probably acquired some knowledge of business by reason of the performance of his duties as executor and trustee. Having a hope at least that he was a beneficiary under his brother's will, when he instituted the proceedings of 1885, can it be said that he was content to abandon it upon an adverse decision by an inferior court? Such is not the conduct of ordinary men who believe that they may be entitled to share in a large estate. They seek the court of last resort before they abandon hope. Again the opinion of the Chancellor in 1885 did not hold that he had no interest in the estate, but simply postponed the enjoyment of it. Furthermore, if it were deemed proper that the entire estate should be held undivided for the protection of the two life tenants, yet by all rules of construction the estate of the remaindermen was vested in them by the language of the sixth paragraph of Albert J. Whittaker's will.

Doe v. Considine, 6 Wall. 458–475 et seq., 18 L. Ed. 869, is a good example of the extent to which courts had gone in determining the character of remainders, and is conclusive that no new principle was pronounced by the decision of the Court of Errors and Appeals in holding that Wesley E. Whittaker's interest in the estate of his brother was vested. Indeed, there seems to be nothing to justify the inference that Wesley E. Whittaker at the time of his death believed that he had no interest in his brother Albert's estate. On the contrary, it is fair to assume that he knew he had an interest therein of which the right to possession was merely postponed.

[2] However, had Wesley E. Whittaker been of the belief that he had no interest in Albert's will, yet the language of the residuary clause in the former's will, "all the rest, residue and remainder of my estate," was broad enough to include it.

[3] The mere fact that a testator may not have knowledge of his estate does not cause an intestacy, unless he lacks the capacity to know of what it consists. There is no allegation or suggestion of want of testamentary capacity on the part of Wesley E. Whittaker.

[4] It is further insisted upon the part of the plaintiff that the very words of the residuary clause manifest clearly that Wesley E. Whittaker did not intend to dispose of his share of Albert's estate. Special emphasis is laid upon "invest," "interest," "income," "principal sum," and so forth, as being inappropriate words to describe property which is not susceptible of being diverted into capital. Those words, however, are not meant to be descriptive of the devise or bequest. In no sense are they to be deemed to qualify the nature of the residuary estate. They are used in expressing the duties to be performed by the trustees. The residuary clause of Wesley E. Whit-

taker's will is conventional in form and expression. The description of the estate is most comprehensive. The names, title, and duties of the trustees, as well as the discretion given to them, are carefully stated. The designation of the cestui que trust, the limitation upon it as to the use of the income, and the provision for the determination of the trust are clearly set out. If it were undoubted that the testator believed that he had an interest in his brother's estate, in what way could that residuary clause be improved, so as to pass the same?

[5] It is further urged that plaintiff's position "is strongly fortified by the oft-repeated maxim that the law favors a distribution as nearly as possible as conforms with the general rules of inheritance and distribution." This maxim, while entitled to weight when the language of the will is obscure, and when it appears that next of kin have been dependent upon the testator, is not of great value in the decision of this case, because the language is not obscure, and it has not appeared that any of the next of kin, of whom none are closer than nieces or nephews, have been dependent upon the testator.

It would be of little value to comment on all the cases cited by counsel in support of their contentions. Few will cases are of value as precedents in controversies such as the one now decided.

[6] One word only is proper with respect to the release executed by the Mercer Hospital. It cannot operate by way of estoppel, because no one has been or can be affected by it to his hurt. It can never be that a mistaken belief by a beneficiary can effect a change of a testator's intent.

Looking at the plaintiff's case from every point of view, the result must be a finding that it is without merit. The court therefore reaches the following conclusions of law:

1. That by the terms of the will of Wesley E. Whittaker, deceased, the residuary estate included his interest in the estate of his brother, Albert J. Whittaker, deceased.

2. That the plaintiff has no interest in that portion of the estate of Wesley E. Whittaker, deceased, which was derived from the estate of Albert J. Whittaker, deceased.

3. That the bill must be dismissed, at plaintiff's costs.

In re NEW YORK & PHILADELPHIA PACKAGE CO.

(District Court, D. New Jersey. August 3, 1915.)

1. BANKRUPTCY ⊂⊃342½—ORDERS OF REFEREE—PETITION TO REVIEW.
A finding of the referee, based on conflicting evidence, involving questions of credibility, will not be disturbed, unless there is most cogent evidence of mistake and miscarriage of justice; but the rule is otherwise when the finding is a deduction from established facts.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. ⊂⊃342½.]

2. BANKRUPTCY ⊂⊃268—SALE OF PROPERTY—TAXES.
An order, directing the property of a bankrupt to be sold, provided for its sale free and clear of all outstanding liens or incumbrances. The prop-

erty was subject to taxes. The trustee in bankruptcy paid the taxes out of moneys which he required the purchaser to advance. The order further provided that the consent by the mortgage trustee to the payment of taxes out of such funds should not preclude the mortgage trustee, who bought in the property, in the event of further assets being discovered, from presenting a petition to the court asking for repayment of the moneys authorized to be paid for taxes. *Held* that, in view of the trustee's acts, and the order of sale, he could not thereafter claim that the property was sold subject to taxes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372-379; Dec. Dig. ⊂⊃268.]

3. BANKRUPTCY ⊂⊃267—SALE OF BANKRUPT'S PROPERTY—CHARGES.

In bankruptcy, where property upon which there was a valid lien was sold by the trustee free and discharged from the lien, without the consent of the lienholder, and it produced only substantially enough to pay the amount of the lien, only those fees, costs, and expenses of administration which were necessary for the preservation of the property for the lienholder, and which the lienholder would necessarily have expended in foreclosing his lien, may be charged against the fund realized.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. ⊂⊃267.]

In Bankruptcy. In the matter of the bankruptcy of the New York & Philadelphia Package Company. On petition to review two orders of the referee. Order reversed, and matter remanded, with directions.

John F. Gorman and William Gorman, both of Philadelphia, Pa., for mortgage trustee.

Joseph H. Gaskill, of Camden, N. J., for trustee in bankruptcy.

David O. Watkins, of Woodbury, N. J., pro se.

HAIGHT, District Judge. The petitions for review in this matter are prosecuted by a substituted trustee under a mortgage given by the bankrupt company to secure an issue of bonds. All of the mortgaged property was taken possession of and sold by the trustee in bankruptcy, over the objection of the mortgage trustee, free and discharged of the mortgage; the order for sale being based upon the assumption that there was a substantial equity in the property, over and above the amount due on the bonds. The validity of the mortgage was not questioned. The property was purchased by the mortgage trustee, for the benefit of the bondholders.

After the sale was confirmed, the purchaser was permitted by the referee, in lieu of paying the whole amount of the purchase price in cash, as the conditions of sale required, to deliver to the trustee in bankruptcy the bonds secured by the mortgage; but he was required to deposit $7,500 in cash. This is one of the orders which it is sought to have reversed. He contends that he should not have been required to advance in cash any more than was sufficient to pay the prior liens on the property and certain expenses of sale, the total of which would have been much less than $7,500. The question thus presented, however, is, in this case, of little, if any, practical importance.

After the sale was consummated, the trustee filed an account of all of his receipts and disbursements in the bankruptcy proceeding to

date, and also a petition wherein he prayed that certain allowances be made, and that he be authorized to pay them, as well as make some other disbursements, out of the proceeds of the sale. The account was allowed; and, by separate order, certain of the allowances were made, and the trustee was directed to pay them, and to make certain of the disbursements mentioned in his petition. This is the other order which is complained of. The only moneys which have as yet come into the hands of the trustee in bankruptcy are a small amount collected on a claim, that borrowed on a certificate issued by him, and the purchase price of the mortgaged property. The two first-mentioned sums have already been more than exhausted in payment of insurance premiums, services of watchmen, and other incidental administration expenses. The trustee under the mortgage contends that, therefore, the additional allowances and authorized disbursements must all be paid from the proceeds of the sale of the mortgaged property, and in that way he will be required to bear expenses which are not legally chargeable against him as a lienholder.

[1, 2] When the matter was first presented to the court, it appeared that, if the property had been sold subject to taxes, the amount realized, over and above the amount admittedly due for principal and interest on the bonds and the amount due on the trustee's certificate, would be substantially enough to pay the allowances and authorized disbursements complained of, and hence the lienholder would have no standing to question the referee's later order. Counsel being unable to agree as to whether the sale was subject to taxes, and the referee having failed to make any mention thereof in his certificate, the matter was remanded to him to report on that question. The referee thereupon heard testimony, and has filed a certificate in which he certifies that the property was sold subject to taxes. The trustee under the mortgage challenges this finding. It is necessary, therefore, to determine primarily whether the referee's conclusion in this respect is correct. It would appear from his certificate that it is based entirely upon the testimony which was taken after the matter was remanded to him. This testimony was conflicting, involving the credibility of witnesses whom the referee heard, and, if it were the only evidence on this question, I should not disturb his finding, because it is the rule in this district, and elsewhere, I think, that the court will not disturb the findings of fact of a referee, based upon conflicting evidence, involving questions of credibility, unless there is most cogent evidence of mistake and miscarriage of justice. In re Partridge Lumber Co. (D. C., N. J.) 215 Fed. 973, 976; In re Utica Pipe Foundry Company (D. C., N. Y.) 221 Fed. 787, 790, where the general rule is stated and the authorities collected.

But it is also a general rule that, if the finding be a deduction from established facts, it will not carry any great weight, for the court, having the same facts, may as well draw inferences or deduce conclusions as the referee. Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306 (C. C. A., 5th Cir.); Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 158, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184 (C. C. A., 6th Cir.). There are facts of that kind in this case, apparently overlooked by the referee, the inferences to be drawn from which, I think, are quite con-

clusive. The order directing the property to be sold provided for its sale "free and clear of *all outstanding liens or incumbrances.*" This language would unquestionably include taxes which were then liens. It was apparently thus construed, and properly so, I think, by the purchaser. The trustee had no right to sell differently than the referee's order authorized him to do. I have not before me the report of sale, but the order confirming it recites the sale "free and clear of *all* incumbrances for $25,000." After the sale was confirmed, the trustee in bankruptcy presented, in effect, a petition asking authorization to pay the taxes, and an order was made directing him to do so. The payment was accordingly made out of the moneys which had been deposited by the purchaser pursuant to the before-mentioned order of the referee. In none of these orders, nor in the petition, is there any mention that the property was to be, or had been, sold subject to taxes, and every indication is that the parties considered that the taxes should be paid by the trustee in bankruptcy out of the purchase price of the property. No demand or request was made upon the purchaser that he should pay them. In addition, the amount due at that time, for principal and interest on the bonds, was $22,350, the taxes were approximately $1,250, and the trustee's certificate, which, by consent, had become a prior lien to the mortgage, amounted to $1,000 and interest. The aggregate of these sums was approximately the amount bid by the mortgage trustee. The next highest bid was $15,000. Under these circumstances, it is inconceivable that the mortgage trustee would have bid more than enough to cover the principal and interest due on the bonds and the other charges which were prior thereto, because he would thereby create a fund for the payment of the expenses of administration, which he had theretofore consistently contended could not be paid out of the fund realized from the sale of the mortgaged property, to the prejudice of his security.

If it were the understanding of the trustee in bankruptcy that the property was sold subject to the taxes, it would manifestly be unjust at this late date to permit him to assume a position contrary to the terms of the order by which he was authorized to sell, and contrary to the apparent understanding of the purchaser, which the trustee's subsequent actions could have but tended to confirm. It is contended that the inference above drawn from the payment of the taxes by the trustee in bankruptcy is not proper, because it was his duty, if he had funds in hand, to pay the taxes before any distribution to creditors. But this begs the question, for his action in paying them was quite as consistent with the theory that he was discharging a lien on the property which it was his duty to discharge in order to comply with the order of sale. This, coupled with the fact that he did not assume to advise the purchaser that he was paying them for him, which, if he were doing so, would have been his duty, in view of the order of sale and the other circumstances, nullifies the trustee's contention.

Attention is also directed to a clause in the order directing the payment of the taxes, admittedly inserted at the suggestion of the attorney for the bondholders, to the effect that the consent by the mortgage trustee to the payment of the taxes out of the funds then in the hands of the trustee in bankruptcy should not preclude the for-

mer, in the event of further assets applicable to the payment of claims against the bankrupt being discovered, from presenting a petition to the court asking for the repayment of the moneys then authorized by the court to be paid for taxes. It is not at all clear to me what inference favorable to the trustee in bankruptcy's present position it is thought can be drawn from this clause. If it had been the understanding of the mortgage trustee that he had bought the property subject to taxes, there would have been no conceivable reason for inserting a clause of that kind in the order, because he would have been under an obligation to pay the taxes, which the collection of further assets of the estate could have in no way changed. I am therefore constrained to find that the property was sold free and discharged of the lien of the taxes.

[3] It remains to consider the important question in the case, which is: What fees, costs, and expenses of administration may be properly charged against a fund realized by a trustee in bankruptcy from the sale of a property upon which there are valid and unquestioned liens, when the property is administered and sold by him free and discharged of the liens, without the consent of the lienholders, and produces only substantially enough to pay the amount due thereon? This question has been the subject of several reported decisions. The Circuit Court of Appeals of this circuit, as well as the courts in other circuits, have recognized a clear distinction between cases where the lienholder has either expressly or impliedly consented to the administration and sale of the property free and discharged of his lien, and cases where he has opposed such a course, and have applied different rules to the two classes of cases. In re Vulcan Foundry & Machine Company, 180 Fed. 671, 103 C. C. A. 637 (C. C. A., 3d Cir.); In re Torchia, 188 Fed. 207, 110 C. C. A. 248 (C. C. A., 3d Cir.); In re Howard (D. C., N. D. N. Y.) 207 Fed. 402; In re Williams' Estate (Anheuser Busch Brewing Ass'n v. Harrison) 156 Fed. 934, 84 C. C. A. 434 (C. C. A., 9th Cir.); In re Freeman (D. C. Ga.) 190 Fed. 48; In re Chambersburg Silk Manufacturing Company (D. C., M. D. Pa.) 190 Fed. 411; In re Clark Coal & Coke Company (D. C., W. D. Pa.) 173 Fed. 658. Thus, in the Torchia Case, where it was held that the lienholders had consented by "necessary implication" to all that had been done by the trustee in the care and sale of the incumbered property, the Circuit Court of Appeals, after pointing out the difference between the situations in that case and in the earlier Vulcan Foundry Case, affirmed an order which allowed commissions to the trustee and referee on the proceeds of sale, and compensation to counsel for the trustee, the receiver, and the bankrupt, and certain expenses incurred in the care and preservation of the incumbered property, all of which had to be paid out of the proceeds realized from the sale of the incumbered property, which were not sufficient to discharge the liens.

On the other hand, in the Vulcan Foundry Case, where the lienholders had objected to a sale free of their liens, and had not consented to the care and preservation of the property by the trustee, the same court reached an entirely different conclusion, and expressed radically different views as to what could be properly charged against

the lienholders under such circumstances. While no general rule on this question is therein announced, I think the opinion quite clearly indicates that there is not to be charged such expenses as were incurred in the interests of the general creditors as distinguished from the lienholders, and which the latter would not at all events have been obliged to incur in order to protect and realize upon their liens. In this class must be included the general expenses of administration and the care and preservation of the property, when the latter was primarily for the benefit of the general creditors or incurred in their interests, without the express or implied consent of the lienholder, and which the latter would not certainly have had to incur. Such a rule is in entire harmony with the decisions in other districts. In re Howard, supra; In re Stewart (D. C., La.) 193 Fed. 791; In re Freeman, supra; In re Clark Coal & Coke Company, supra; In re Prince & Walter (D. C., M. D. Pa.) 131 Fed. 546; In re Williams, supra; In re Davis (D. C., E. D. N. Y.) 155 Fed. 671; In re Utt, 105 Fed. 754, 45 C. C. A. 32 (C. C. A., 7th Cir.).

It may be considered as equally well settled, in other districts, where the lienholder does not consent to the sale of the property discharged of his lien, that if the general estate is insufficient, he can be charged with the necessary costs and expenses of the sale (In re Howard, supra; In re Clark Coal & Coke Company, supra; In re Prince & Walter, supra); and in some jurisdictions this has been limited to what it would have cost the lienholder to have foreclosed his lien in the state court, on the theory that the proceedings in bankruptcy have relieved him from the necessity of foreclosure, and that it is equitable that he should pay at least what it would have cost him to foreclose in another forum (In re Zehner [D. C., E. D. La.] 193 Fed. 791; In re Utt, supra; In re Stewart, supra).

I do not understand the decision in the Vulcan Foundry Case to hold, where the lienholder has not consented, that the costs of the sale may not be properly charged against him. It is entirely equitable and just that such costs should be so charged, because the lienholder has himself been benefited to that extent, in being relieved of the certain necessity of realizing upon his lien and the expense incident thereto; but the same reason would make it unjust to charge him with more than he would have been required to expend had he been permitted to choose his own forum. This I think accords with the spirit of the decision in the Vulcan Foundry Case. If he has voluntarily come into the court of bankruptcy, seeking a sale of the property, and thus a liquidation of his lien, or has consented to being brought in, it is entirely just and proper, as was said in Re Williams, supra, that he should be charged with the costs of such court, appropriate to such enforcement. I therefore conclude that the rule which should govern in a case such as this, where the lienholder has objected to the sale of the property free and clear of his lien, and the administering of it in bankruptcy, is that he cannot be charged with the general expenses of administration, including referee's, trustee's, and counsel fees, or the expenses of the care and preservation of the property, which were not incurred with his consent, except when the latter were for his benefit, as distinguished from the general creditors, and were such as he would of necessity

have had to incur, nor with any costs and expenses of the sale of the property in excess of those which he would have been required to expend in order to foreclose his lien in an appropriate forum of his own choice.

Viewing the order in question in the light of this rule, it is clear that the same was erroneous. The moneys directed to be paid to the state court receiver were the balance of his court costs and fees allowed for services as counsel and as receiver. He did not sell the property; in fact, he was powerless to sell free and clear of the lien under the New Jersey statute, unless its validity were brought in question. It does not appear what part of the balance of the fees allowed him represents services in the preservation and care of the property, and what part represents his services as receiver and counsel in other matters pertaining to the estate. The latter, being general expenses of administration, cannot, under the circumstances of this case, be charged against the lienholder. It does appear sufficiently that what he did in the care and preservation of the mortgaged property was without the express or implied assent of the lienholder, and under the circumstances of the case it must be presumed to have been primarily for the benefit of the general creditors. A charge for such services cannot be made against the mortgagee. This likewise applies to the moneys directed to be paid to Mr. Summerill, as they represent the fees allowed him by the Court of Chancery as counsel for the complainants in that suit. The trustee in bankruptcy is entitled to only such commissions as would have been payable to a sheriff or a special master (they are the same in New Jersey on a foreclosure sale). These would not have exceeded, figured on the amount of the purchase price, $167.

The allowance to counsel for the trustee is stated to be for "compensation for services rendered in connection with the sale"; but, if this means services other than those of a strictly legal nature, they cannot be charged against the lienholder, because the above allowance to the trustee is the full compensation for everything connected with the sale which a sheriff or special master would have been entitled to receive. I think, however, that he may be properly allowed a fee for preparing the petition for sale and the other papers necessary to consummate the sale and vest the title in the purchaser, and for his necessary appearance in court in connection therewith. If the trustee under the mortgage had foreclosed in another forum, he would have had to employ and pay counsel. The strictly legal services which were rendered by counsel for the trustee in connection with the sale relieved him of that necessity. The allowance for these services should not, however, exceed $100. The objection to the allowance to the auctioneer having been withdrawn at the argument, it will not be disturbed. There may also be charged against the lienholder such fees, not commissions, of the referee, as were strictly incident to the sale.

After charging the taxes and the amount of the trustee's certificate against the difference between the purchase price and the amount due on the bonds, a small balance remains. Part of this has already been disbursed for general expenses of administration. The balance must be used, as far as it will go, in paying the allowances which have been

determined to be proper, and the mortgagee charged only with the difference between them and the balance remaining in the general estate. If other moneys are afterwards secured by the trustee, the bondholders may petition for any deficiency between the amount due on their bonds and the amount actually paid to them.

It seems unnecessary to determine whether the first-mentioned order of the referee, requiring the deposit of cash, was in any respect erroneous. It has already been determined what may be properly charged against the moneys due on the bonds, and the bondholders will be entitled, either directly or through their trustee, upon proper application, to the balance of the purchase price, providing, of course, that any of the bonds are not then subject to attachment or other independent liens, and providing there were no other liens on the property prior to their mortgage.

The order of May 12, 1915, must be reversed, and the matter remanded to the referee, with instructions to enter an order in accordance with these conclusions.

TILLINGHAST et al. v. RICHARDS, United States Marshal, et al.

(District Court, D. Rhode Island. July 27, 1915.)

1. CONSPIRACY ⊂=43—TO DEFRAUD UNITED STATES—CHARACTER OF ACTS—NECESSARY ALLEGATIONS.

Where an indictment charged conspiracy to defraud the United States by the removal of oleomargarine from a factory without payment of the tax thereon, it need not allege that the defrauding was to be accomplished by deceit, misrepresentations, or concealment, since the intent to defraud in such case is supplied by the allegation that the prohibited act was to be done unlawfully and knowingly.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⊂=43.]

2. CONSPIRACY ⊂=43—OFFENSE AGAINST REVENUE LAW—SUFFICIENCY OF INDICTMENT.

An indictment, found in the Southern district of New York, charging defendants with conspiring to defraud the United States by removing oleomargarine from the factory at Providence, R. I., without payment of the tax thereon, and alleging as overt acts that the defendants purchased palm oil in New York, its shipment, payment for it, etc., is bad, for a conspiracy must be found in the clause of the indictment which sets it forth, and cannot be enlarged by the overt acts alleged, which, in the instant case had no necessary connection with the conspiracy, and while in cases of conspiracy an unlawful plan may make unlawful, as parts of itself, what otherwise would be innocent acts, and while an overt act may be one innocent in itself, an indictment, charging conspiracy, which seeks to make an innocent act an ingredient of the offense, must allege a plan, including it directly or indirectly.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⊂=43.]

3. CONSPIRACY ⊂=43—OFFENSE AGAINST REVENUE LAWS—SUFFICIENCY OF INDICTMENT—AIDER BY ALLEGATION OF OVERT ACTS.

Where the indictment charged conspiracy to defraud the United States by removing oleomargarine from the factory at Providence, R. I., without payment of the tax thereon, allegations that the defendants purchased

palm oil in New York, etc., were too uncertain to render the indictment subject to construction as one for conspiracy to defraud by unlawful procurement or covert manufacture.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

4. CONSPIRACY ⟸43—INDICTMENT—OVERT ACTS.

Where an overt act alleged in an indictment charging conspiracy must be qualified by circumstances to make it relevant to the particular conspiracy charged, it should be pleaded with the circumstances which make it relevant.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

5. CONSPIRACY ⟸43—INDICTMENT—ALLEGATION OF OVERT ACTS.

Where the jurisdiction of the court depends solely upon an overt act alleged in an indictment for conspiracy, it must be alleged with all the definiteness and certainty of any other jurisdictional fact, and the connection between the overt act and the conspiracy charged must be made to appear specifically by necessary recitals.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

6. CONSPIRACY ⟸5—CRIMINAL LAW ⟸113—VENUE—CONSPIRACY TO DEFRAUD UNITED STATES.

To the statutory offense of conspiring to defraud the United States, defined by Cr. Code, § 37 (Comp. St. 1913, § 10201), which prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an act to effect its object, an overt act, forming at least a step towards execution of the conspiracy, is an essential ingredient, and may be the sole basis of local jurisdiction.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 4; Dec. Dig. ⟸5; Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⟸113.]

Habeas corpus on the petition of Frank W. Tillinghast and others against John J. Richards, United States Marshal, and others. Petitioners discharged.

Charles C. Mumford and John S. Murdock, both of Providence, R. I., for petitioners.

Harvey A. Baker, U. S. Atty., of Providence, R. I., for defendants.

BROWN, District Judge. The petitioners were indicted in the Southern District of New York for violation of section 37 of the Criminal Code, in that they unlawfully conspired to defraud the United States of sums to become due for internal revenue taxes, of 10 cents per pound on oleomargarine not free from artificial coloration.

A similar indictment for substantially the same conspiracy, and also an indictment charging the petitioners with the completed offense of defrauding the United States, had previously been found in this district. While under bail on the Rhode Island indictments the petitioners were arrested in this district, and the commissioner, in view of the previous indictments in this district, made application for leave to proceed, which leave was granted. After a hearing the commissioner found probable cause, and directed that each of the petitioners be held to bail for appearance before the District Court for the Southern District of New York, and upon failure to give bail issued warrants to the marshal for the commitment of the petitioners to the custody of

the keeper of the Providence county jail, and thereupon a writ of habeas corpus was issued to the marshal, whose returns show that the petitioners were held under the commissioner's warrants. The question now before us is as to the validity of the commitments.

Jurisdiction of the New York court to try the petitioners for the offense alleged in that indictment must rest either upon the fact that the conspiracy was actually formed in the Southern district of New York, or upon any overt act, or, to use the language of section 37, "any act to effect the object of the conspiracy," done in the Southern district of New York, by one or more of the conspirators.

The commissioner's finding of probable cause to believe that the petitioners had committed the offense as charged in the New York indictment, as appears by his opinion, was upon the ground that he was constrained to do so by the decision of the Supreme Court in Hyde & Schneider v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. The commissioner found as a fact that if the petitioners conspired anywhere they conspired in the city of Providence in the district of Rhode Island.

The United States now contends that the conspiracy was in fact entered upon in New York, and also that the crime is triable in New York, even if the conspiracy itself was not entered into there, on the ground that the locus of an overt act may be the jurisdiction for trial.

In order to determine: First, whether there was probable cause to believe that the conspiracy was in fact formed in New York; and, second, whether an overt act was committed in New York—it is necessary to examine the allegations of the indictment as to what was included within the scheme of the conspiracy.

The conspiracy charged is to defraud the United States at Providence, R. I., by the doing or procuring of an act made unlawful under the olemargarine laws and regulations in pursuance thereof, namely, to cause oleomargarine having artificial coloration to be unlawfully removed from the place of manufacture at Providence, R. I., for consumption and use, etc., without there being affixed coupon stamps representing payment of an internal revenue tax of 10 cents per pound, and without such tax having been paid or secured by any person.

While the conspiracy contemplated the production of a taxable commodity, this forms no part of the conspiring, or of what was to be done unlawfully; and the indictment nowhere alleges that the manufacture of the taxable commodity was to be done secretly or unlawfully.

[1] The indictment, it should be observed, is not for doing a lawful act by unlawful means, and therefore does not contain, and does not require, allegations to the effect that the defrauding of the United States was to be accomplished by deceit, misrepresentation, or concealment. If the indictment were based upon actual fraud by deception or concealment, it would, of course, be essential to allege this as a part of the conspiracy or plan, or of the means whereby the fraud was to be accomplished. Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419. The object of the conspiracy being to defraud the United States by an act prohibited by law, the intent to defraud is supplied by the allegation that the prohibited act was to be done unlawfully and knowingly.

Upon such an indictment it becomes unnecessary for the United States either to allege or to prove acts of positive deceit or concealment, and the defendant who manufactured his goods openly and lawfully would be liable equally with one who manufactured his goods covertly without paying a manufacturer's tax, or otherwise unlawfully.

[2, 3] As appears by the indictment, the unlawful object of the conspiracy, that is, the removal of the goods without payment of the tax, was to be performed wholly at Providence. Confusion seems to have arisen from the fact that the overt acts are not alleged consistently with the object of the conspiracy as defined by the indictment. The overt acts seem to be alleged upon the theory of defrauding the United States by a scheme which comprehended deception, or illicit manufacture, or concealment. The result is that we have allegations of some 49 overt acts, most of which are framed on the theory of a conspiracy to defraud by deception or concealment, though no such conspiracy is charged in the indictment.

An indictment similar to the New York indictment was sustained upon demurrer by an opinion of this court dated May 19, 1915, United States v. James S. Orr et al. (D. C.) 223 Fed. 220.

If this indictment is to be interpreted as the indictment in U. S. v. Orr was interpreted, it follows that the unlawful object of the conspiracy includes neither the procurement of materials for the manufacture nor the complete manufacture of the taxable product.

As was held by the Supreme Court in a recent case, Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705, February 23, 1915, the plan of the conspiracy must be found in the clause of the indictment which sets it forth. It cannot be enlarged by the overt acts alleged. Even if it could be so enlarged, the allegations of overt acts are entirely too uncertain to enable us to read this indictment as for a conspiracy any part of which was deceit or concealment, or which involved, directly or indirectly, the unlawful procurement of materials, or unlawful or covert manufacture.

While it is possible that what are alleged as overt acts might be such as to a conspiracy of a different character, they are not in train or in causal connection with the unlawful object of the conspiracy here alleged.

As the object of the conspiracy, as expressly alleged, was to defraud the United States at Providence by means of removing from the factory at Providence oleomargarine upon which the tax had not been paid, anything which merely effects the object of manufacturing the taxable commodity cannot be regarded as an act to effect the object of this conspiracy.

Before the commissioner it seems to have been assumed that the indictment did in fact charge the doing of overt acts in New York. This assumption seems erroneous. The brief of the petitioners, shortly and without elaboration, now makes the point that the purchase of palm oil is merely "an adventitious circumstance, in no way essentially related to the alleged criminal purpose or its execution."

This point seems to be well taken and of chief importance, and particularly so in view of the recent decision in Joplin Mercantile Co. v.

United States, as well as of the decisions in United States v. Britton, 108 U. S. 199, 205, 2 Sup. Ct. 525, 27 L. Ed. 703; United States v. Greene (D. C.) 100 Fed. 941; Hyde et al. v. United States, 225 U. S. 347, 358, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

While it is true, as has been held in many cases under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), for example, the Reading Case, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, that an unlawful plan may make unlawful, as parts of the plan, what otherwise would be innocent acts, and while it also has been held that an overt act may be one innocent in itself, it is yet essential that an indictment or other pleading, which seeks to make an act, innocent in itself, an ingredient of a criminal offense, or an act in pursuance of a criminal conspiracy, should allege a plan which includes it directly or indirectly. The object defined as the purpose of a criminal plot, and not some other undefined object, must be looked to in determining whether an alleged overt act is in fact an act to effect it. The purchase of palm oil, its shipment, payment for it, etc., may be acts to effect the object of manufacturing colored oleomargarine; but they cannot possibly effect the removal of that oleomargarine without the payment of the tax, unless by some connection which does not appear and which is not inferable from what is alleged. These are, for all that appears, nonculpable acts, from which no intent to defraud can be inferred, and which cannot support a finding of probable cause.

[4] The case of United States v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14,983, decided June 2, 1873, has been many times cited as justifying the proposition that it need not appear upon the face of the indictment in what manner the act described would tend to effect the object of the conspiracy, and there is considerable authority to the effect that if any act is set forth and is alleged by the pleader to have been done pursuant to the conspiracy or to effect its object, this is enough, though there is no apparent connection between the overt act and the object. This seems unsound in principle, for relevancy is for the court and not for the pleader. If the act must be qualified by circumstances to make it relevant it should be pleaded, not simpliciter, but with these circumstances which make it relevant. See U. S. v. Ruroede (D. C.) 220 Fed. 211.

[5] Since the decisions in Hyde v. United States, and in Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136, however, I am of the opinion that U. S. v. Donau, which was decided when the law was understood to be that the overt act was not a part of the offense and not a jurisdictional fact, and cases which have followed it, are of doubtful authority. Where the overt act and the conspiracy are in the same place, local jurisdiction may rest entirely upon the conspiracy. Where, however, the jurisdiction of the court depends solely upon the alleged overt act (see Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136), it must be alleged with all the definiteness and certainty of any other jurisdictional fact; and certainly it should be made to appear by the allegations of the indictment that there was a connection between the act done and the plan. If a rule of pleading is adopted which permits a constructive presence to be

alleged in the same terms as an actual presence, and this upon the foundation of a bare allegation that an act apparently isolated was done in pursuance of a plan with which it has no apparent connection, then the prima facie effect of an indictment as evidence of probable cause is entirely destroyed.

Jurisdiction may be founded upon an overt act, as the hiring of a post office box in pursuance of a plan, for there is an apparent connection between act and offense. See Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136. It would be quite another thing to allege, for example, in this case, the hiring of a post office box as an overt act, for this would be in no apparent connection with the alleged plan. A pleader should not be permitted to allege isolated acts, and the court required upon his mere allegation that they were done pursuant to the conspiracy, and without the slightest idea whether this is true or not, to take the pleader's word, instead of himself seeing whether the act alleged was relevant or not. In the present case, for example, it seems that the pleader is mistaken in his notion that the purchase of palm oil could possibly be an act to effect the unlawful removal of oleomargarine containing it from the factory at Providence. I am quite convinced, also, that the use of this palm oil in the manufacture of oleomargarine at Providence could not, in any way, effect the object of unlawfully removing it. There are instances where the impossibility of the allegation is apparent on its face; but the rule, I think, is not altered if the act alleged is one which may or may not be an act to effect the object. A charge of crime must not be equivocal. The court must find it in the facts alleged, and not in the pleader's conclusions as to logical connection of facts.

What we have said bears directly upon both grounds of jurisdiction asserted by the United States in favor of the commitments. Oral evidence was adduced before the commissioner as to arrangements between one of the defendants and an oil merchant to ship palm oil to a fictitious address. This is relied upon as a conspiring in New York. Possibly this may be conspiring; but it is not conspiring to defraud the United States at Providence by the unlawful removal of colored oleomargarine at Providence, which is the indictment before me. These petitioners cannot be removed to New York to try them for conspiring to purchase palm oil or to manufacture or color oleomargarine secretly, for all this is outside this indictment, which is no evidence of probable cause that they have committed such other offense.

I find no ground for disturbing the commissioner's finding that, as a matter of fact, there was no probable cause to believe that there was any actual conspiracy in New York. I am of the opinion, however, that he was not coerced by the decisions in Hyde v. United States and in Brown v. Elliott to find a constructive presence or a fictional presence in New York by reason of any allegations of overt acts, since only five acts alleged, to wit, acts committed at Providence, the removal of oleomargarine, can be regarded as acts to effect the object of the conspiracy. The purchasing of palm oil, payment for palm oil, or shipment of palm oil, whether under a real or fictitious name, cannot effect the object of unlawfully removing oleomargarine from the factory at Providence.

It must be remembered that we are dealing here with a question of constitutional right. If the right to be tried in the place where the offense is committed is to be impaired by a fiction of constructive presence, the facts out of which the courts will, as conclusion of law, create that fiction must be set forth with certainty, and the fiction may not be based upon the arbitrary statement that an act was done in pursuance of a plan and to effect the object of that plan, when nothing in the nature of the plan or of the act done, or the object alleged, shows to the court the relevancy of the act to the preconceived plan or the object of that plan.

[6] Since the decisions in Hyde & Schneider v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, and Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136, the overt act has become an essential ingredient of the statutory offense, and may be the sole basis of local jurisdiction. It must be something more than evidence of a conspiracy; thus a complete confession of a conspiracy would not be equivalent to an overt act, which must constitute execution, or part execution. Apparently it may be the act which completes the offense of defrauding, or an act so near the completion of the offense as to constitute an attempt, or an act so remote as not to amount to an attempt; but at least it must be a step towards execution. Whether a certain act was in pursuance of the conspiracy might, of course, depend entirely upon what the conspiracy was, and upon whether the parties conspired to accomplish their purpose by the means alleged. See Hyde v. United States, 225 U. S. 347, 375, 376, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

To apply the doctrine of constructive presence to the place of intended execution of a plan, or possibly to the place of the doing of an act so near the completed crime as to constitute an attempt, may perhaps be justified as a useful fiction. To apply it to acts so remote in causal connection and so remote in place that they can neither effect the object of the conspiracy, nor constitute an attempt to effect it, is stretching the doctrine of constructive presence to its limit. The fiction that one is legally present, though really absent, is one which may be so applied as to give rise to the question asked by Chief Justice Marshall in United States v. Burr, 4 Cranch, 470, 490, Fed. Cas. No. 14,692a:

"To what purpose are those provisions in the Constitution which direct the place of trial, and ordain that the accused shall be informed of the nature and cause of the accusation?"

The division of the court in Hyde v. United States and Brown v. Elliott indicates that, even in cases where the alleged overt acts fall within the conspiracy charged, the fiction of constructive presence was worked to its limit. The possible abuse of such a doctrine was recognized in the majority opinion. But surely, if an indictment may be so loosely framed that the court is unable to see that the act alleged to be done was in the relation of cause and effect with the thing planned, then it may be called upon to base a fiction that one who is really absent is legally present upon an isolated fact having no apparent tendency to effect the object of the conspiracy, upon faith in the pleader's

bare allegation that it has such connection. This is not permissible, for the question of relevancy is to be determined by the court upon facts alleged, and not by the pleader's opinion.

When a specific offense had been fully committed it was formerly the general practice to indict for that offense under the specific section applicable thereto, and to affix to a conviction the specific penalties prescribed. The practice has grown up, however, of indicting not for the commission, but under the blanket section 37, when the parties are merely ordinary joint offenders, and where, if there is a joinder in an unlawful project, the real dangers from conspiracy, considered as a crime by itself, are little greater than in the case of an individual offender. To do this as a means of changing the venue for trial from the place of commission of the offense to the place of commission of some small preparatory act seems a substantial invasion of constitutional right.

If the mere purchase of one of the lawful ingredients of a taxable commodity in a place remote from the place of manufacture is to be regarded as amounting to a step towards defrauding the government, or of committing an offense against the United States, then we should bear in mind that the pure food laws, as well as revenue laws, prescribe offenses against the United States which would ordinarily be done by persons in association and, therefore, conspirators. A bottle of misbranded medicine might give a prosecuting officer a very wide range in the selection of place for trial.

The purchase of materials which, like palm oil, may be lawfully used in the manufacture of a lawful taxable product, are merely steps in the creation of a taxable product, and are preliminary to the creation of an obligation to pay money. This is the creation of the condition upon which it may become possible to defraud the United States; but this is sharply separable from the defrauding which is contemplated after the obligation shall arise.

A tradesman may be defrauded in the creation of a debt to him, since he simultaneously parts with the consideration, and every step whereby the debt is created is in furtherance of the fraud. The United States cannot be defrauded by the production of a taxable commodity, since it parts with no consideration. There is no similarity in the cases.

Unlawful manufacture, or moonshining, may be a step toward the accomplishing of fraud; but lawful manufacture, even if secret, as many manufactures are, is not a step towards the deprivation of the United States of sums of money.

Even if we assume a plan which involves from the outset a scheme of voluntarily creating a debt to the United States for which it surrenders nothing by way of consideration, and a deprivation of the United States of that debt when it shall be created, no innocent step toward the creation of a new right in the United States to receive sums of money should be regarded as an act "to effect the object" of depriving the United States of that money.

But whether this be true or not, and whether or not it would be possible to frame any indictment setting forth an extensive plan which could make the purchasing of oil, butter, salt, cream, or palm oil used

in oleomargarine an overt act or step towards defrauding, yet, under well-settled rules of law, this indictment which defines a conspiracy to do a specific unlawful act, whereby the United States is to be defrauded, and contains no averment of anything which can amount to an overt act done in New York to effect the purpose defined by the indictment, renders inapplicable the decisions of the Supreme Court in Hyde & Schneider v. U. S. and Brown v. Elliott.

The United States contends that upon habeas corpus the questions presented are not open. Greene v. Henkel, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177, cited on the last page of Henry v. Henkel, 235 U. S. 219, 230, 35 Sup. Ct. 54, 59 L. Ed. 203, and Tinsley v. Treat, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689, seem to justify the present consideration and decision of the questions discussed.

Orders will be entered discharging each of the petitioners.

In re GAYLORD et al.

(District Court, N. D. New York. August 6, 1915.)

1. BANKRUPTCY ⟸166—PREFERENTIAL TRANSFERS—INSOLVENCY.

Under Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1913, § 9644), providing that if a bankrupt shall have made a transfer of any of his property, and if at the time of the transfer, being within four months before the filing of the petition, the bankrupt be insolvent and the transfer then operates as a preference, and the person benefited thereby shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable, the creditor must have had reasonable cause to believe that the financial condition of the debtor at the time when the transfer was made was such that the security when enforced would work a preference; i. e., that the debtor was then insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.]

2. BANKRUPTCY ⟸166—PREFERENTIAL TRANSFERS—INTENT.

Under Act July 1, 1898, § 60b, as amended by Act Feb. 5, 1903, § 13, and Act June 25, 1910, § 11, providing that if a bankrupt shall have made a transfer of any of his property while insolvent, and such transfer operates as a preference, and the person benefited thereby shall then have reasonable cause to believe that it would so operate, it shall be voidable, the intent of the debtor in making the transfer, or of the person receiving it is immaterial if he then had reasonable cause to believe that the taking and enforcement of the security would enable him to obtain a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.]

3. BANKRUPTCY ⟸166—PREFERENTIAL TRANSFERS—REASONABLE CAUSE.

Under Act July 1, 1898, § 60b, as amended by Act Feb. 5, 1903, § 13, and Act June 25, 1910, § 11, providing that if a bankrupt shall have made a transfer of his property while insolvent and within four months before the filing of the petition, and the person receiving it shall have reasonable cause to believe that the enforcement thereof would effect a preference, it shall be voidable, the creditor taking the security need not actually know of the insolvency of his debtor, nor need he actually believe that the security and its enforcement would work as a preference, if facts and circumstances, with the knowledge of which he is chargeable, are such as

would cause an ordinarily careful and prudent man of intelligence and reasonable experience in business to believe that the taking and enforcement of the security would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.]

4. BANKRUPTCY ⟸303—PREFERENTIAL TRANSFERS—AVOIDANCE—BURDEN OF PROOF.

Under Act July 1, 1898, § 60b, as amended by Act Feb. 5, 1903, § 13, and June 25, 1910, § 11, providing that if a bankrupt shall have made a transfer of any of his property while insolvent and within four months of the filing of the petition, and the person receiving it shall have reasonable cause to believe that its enforcement would effect a preference, it shall be voidable by the trustee, the burden of proof is on the trustee to show the insolvency of the debtor when the security was given; that other creditors then existed; that the enforcement of the security would operate to give them a lesser percentage of their debt than the secured creditor will receive; and that such creditor had reasonable cause to believe that he would obtain such preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458–462; Dec. Dig. ⟸303.]

5. BANKRUPTCY ⟸166—PREFERENTIAL TRANSFERS—INSOLVENCY.

Where a creditor made adequate inquiry and came to the conclusion, justified under the evidence, that his debtor was not insolvent, although the fact was otherwise, the taking of a chattel mortgage to secure a previous indebtedness within four months prior to the filing of the debtor's petition in bankruptcy did not constitute the taking of a preference under Act July 1, 1898, § 60b, as amended by Act Feb. 5, 1903, § 13, and Act June 25, 1910, § 11, providing that if a bankrupt shall have made a transfer of any of his property, and if at the time of such transfer the bankrupt be insolvent and the transfer then operates as a preference, and the person benefited thereby shall then have reasonable cause to believe that its enforcement would effect a preference, it shall be voidable by the trustee, since where a creditor makes inquiry and information is suppressed or so colored that the creditor does not obtain the information which would give him reasonable cause to believe that the debtor was insolvent, such knowledge cannot be imputed to him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.]

In Bankruptcy: In the matter of Charles M. Gaylord and another, comprising the firm of the Crescent Park Market, bankrupts. Review of an order of the referee in bankruptcy, allowing the claim of George C. Woodworth as an unsecured claim, but denying it as a secured claim, by virtue of a chattel mortgage executed by the bankrupts. Order reversed, and claim allowed as a secured claim.

Del B. Salmon, of Schenectady, N. Y., for trustee in bankruptcy.

Hiram C. Todd and Wm. Brown, both of Saratoga Springs, N. Y., for claimant.

RAY, District Judge. August 20, 1913, an involuntary petition in bankruptcy was filed against Charles M. Gaylord and John A. Day, copartners composing the firm trading and doing business as and under the name of Crescent Park Market, and in due course adjudication followed, September 8, 1913. Prior to that time, and extending over a considerable period of time, Sulzberger & Sons Company of America, doing a general wholesale meat business, had sold divers quantities of

meat to said Crescent Park Market, a retail dealer, on credit, and June 27, 1913, the now bankrupt was owing to said Sulzberger Company (so-called for brevity) the sum of $2,803.21 on past-due accounts. Several requests and demands of payment were made, but not complied with, and on said June 27, 1913, said Gaylord and said Day, composing such firm, Crescent Park Market, executed and delivered to said Sulzberger Company a chattel mortgage to secure such indebtedness. July 12, 1913, $300 was paid on such mortgage, and July 19, $200 was paid, leaving a balance of $2,303.21. The mortgaged property has been sold and the proceeds paid into court to await determination of the validity, as against the trustee in bankruptcy, of said chattel mortgage as a lien which was subsequently, with the debt represented thereby, duly sold and transferred for value to George C. Woodworth, the claimant herein. In addition to the payments made on said chattel mortgage, as above stated, there was paid on said account June 26, 1913, the day before the chattel mortgage was given, the sum of $680.28. The trustee objected to the allowance of said claim as a secured claim, alleging that such mortgage, if enforced, would constitute and work a preference under the facts and the provisions of the Bankruptcy Act, and also insisted that such claim should only be allowed as unsecured on condition that the said payments on account, in all $1,180.28, all made within four months of the filing of the petition in bankruptcy, be returned to the trustee. A careful examination of the evidence satisfies this court that this mortgage was not given or received with intent to hinder, delay, or defraud creditors, or for that purpose, or with any actual fraudulent intent or purpose. It was given to secure the payment of a pre-existing indebtedness. The claimant, Woodworth, assignee of Sulzberger Company, is in the same position that company was—no better, no worse. The question is: Should this claim be disallowed as a secured claim for the reason a preference was given and the enforcement of the mortgage would work a preference forbidden by the provision of the Bankruptcy Act? Act of 1898, as amended February 5, 1903, and June 25, 1910.

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Section 60a.

"If a bankrupt shall * * * have made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference it shall be voidable by the trustee and he may recover the property or its value from such person." Section 60b.

It is not disputed that the Crescent Park Market was insolvent at the time this chattel mortgage was executed and delivered, but it is not claimed that it was very largely so. The counsel for the trustee claims in his brief the assets were worth $6,000, and that the liabilities

were $8,000. Between the dates of June 10 and June 27, 1913, the referee finds the indebtedness was about $12,000 to $13,000. The assets did not increase. The now bankrupt firm purchased meats of the Sulzberger Company at its three branches on credit payments therefor to be made weekly, and the evidence shows these payments were promptly made up to June 10, 1913. Between June 10th and June 26th only one payment was made, and the account had increased to $3,483.92 when the payment of $680.25 was made, as stated.

One Hall was the local manager of the Sulzberger Company and knew both Gaylord and Day. Between June 10th and June 27th, when the chattel mortgage was given, said Hall on several occasions asked both Gaylord and Day for a check for the amount then owing, and a check was refused. Mr. Gaylord, on more than one occasion when such requests were made, told Hall he would not give a check unless they had the money in bank to meet it. Mr. Hall also knew the fact that there were differences between the partners, Gaylord & Day, and that Day had said unless Gaylord acceded to his terms he would "smash the business," while Gaylord claimed their financial difficulties arose from the fact that Day had not put in capital as he had agreed to do. On or a day or two prior to June 26, 1913, Mr. Hall went to the law office of one James C. Cooper in relation to the claim of the Sulzberger Company against the now bankrupt, and Mr. Gaylord was sent for. Mr. Cooper says, and I think correctly, and the referee so finds, that the following took place:

"I said to him: 'Now Mr. Gaylord, some arrangement has to be made looking toward the payment of this claim of Sulzberger & Sons Company. I am the attorney for these people, and I insist that you make some arrangement.' He said, 'Don't start any action.' I said, 'I am prepared to collect this claim.' I said, 'From your statement to me I can collect 100 cents on the dollar if I sue.' 'But,' he said, 'If you do start suit everybody else will start and we haven't the money convenient to pay,'" etc.

The referee also finds, and this court concurs in the finding:

"On June 26, 1913, Carl C. Norlinger, credit man of the Sulzberger & Sons Company, whose territory does not include Schenectady, received a wire from Chicago to go to Schenectady, where he arrived on June 27th, and talked with Mr. Gaylord at his store. Later in the day Mr. Gaylord and Mr. Day went to the office of Sulzberger & Sons Company in Schenectady, where were present Mr. Hall, Mr. Nowinski, Mr. Hudson, the manager of the Troy branch, and perhaps the manager of the Albany branch. Mr. Norlinger inquired about the outstanding accounts due the firm, and wanted to help Mr. Gaylord collect them so that he could apply the proceeds on their account, and for that purpose made a list, but Mr. Gaylord said that it would be very poor policy to interfere with this, as it would hurt his business if he had to take an outsider to help get them in. Mr. Gaylord said: 'Suppose we give you a chattel mortgage on the place; will that satisfy you?' And Mr. Norlinger said, 'I told him it would, provided the list of the fixtures up there would equal our claim.' Mr. Norlinger examined the fixtures and went to see whether there was any previous chattel mortgage recorded against them."

From these findings we conclude that Mr. Gaylord had the idea the Crescent Park Market was solvent. Evidently he expected it would continue business, as he did not desire to "hurt his business" by having some outsider interfering with the collection of accounts due the firm. The insistence of the Sulzberger Company in collecting the account,

then grown to more than $3,000, might show or warrant the inference, under some circumstances, that that company had doubts of the continued ability of the now bankrupts to pay. This was coupled with the fact that the account was growing, and no payments as agreed upon were being made. We may properly infer that this creditor regarded the outstanding accounts, if collected, sufficient to meet its claim, and regarded dilatory collections as the evil, and not insolvency. In fact the attorney, Mr. Cooper, in effect declared confidence in the solvency of the firm. He said, "From your statements to me I can collect 100 cents on the dollar if I sue."

[1] No mortgage was demanded or requested. The giving of it was suggested by Mr. Gaylord. It does not appear that either party had bankruptcy in mind during these negotiations. However, it is evident that both parties knew that if payment on all hands by all creditors was pressed, bankruptcy might ensue, and that in such event the enforcement of the mortgage would work a preference; that is, enable it to obtain a greater percentage of its debt than any other of the creditors of said Crescent Park Market of the same class. It must be conceded that every creditor of a person or firm who takes security from his creditor for a past-due indebtedness, by way of chattel mortgage, knows that its enforcement will work a preference if insolvency then exists and bankruptcy follows. But this is not enough to avoid the transfer. The creditor must have reasonable cause to believe, etc. The words, "shall then have reasonable cause to believe that the enforcement of such judgment or transfer, would effect a preference" not only refers to the time when the transfer is made, that is, when the mortgage is given, but means that the creditor taking it must then have had reasonable cause to believe that the then financial condition of the creditor was such that the enforcement of the security would work a preference as between the then existing creditors of the same class. In short, the creditor, or his agent acting in the matter, must have had such information at the time as gave him reasonable cause to believe that the taking of the transfer would, as to then existing creditors, if the transfer were later enforced, enable such creditor to obtain a greater percentage of his debt than any other of such creditors of the same class. This necessarily means that the creditor taking the security, or his agent acting in the matter, must have had reasonable cause to believe such debtor was then insolvent, and insolvency must then have existed, as otherwise the enforcement of the security could not work a preference.

[2] I do not see that the intent of the debtor is of any consequence, as the Bankruptcy Act now, since the amendments of 1910, reads. The statute, as it now reads, does not concern itself with the intent of the debtor in giving the transfer. Herron Co. v. Moore, 208 Fed. 134, 125 C. C. A. 356, 31 Am. Bankr. Rep. 221; In re Harrison (D. C.) 28 Am. Bankr. Rep. 684, 197 Fed. 320; In re Herman (D. C.) 31 Am. Bankr. Rep. 243, 207 Fed. 594; 2 Remington on Bankruptcy, § 1400. So the intent of the person taking the security or receiving the transfer is immaterial, provided he then had reasonable cause to believe the taking and enforcement thereof would enable him to obtain a greater per-

centage of his debt than would other creditors of the same class then existing. This constitutes the taking of a preference by him, even if he thought the debtor might pull through, keep up his business, make money thereon, and eventually pay all his creditors 100 cents on the dollar. This is interpreting the statute exactly as it reads. So far as intent is involved, the mere act of taking the security demonstrates that the creditor's intent was to get his pay in full, or so far as his security would go, whether other creditors get their pay or not. Therefore reasonable cause to believe that the debtor is insolvent and cannot pay in full, accompanied by the taking of security which, if enforced, will give the creditor his pay to the exclusion of other then existing creditors, or his pay in greater proportion than the other creditors of the same class will receive, makes such security voidable by the trustee if given and accepted within the four months preceding the filing of a petition in bankruptcy, and the debtor was in fact insolvent.

Of course we can argue and reason that if the debtor was in fact insolvent and the creditor knew it and took his security with such knowledge, or with reasonable cause to believe such was the condition, then the creditor must have intended to secure a preference. This is undoubtedly true. But his hopes, expectations, and even his honest belief that the creditor would prosper in business, make money, and eventually pay all his creditors in full does not validate a security taken under the circumstances and conditions named.

[3] In Remington on Bankruptcy (2d Ed.) vol. 2, §§ 1397 to 1407, inclusive, pp. 1274 to 1288, inclusive, this subject is made quite clear. A preference is not necessarily actually fraudulent, and it is not necessary to prove that the creditor taking the security actually knew the insolvent condition of his debtor giving it, or that he actually believed the security and its enforcement would work or operate as a preference. The existence of facts which came to the creditor's knowledge, or as to which facts he had such information as put him on inquiry in taking the security, or transfer, may establish reasonable cause to believe. If the facts and circumstances proved in the case to have been within the knowledge and observation of the creditor, or as to which he was actually put on inquiry, and inquiry would have disclosed, were such as would naturally cause a business man of ordinary care and intelligence—an ordinarily careful and prudent man of intelligence and reasonable experience in business matters—to believe, then it may properly be held, and should be held, that the creditor had reasonable cause to believe the debtor was insolvent, and that the taking and enforcement of the security or transfer "would effect a preference." See cases supra.

[4] The burden of proof is on the trustee alleging the invalidity or voidability of the transfer. 2 Remington on Bankruptcy (2d Ed.) § 1404, p. 1285; Calhoun County Bank v. Cain, 152 Fed. 983, 82 C. C. A. 114, 18 Am. Bankr. Rep. 509. He must prove the insolvency of the debtor, later bankrupt, at the time the security was given. He must establish the existence of other creditors of the same class at that time, and that the enforcement of the security or transfer will operate to

give them a lesser percentage of their debt than the secured creditor will receive by reason of his security given by such debtor, and he must also prove the existence of the "reasonable cause to believe." All this must be done by a fair preponderance of all the evidence in the case, and where inferences from proved facts are to be drawn, the rule obtains that if two inferences of substantially equal weight may reasonably be drawn from the proved facts, then that inference shall prevail which sustains the transfer or security.

"Reasonable cause for belief that a preference would be effected by the transaction necessarily involves reasonable cause to believe that the debtor was in fact insolvent. And this means reasonable cause for belief that his assets at a fair valuation do not equal his liabilities." 2 Remington on Bankruptcy (2d Ed.) § 1402, p. 1282; Merklein v. Hurley (D. C.) 197 Fed. 183; In re Lorch & Co. (D. C.) 199 Fed. 944; In re Carlile (D. C.) 199 Fed. 612; In re Pettingill & Co. (D. C.) 135 Fed. 218; Suffel v. Natl. Bank, 16 Am. Bankr. Rep. 262, 127 Wis. 208, 106 N. W. 837, 115 Am. St. Rep. 1004. However, "Merely because some cause to suspect the insolvency of the debtor exists is not enough; there must be such knowledge of facts (actual or implied knowledge) as would induce a reasonable belief in the ordinary man that a preference would result." 2 Remington on Bankruptcy (2d Ed.) § 1405, p. 1285; Grant v. National Bank, 97 U. S. 80, 81, 24 L. Ed. 971; Stucky v. Masonic Savings Bank, 108 U. S. 74, 75, 2 Sup. Ct. 219, 27 L. Ed. 640; Bardes v. Bank, 12 Am. Bankr. Rep. 771, 122 Iowa, 443, 98 N. W. 284; Turner v. Fisher (D. C.) 13 Am. Bankr. Rep. 243, 133 Fed. 594; Off v. Hakes, 15 Am. Bankr. Rep. 699, 142 Fed. 364, 73 C. C. A. 464.

In Grant v. National Bank, supra, Mr. Justice Bradley said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt."

In Off v. Hakes, supra (C. C. A. seventh circuit) 142 Fed. 364, 73 C. C. A. 464, 15 Am. Bankr. Rep. 696, it was held:

"In an equitable action to recover the amount of the note as an alleged preference, evidence that defendant's agent was informed by the bankrupt that, should the stock of goods be sold at what they were then estimated to be worth, the ability to pay creditors in full would depend upon the collection of an unknown amount of outstanding accounts is not sufficient to sustain a finding that the defendant had reasonable cause to believe that the bankrupt was insolvent, and that a preference was intended."

Financial embarrassment is not necessarily insolvency, but may, under certain circumstances, suggest it and put the creditor on inquiry. In re Bartlett (D. C.) 172 Fed. 679, 22 Am. Bankr. Rep. 891.

[5] In the case now before this court it seems inquiry was made and resulted in the honest conclusion arrived at by Mr. Cooper, the attorney for the Sulzberger Company, that he could collect 100 cents on the dollar if he sued. This, of course, indicates inquiry by him and an honest belief in the solvency of the Crescent Park Market. The now bankrupt was not paying its weekly bills as they fell due, and had not from June 10, to June 26, 1913. A check was requested, and Mr. Gaylord declined to give one on the ground he would not give a check unless there was money in bank to meet it. As it is contrary to law in New York to give a check on a bank when the maker of the check has no funds, we cannot predicate any finding on the mere fact

Mr. Gaylord declined to give a check. What force under all the circumstances can be given the fact the Crescent Park Market had not sufficient funds in bank to meet a check for the amount of the indebtedness? It is not shown that company did not have property which, if turned into cash and deposited, would have met such a check, or that the outstanding accounts receivable would not, if collected, have furnished funds for the purpose. As stated, inquiry was made, and we must assume that the representative of the Sulzberger Company believed the information given was correct and truthful, as evidenced by the statement that the full claim was collectible. It is true that business houses should have funds in bank, or on hand, to pay all outstanding bills and claims when due. But failure to be in funds, while a circumstance to be considered, does not of itself give reasonable cause to believe that the house or individual is insolvent. See In re Houghton Web Co. (D. C.) 26 Am. Bankr. Rep. 202, 204, 205, 185 Fed. 213. In that case the bankrupt was short of funds, discounted notes, and on at least three occasions its notes went to protest. The referee found the bankrupt was insolvent and short of funds and without sufficient capital to do business, but took into account other facts, as we must do here. What is there in this case to show that, after receiving the information referred to, and which led to the conclusion the debtor was able to pay in full, the Sulzberger Company had reasonable cause to believe the enforcement of the transfer made to it as security would effect a preference? Day had threatened, unless he could have his way, "to smash the business." We may assume Day had agreed to put in capital, which he had failed to do. This failure would account for a shortage of ready cash, but would not show insolvency. It does not appear Day had actually done anything "to smash the business," except fail to put in all the capital he had agreed to put in. However, it does not appear that such failure would make the company a bankrupt, or insolvent. If so, no such knowledge or information was conveyed to Sulzberger Company. It is evident that the whole truth was not conveyed to the agents of the Sulzberger Company, but they made inquiry, and it cannot be held that when a creditor does his duty and makes inquiry and the truth is suppressed, or only half told, he is charged with knowledge of the actual truth. When put on inquiry and there is a failure to inquire, it may be presumed that inquiry would have disclosed the truth, all the facts; but when put on inquiry, and due inquiry is made and the truth is either wholly suppressed or so colored and explained that the creditor taking the security does not, in fact, have the information which would give reasonable cause to believe, knowledge cannot be imputed to him and he held to have had reasonable cause to believe. This is not a case where the creditor took a transfer by way of security of substantially all the property of the debtor with knowledge of the existence of other creditors. The accounts receivable were untouched, thus leaving this debtor free to collect in all outstanding accounts, which it seems were represented to Sulzberger Company as sufficient to pay its claim of over $3,000, and continue its business. As already stated, it seems clear that it was expected the Crescent Park Market would continue

its business, was able to do so, and the findings of the learned referee indicate nothing to the contrary. In this case we find no resort to unusual methods of payment or of giving security when demanded. In Re Andrews (D. C.) 14 Am. Bankr. Rep. 247, 135 Fed. 599, there was a payment by return of goods, not by cash. In Laundy v. First National Bank, 11 Am. Bankr. Rep. 223, 66 Kan. 759, 71 Pac. 259, there was a deposit of the books of account as security, but this was held insufficient to show reasonable cause to believe. I do not wish to concur in this holding as a naked proposition. It would depend on all the surrounding circumstances and conditions.

In Tilt v. Citizens' Trust Co. (D. C.) 191 Fed. 441, affirmed 200 Fed. 410, 118 C. C. A. 562, 29 Am. Bankr. Rep. 906, the creditor took from the debtor, within the four-month period, a large part of its assets, and also practically all of its bills receivable, and hence left it crippled so far as money from collections was concerned, and stripped of substantially all its other assets. The court held that adequate inquiry was not made as to the solvency of the company, which it would seem was practically obvious. In this case the evidence discloses that the agents of the Sulzberger Company made careful inquiry of the debtor, and also outside. It was represented to them that no other creditors, unless it was one, was pressing for payment, that the assets were about double the liabilities, and that they could pay up in a year from the business. The agents watched the business, and the market seemed to be doing a good and an extensive business. There was no concession of insolvency or of inability to pay in cash from the profits of the business if given time, and the mortgage shows the credit was extended a year. The question in the case now before this court is: Did the Sulzberger & Sons Company of America, acting by its agents in this matter, receive this mortgage under such circumstances and with such information and knowledge (actual or imputed) as naturally would have caused the ordinary business person of intelligence and reasonable prudence, had he been the creditor receiving it, to have believed that thereby a preference would be effected? All the acts and conduct and transactions connected with the taking of the mortgage and all the knowledge gained must be considered as a whole, and not each occurrence and item of information by itself. After repeated readings of the evidence, I am unable to concur with the ultimate findings and conclusions of the learned referee. The referee has not found that adequate inquiry was not made, and I cannot so find.

Considering all the proved facts and circumstances and all the information obtained by the representatives of the Sulzberger Company, I find that that company and its agents did not think the now bankrupt company insolvent, but, on the other hand, honestly believed it solvent, and did not have reasonable cause to believe it insolvent, or that the taking of the security would operate as a preference. In my opinion the evidence does not sustain a finding to the contrary. The order of the referee, disallowing the claim of George C. Woodworth as a secured claim, is therefore reversed, and the claim will be allowed as a secured claim.

So ordered.

In re T. H. BUNCH COMMISSION CO.

(District Court, E. D. Arkansas, W. D. August 3, 1915.)

BANKRUPTCY ⊂=161—VOIDABLE PREFERENCES—EFFECT IN DELAY IN RECORDING MORTGAGES.

Under Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 544) § 47, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), vesting the trustee in bankruptcy with all the rights of a creditor holding a lien and section 60a, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (Comp. St. 1913, § 9644), declaring that a person shall be deemed to have given a preference if, being insolvent, he has, within four months before filing the petition or after the filing and before adjudication, made a transfer of any of his property, and that the period of four months shall not expire until four months after date of the record of the transfer as required by law, and section 60b, as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1913, § 9644), declaring that if, at the time a bankrupt makes a transfer, or at time of recording thereof, as required by law, being within four months before filing of petition in bankruptcy or after the filing and before adjudication, he is insolvent, the transfer shall operate as a preference, a mortgage, required by Kirby's Dig. Ark. §§ 5395, 5396, 5407, to be recorded to be good as against subsequent purchasers or lien creditors, must be treated as made when first filed for record, and when not filed until within four months of the mortgagor's adjudication in bankruptcy, it is invalid as against his trustee, who may recover the mortgaged property or its value, if in possession of the mortgagee, though the mortgage was in fact previously executed to secure a bona fide debt; the bankrupt being insolvent at the time of the filing for record.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⊂=161.]

In Bankruptcy. In the matter of the T. H. Bunch Commission Company, bankrupt. Intervention petition by Mrs. Laura L. Bunch, for the possession of personalty in the possession of the trustee in bankruptcy. Intervention petition dismissed, without prejudice.

This is an intervention by Mrs. Laura L. Bunch, for the possession of certain personalty in the possession of the trustee in bankruptcy in this cause. She claims title thereto by virtue of a chattel mortgage executed by the bankrupt to her for the purpose of securing an indebtedness due her from the bankrupt. To this petition of intervention the trustee filed an answer, admitting the possession of the property claimed by the intervener, and the execution of the mortgage as set forth in the petition, but denied that it was a valid mortgage as against the trustee, for the reason that the bankrupt corporation was created and existed under the laws of the state of Arkansas, and had its principal office in the county of Pulaski, and that the mortgage was not legally filed for record until October 7, 1914, within four months before the filing of the petition in bankruptcy herein; that at the time of such recording in Pulaski county the said Commission Company was insolvent, and the effect of the enforcement of said mortgage would and will be to enable the intervener to obtain a greater percentage of her debt than other creditors of the Commission Company, of the same class, whose debts were in existence at the time said mortgage was given and accepted, and thereafter; that at the time of recording the said mortgage in Pulaski county, as aforesaid, the intervener had reasonable cause to believe that the enforcement of said mortgage would prefer her to other creditors.

The intervention was referred to the referee in bankruptcy as special master, and was submitted to him upon an agreed statement of facts, the substance of which is: "That the Commission Company, the bankrupt, is a corporation organized November 3, 1909, under the laws of the state of Arkansas.

Its principal place of business and its office for the transaction of business is, and at all times was, in Pulaski county, state of Arkansas. That T. H. Bunch has been the president ever since its organization, and the intervener is his wife; that on December 18, 1913, the said T. H. Bunch, acting for the Commission Company, borrowed from the intervener $20,000 in money, and for the purpose of securing the same executed in behalf of the Commission Company a note for $20,000 to Mrs. Bunch and a chattel mortgage on the property in controversy. After it had been delivered to her, she requested her husband to take such steps as were necessary to validly file or record the mortgage. That the mortgage was filed on January 10, 1914, with the recorder of deeds of Lonoke county, Ark., but with no directions to record same, nor was there any indorsement made thereon, as provided by section 5407 of Kirby's Digest. The personalty covered by the mortgage was at that time in Lonoke county. On October 1, 1914, a suit was filed in the chancery court of Pulaski county, Ark., by creditors of the Commission Company, asking for the appointment of a receiver of the Commission Company to wind up its affairs, upon the ground that it was insolvent. That upon a hearing the court by consent of the parties appointed a receiver on October 3, 1914, upon the ground of said insolvency. On October 3, 1914, the attorney for Mrs. Bunch, who was also the attorney of the Commission Company, was advised that her mortgage was on file in the recorder's office in Lonoke county, but had not been recorded or indorsed, so that it could be legally filed without recording, whereupon the attorney withdrew the mortgage and immediately refiled it with the recorder of deeds of Lonoke county, with an indorsement as required by law for filing, but not recording, chattel mortgages. On October 7, 1914, the attorney for Mrs. Bunch directed the recorder of Lonoke county to record the mortgage in that county, and when recorded to return it, whereupon it was indorsed by the recorder of Lonoke county, 'Filed for record at 11:00 o'clock a. m. October 7, 1914.' He immediately recorded it, and then sent it to this attorney at Little Rock, in Pulaski county, who then filed it for record with the recorder of Pulaski county, at 3:20 p. m. October 7, 1914, and the same is now of record in said county. The attorney who attended to these matters was also the attorney of the Commission Company, and had, up to that time, also been the attorney for Mrs. Bunch, but another attorney was employed by Mr. Bunch to act for Mrs. Bunch thereafter. At that time Mrs. Bunch was away from home, and all this was done by direction of her husband, the president and manager of the Commission Company. She returned home on October 11, 1914, and after being advised of what had been done, ratified the employment of a new attorney and everything that had been done on her behalf during her absence by either of the attorneys. At the time she ratified these acts she knew that the receiver had been appointed by the chancery court and was in charge of the property of the Commission Company, including the mortgaged personalty, and she also knew that the Exchange National Bank, a creditor of the Commission Company, claimed that within the preceding two or three months approximately $35,000 or $40,000 had been obtained by the Commission Company from the bank in an unlawful way, and, as a result of the action of the bank on its claim, said receiver had been appointed and the Commission Company had ceased to transact business. At the time the application for a receiver was made to the chancery court the Commission Company was insolvent, having unsecured creditors whose claims exceeded in amount the fair valuation of its assets, and has been insolvent ever since."

The agreed statement also contains this stipulation: "It is stipulated and agreed that T. H. Bunch, if sworn as a witness in this cause, would testify that at the time of and after the appointment of the receiver for the Commission Company by the Pulaski chancery court, he did not personally think the said Commission Company was insolvent, but thought that the company could not pay some debts that were then due, but that its assets were sufficient to pay all its debts. Notwithstanding, for the purpose of the trial of this intervention, it is stipulated and agreed that at the time of and at all times after the appointment of said receiver by the Pulaski chancery court, the said T. H. Bunch had actual knowledge, acquired by him while acting not adversely to the interests of Mrs. Bunch, of such substantial facts and

surrounding circumstances as would put a man of ordinary prudence or business experience on inquiry, which inquiry, if pursued with reasonable diligence, would have disclosed that the said T. H. Bunch Commission Company did not have sufficient assets at a fair valuation as a going concern to pay its debts, and, further, that if said mortgage in favor of Mrs. Bunch was enforced, she would get a greater percentage of her debt than general creditors. It is agreed that T. H. Bunch had access to the sources of information, which, if reasonably pursued, would have disclosed the above facts. At no time did the said T. H. Bunch, or any officer of the T. H. Bunch Commission Company, or Mrs. Laura L. Bunch, or her attorneys, attempt or intend to conceal the existence of the said debt or the said mortgage from any one. On October 19, 1914, a petition in bankruptcy herein was filed, and on November 9, 1914, adjudication in bankruptcy therein was had. The debt secured by the mortgage is still unpaid. For the purpose of this case it is stipulated that the said T. H. Bunch, as president of the said Commission Company, had authority to make the loan and execute the note and mortgage on behalf of the Commission Company."

At the hearing before the master the parties agreed that the cause be submitted upon two issues only: (1) Whether the debt, in the securing whereof the chattel mortgage was made, is to be deemed a pre-existing debt as of the date of the transfer itself, or as of the date of the recording of said transfer itself, or as of the date of the recording of said transfer in Pulaski county, Ark.; (2) whether the recording of said transfer was by law required within the meaning of section 60 of the Bankruptcy Act. The special master found in favor of the trustee, and dismissed the intervention.

Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, Ark., for intervener.

H. M. Trieber, of Little Rock, Ark., for trustee.

TRIEBER, District Judge (after stating the facts as above). Section 60a of the Bankruptcy Act, as amended by the act of February 5, 1903, 32 Stat. p. 799, reads as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

Section 60b, as amended by the act of June 25, 1910, is as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The amendment of 1910 to section 47 reads:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights,

remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

As the act only applies so far as recording or registering of the transfer is concerned, if recording or registering thereof is required by law, which means the law of the state where the transaction occurs, it is necessary to ascertain and determine what the laws of that state require to be done. In other words, the question to be determined is, What is the effect of a failure to file for record a chattel mortgage as against a trustee in bankruptcy under the laws of Arkansas, where this transaction took place? To answer that we must look to the statutes of that state and the construction placed upon them by the highest court of that state. The statutes of Arkansas, as digested in Kirby's Digest, applicable to the issues herein involved, are:

"Sec. 5395. All mortgages whether for real or personal estate, shall be proven and acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proven or acknowledged; and when so proven or acknowledged shall be recorded, if for lands in the county or counties, in which the lands lie, and if for personal property, in the county in which the mortgagor resides. Provided, if the mortgagor is a nonresident of this state, the mortgage shall be recorded in the county in which the property is situated at the time the mortgage is executed.

"Sec. 5396. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

"Sec. 5407. Whenever any mortgage or conveyance intended to operate as a mortgage of personal property, or any deed of trust upon personal property, shall be filed with any recorder in this state, upon which is indorsed the following words, 'This instrument is to be filed, but not recorded,' and which indorsement is signed by the mortgagee, his agent or attorney, the said instrument when so received shall be marked 'Filed' by the recorder, with the time of the filing upon the back of said instrument; and he shall file the same in his office, and it shall be a lien upon the property therein described from the time of filing, and the same shall be kept there for the inspection of all persons interested; and such instrument shall thenceforth be notice to all the world of the contents thereof without further record."

The effect of an unrecorded mortgage under these laws, is well settled by the decisions of the highest court of that state, and has been ever since 1848, when the opinion in Main v. Alexander, 9 Ark. 112, 47 Am. Dec. 732, was delivered. A mortgage, although not filed for record, is good between the parties or as against the administrator of the mortgagor, or of a voluntary assignee or a receiver in insolvency, but is void as against subsequent purchasers or creditors who have obtained a lien on the mortgaged premises by a levy under execution or a seizure under attachment. The fact that they have actual notice of the mortgage is immaterial, if it is not filed for record in the proper office prescribed by law, and not then if so defectively executed or acknowledged, as not to entitle it to record. These rules have been consistently adhered to by the Supreme Court of the state ever since Main v. Alexander was decided.

In Carnall v. Duval, 22 Ark. 136, a mortgage had been filed for

record with the clerk, who was ex officio recorder of deeds, and of which the clerk had actual notice, but the acknowledgment was defective so as not to entitle it to record under the laws of the state. With full knowledge of these facts, the clerk purchased the property, and the court held that his title was superior to that of the mortgagee. The decisions of the Supreme Court of Arkansas are quite numerous and uniform on that subject. Among the many decisions, the following may be consulted: Watson v. Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62; Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353; Cumberland Building & Loan Ass'n v. Sparks, 111 Fed. 647, 49 C. C. A. 510, a case arising under the laws of Arkansas and determined by the Circuit Court of Appeals for the Eighth Circuit.

The attempted filing and the later recording of the mortgage in Lonoke county were void for two reasons: First. A chattel mortgage must, under the provisions of section 5395, be filed or recorded in the county in which the mortgagor resides, otherwise it is no better than if not filed or recorded. Beaver v. Frick Co., 53 Ark. 18, 13 S. W. 134. Under a similar statute of the state of New York it was held, in Stewart v. Platt, 101 U. S. 731, 735, 737, 25 L. Ed. 816, that a chattel mortgage filed for record in a town other than that where the plaintiff resided, although the property was in the town where the mortgage was recorded, is void as against creditors. Second. Section 5407 requires a certain indorsement to be made when a chattel mortgage is to be merely filed, but not recorded. Failure to make such an indorsement, or one practically to the same effect, is insufficient, and is no lien on the property, as against subsequent purchasers or creditors, although verbal directions were given to the recorder of deeds to file it, but not record it. Bowen v. Fassett, 37 Ark. 507; Dedman v. Earle, 52 Ark. 164, 12 S. W. 330; Davis v. Perry, 64 Ark. 369, 42 S. W. 768.

A provision in the statutes of Colorado requires an affidavit by the mortgagee to be recorded annually on the records of the county wherein the mortgage is recorded that the mortgage was given in good faith, and the amount still unpaid. In Williams v. German-American Trust Company, 219 Fed. 507, — C. C. A. —, the Circuit Court of Appeals for the Eighth Circuit held that the failure to comply with these requirements of the statute made the mortgage void as against a trustee in bankruptcy, the court, quoting from Ferris v. Chambers, 51 Colo. 368, 117 Pac. 994, the following excerpt:

"Provisions of a statute, rendering a chattel mortgage effective, even though the mortgagor retains possession of the property, are statutory, and if the statute prescribes that, in order to preserve the lien of a mortgage with the property in the possession of the mortgagor, something shall be done, that thing must be done as prescribed by the statute."

The cases cited by the learned counsel for the intervener are not in point.

In Martin v. Ogden, 41 Ark. 186, the mortgage was held good as against the administrator, the court holding that the administrator is not a purchaser nor a creditor. In Wolfe v. Perkins, 51 Ark. 46, 9 S.

W. 432, the issue involved was whether an unrecorded mortgage was a violation of a provision in a fire insurance policy against incumbrances, and it was held that, the mortgage being a valid lien on the property insured between the parties, it was such a violation.

In Little v. Bank, 97 Ark. 61, 133 S. W. 166, and Arkansas Cypress Co. v. Meto Valley R. R. Co., 97 Ark. 534, 134 S. W. 1195, it was held that a receiver in an insolvency proceeding, not being a purchaser nor a creditor, occupied no better position than the mortgagor.

There can be no doubt but that if, before the mortgage was filed in Pulaski county on October 7, 1914, a creditor would have caused the mortgaged property to be seized under an execution or attachment, the lien obtained thereby would have been superior to that of the mortgagee under the laws of the state of Arkansas as uniformly construed by the Supreme Court of that state ever since 1848.

Is the trustee in bankruptcy entitled to the same rights that such a creditor would have in view of the fact that the agreed statement of facts admits that the Commission Company was, at the time the mortgage was filed for record in Pulaski county, insolvent; that T. H. Bunch, its president, who acted as the representative and agent for the intervener, and the attorney who was employed by Mr. Bunch for Mrs. Bunch and acted for her in filing the mortgage for record, actually knew, or beyond question had reasonable cause to know, at the time the mortgage was filed by him for record in Pulaski county that the Commission Company was insolvent, and that the effect of the mortgage would be to enable Mrs. Bunch to obtain a preference over other creditors, who had unsecured claims?

Prior to the amendments of 1903 and 1910 of the Bankruptcy Act it has been determined in York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, that the trustee in bankruptcy occupied no better position than the mortgagor, and if the mortgage was good against the mortgagor, it was good against the trustee. By the amendment of 1903 the period of four months within which a preference could be subject to attack by the trustee in bankruptcy was to be computed from the date of the recording or registering of the transfer, "if by law such recording or registering is required."

There has been some conflict among the courts inferior to the Supreme Court (that court never having passed upon that question) what the effect of the amendment of 1903 was; but the Circuit Court of Appeals for the Eighth Circuit, in First National Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, held that where the statutes of a state required liens to be recorded, the question of insolvency and knowledge thereof is to be determined as of the date when the mortgage was filed for record, and this date is to be adopted as the date for the purpose of determining the four-month period for the purpose of determining the legality of a preference. This decision has been followed ever since by that court. McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399; People's State Bank v. Gleason, 178 Fed. 1004, 101 C. C. A. 663, affirmed without an opinion, on the authority of the Connett Case; Mattley v. Giesler, 187 Fed. 970, 110 C. C. A. 90; Lathrop Bank v. Holland, 205 Fed. 143, 123 C. C. A. 375; Williams v. German-American Trust Co., supra; The T. L. Smith

Co. v. Orr, 224 Fed. 71, — C. C. A. —, filed May 12, 1915. Other appellate courts have followed this rule: Remington on Bankruptcy (2d Ed.) § 1379½; Brigman v. Covington, 219 Fed. 500, — C. C. A. — (4th Ct.).

The language of the statute, especially as amended by the act of 1910, is so clear that there is nothing left to construction. But if there were room for doubt as to the intention of Congress on that subject, it is removed by the reports of the judiciary committees of the two houses of Congress when the amendment of 1910 was pending. Senate Report No. 691, Sixty-First Congress, Second Session, which accompanied the bill for these amendments, after it had passed the House and was reported to the Senate, concurs in the report of the House Judiciary Committee, which reads as follows:

"The object of this amendment is further to protect against the evil of secret liens, against which evils this same section was amended in 1903, but in such an unfortunate way as not effectually to prevent such liens. As the present law stands, even as amended in 1903, secret liens are still being held good in many jurisdictions, notably in Wisconsin, where the Supreme Court of that state has held in effect, in the case of Claridge v. Evans [137 Wis. 218] 118 N. W. 198 [803, 25 L. R. A. (N. S.) 144], that a mortgage withheld for years from record is not a preference, even if finally filed within a few days before bankruptcy, provided the debtor was not insolvent at the time it was given, years beforehand, or provided it were given for money then passing.

"Thus as the law stands, even by the amendment of 1903 as construed in many jurisdictions, a debtor may, if solvent at the time or if presently passing consideration be then received, give a chattel mortgage or other lien upon his property requiring recording by the state law, and the creditor receiving it may keep this lien off the record for months or even years (if not so done by collusive agreement) and filed it within a few days of bankruptcy, and yet the lien be held perfectly good. This is so held because the courts rule that the insolvency of the debtor, the existence of a pre-existing debt, and all the other elements of the preference are to be determined as of the date of the transfer between the parties. The amendment of 1903, by declaring the four-month period should not begin to run until the date of the recording where the recording is 'required' by state law, evidently attempted to make the date of the recording in such instances the date at which the existence of insolvency of a pre-existing consideration and of all the other elements of the preference should be taken.

"Nevertheless, the amendment of 1903 did not effectually accomplish this object. As the law now is construed, even if the recording be not done until within the four-month period, on the very eve of bankruptcy, yet if at the time of the original transfer, which might have occurred years beforehand, the debtor was solvent or the lien had been given upon a then presently passing consideration, the transfer will not be set aside as a preference, the date of the 'transfer' under any theory always being necessarily the date at which all the elements of the preference must be proved to have existed.

"The real trouble it seems, is this: There are two times of 'transfer' in such cases; as between the transferror and the transferee obviously the time of transfer is the time of the original execution and delivery of the instrument to the grantee or transferee, regardless of its registration, but as to other creditors and the rest of the outer world, the 'transfer' is, by the statute, not a complete 'transfer' at all until recording, until delivery to the public recorder, then and not until then the debtor signifying to outside parties, to all others that might become interested in his assets, the effectual separation of the liened property from the rest of his assets. This, it must be conceded, is the bottom principle upon which rest the recording statutes of all our states. It is also the bottom principle of the right to legislate against secret liens. Thus, in our bankruptcy preference statute, the great object likewise should be to make clear that the 'transfer', so far as outside parties becoming interested

In the estate are concerned, is not complete or perhaps is not even to be considered a 'transfer' at all (in cases where state law requires recording as against creditors) until delivery of the instrument to the recorder for registration.

"Creditors, then, by these state Supreme Court decisions construing the preference provisions of the present Bankruptcy Act, must be able to prove that at the time of the 'transfer,' perhaps several years beforehand, the debtor was then insolvent, the debt was then a past, a pre-existing, debt, etc., a practical impossibility; indeed, an unreasonable requirement, since it is the present insolvent fund of the debtor that is rightly involved, and not some ancient fund existing years beforehand.

"The proposed amendment squarely and clearly makes the date of the recording (where recording is required under state law to make the lien valid as against levying creditors) the date at which the creditor is to prove the existence of all the elements of a preference—truly the right date, for, as above noted, it is the present insolvent fund with which creditors are concerned, not the debtor's estate in the condition which might have existed two or three years beforehand.

"Further, the amendment of 1903, making the existence of 'reasonable cause to believe' on the creditor's part a prerequisite to the trustee's right to recover the preference from him, required that this reasonable cause of belief should be that a 'preference was intended to be given,' rather than that a 'preference would be effected.' Logically it is the creditor's knowledge or belief that a preference would be effected that should be the test, rather than his knowledge or belief of the debtor's intention to prefer.

"This amendment, viewed in the light of the previous discussion, would seem to speak clearly. It brings forward to the date of the recording the proof of the insolvency and of all other operative facts of the preference, and makes the section conform to the real and actual intentions of the framers of the amendment of 1903.

"Indeed, it is perhaps merely declaratory of the law as it exists to-day, as laid down in the following cases, to wit:

"Bank v. Connett, 142 Fed. 33 [73 C. C. A. 219, 5 L. R. A. (N. S.) 148], Circuit Court of Appeals: 'The mortgages constituted a transfer of his property, and their effect was to enable the bank to obtain a greater percentage of its claims than other creditors. They were recorded within four months of the filing of the petition in bankruptcy. Therefore, assuming that a recording is required by the law of Missouri, it follows that a preference arose under section 60a. And, in our opinion, it also follows that the preference arose when the mortgages were recorded, and not as of the date they were given. In other words, the amendment of 1903 was intended to remedy the evil resulting from secret instruments of transfer of the bankrupt's property, the withholding of them from record until shortly before the institution of bankruptcy proceedings, and the then assertion of them as of the prior date of their execution and delivery. And this was accomplished by making the rights of a creditor thus favored determinable by the conditions existing when he caused the transfer to him to be recorded as required by the state law rather than by those existing at the time he secured it.'

"McIlvain v. Hardesty, 169 Fed. 31 [94 C. C. A. 399] 22 Am. Bankr. Rep. 320 (U. S. C. C. A. from Mo.): '* * * The effect of the transfer to McIlvain is to be judged as if made on the 7th day of July, 1905, when it was filed for record. If C. & C. were then insolvent, and if the effect of the enforcement of the transfer was to enable McIlvain to obtain a greater percentage of his debt than any other of their simple contract creditors, the transfer constituted a preference within the meaning of the bankruptcy law. * * * As, for the purpose of this case, the transfer is to be treated as made on the date the agreement was recorded, so the transferee's belief or cause for belief concerning it must relate to that time.'

"Also see In re Hickerson (U. S. D. C.) 20 Am. Bankr. Rep. 682 [162 Fed. 345].

"But there are contrary holdings. The question is continually arising, and is a frequent source of litigation. It is of such importance that it should be set at rest."

This shows beyond question that the Congress was of the opinion that the rule laid down in First National Bank v. Connett correctly interpreted its intention, when it enacted the amendment of 1903. But as the courts were not harmonious in the construction of this amendment, the act of 1910 was passed in order that there may be no room for doubt that the opinion in the Connett Case correctly interpreted the congressional intention. The mortgage must therefore be treated as executed on October 7, 1914, when it was first filed for record in accordance with the laws of the state and became a valid lien against creditors who had secured a lien by seizure under execution or attachment, or the trustee in bankruptcy, who occupies such a position; his right as such dating back four months prior to the institution of the proceedings. First Nat. Bank v. Connett, 142 Fed. 33, 40, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148. The indebtedness secured thereby was then pre-existing, and, the Commission Company being then insolvent, of which fact the agent and attorneys of the intervener had notice and reasonable cause to believe that the enforcement of the mortgage would effect a preference, and being within four months preceding the filing of the petition in bankruptcy against the Commission Company, it is clearly voidable under the provisions of sections 60a and 60b. As the trustee could have recovered the property, or its value, if in the possession of the intervener, he can, of course, defeat an action against him for the recovery of the property by one claiming under such a voidable instrument.

The conclusions of law reached by the special master are correct, and the exceptions thereto are overruled. The result, no doubt, works a great hardship on the intervener, who acted in good faith and parted with her money in the belief that it was to be secured by the mortgage. There is no act of hers which savors in the least of fraud. But courts are bound to enforce the law as it has been made by the proper legislative department of the government and cannot make shipwreck of it to avoid hardships. It is a well-known fact that several efforts have been made by the State Bar Association of Arkansas to have these statutes as construed by the Supreme Court of the state amended so as to conform to the more liberal view prevailing in many other states, as to notice of unrecorded or improperly recorded mortgages, but these efforts have failed of success, the Legislature declining to act on these suggestions, and the Supreme Court holding that the principle laid down in Main v. Alexander has become a rule of property, which can only be changed by legislative action.

The order will be that the intervention be dismissed at the cost of the intervener, but without prejudice to her right to prove the claim against the estate as an unsecured claim, if found to be a valid claim.

G. W. PARSONS CO. v. UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD.

(District Court, S. D. Iowa, C. D. June 26, 1915.)

No. 203.

1. SALES ⊂=450—CONDITIONAL SALES—VALIDITY.
A provision in a contract of sale of personal property reserving title thereto until full payment has been made of the purchase price is valid and enforceable between the parties.
[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1321; Dec. Dig. ⊂=450.]

2. SALES ⊂=473—CONDITIONAL SALES—BONA FIDE PURCHASERS.
Defendant executed a surety bond for a contractor, and to indemnify it the contractor assigned and conveyed to it all tools, etc., then or thereafter upon the work, with authority to take possession thereof in case the contractor failed or was unable to complete the work, or in the event of any default on its part. The contractor subsequently purchased a trenching machine from plaintiff by a contract which expressly reserved title until full payment of the purchase price. The contract was not recorded. Defendant, upon the contractor's default, took charge of the work and took possession of all tools and machinery, including such trenching machine, and after completion of the work sold such machine. *Held*, that defendant was in no sense a purchaser in good faith of the machine, as, the contractor not having purchased the machine until after the contract of indemnity was made, defendant was in no way induced to execute the bond by the contractor's supposed ownership of the machine.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377–1390; Dec. Dig. ⊂=473.]

3. CHATTEL MORTGAGES ⊂=138—CONDITIONAL SALES—RIGHTS OF MORTGAGEES.
The contention of defendant that its rights were superior to those of plaintiff, on the theory that it became a mortgagee in good faith, without notice of plaintiff's reserved title, and that by taking possession it acquired the legal title and cut off plaintiff's undisclosed interest, was unsound, as, though a chattel mortgage passes the legal title subject to defeasance by payment of the secured debt, the contractor never owned the legal title, and defendant only acquired the interest of the contractor, or a right to acquire the legal title by paying the purchase price.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228–236; Dec. Dig. ⊂=138.]

4. SALES ⊂=480—CONDITIONAL SALES—CONVERSION BY THIRD PERSON—DAMAGES.
A party, who took possession of machinery sold conditionally, sold it, and appropriated the proceeds, was not liable to the conditional seller for expenses incurred by such seller in its unsuccessful endeavors to recover possession of the machine.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439–1448; Dec. Dig. ⊂=480.]

At Law. Action by the G. W. Parsons Company against the United States Fidelity & Guaranty Company of Baltimore, Md. Judgment for plaintiff.

POLLOCK, District Judge. The facts are substantially as follows: In the month of May, 1913, a copartnership doing business under the firm name of Frank S. Misho & Co., at Seattle, in the state of Wash-

ington, was awarded the work of constructing a sewer in the city of Edmonton, province of Alberta, Canada, and on May 22, 1913, a contract was entered into between the city and the contracting company (hereinafter called Misho & Co.) for the doing of the work. In order to qualify itself to undertake the performance of this public work Misho & Co. were compelled to and did give to the city a surety bond conditioned on the faithful performance of the contract. This bond was made by Misho & Co. as principal and defendant as surety, and was procured to be made by defendant on an agreement of indemnity entered into by Misho & Co., which, among other things, provides as follows:

"And for the better protection of the said company, we do, as of the date hereof, hereby assign, transfer, and convey to it, the said United States Fidelity & Guaranty Company, all our right, title, and interest in and to all the tools, plant, equipment, and materials of every nature and description that we may now or hereafter have upon said work, or in, on, or about the site thereof, including as well materials purchased for or chargeable to said contract, which may now be in process of construction, or storage elsewhere, or in transportation to said site, hereby assigning and conveying, also, all our rights in and to all subcontracts, which have been or may hereafter be entered into, and the materials embraced therein, and authorizing and empowering said company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials, and subcontracts, and enforce, use, and enjoy such possession upon the following conditions, viz.: This assignment shall be in full force and effect, as of the date hereof, should we fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on our part under the said contract. In further consideration of the execution of the said bond, we do hereby agree, as of this date, that the said United States Fidelity & Guaranty Company shall, as surety on said bond, be subrogated to all our rights, privileges, and properties as principal and otherwise in said contract, and we do hereby assign, transfer, and convey to said company all the deferred payments, and retained percentages, and any and all moneys and properties that may be due and payable to us at the time of such breach or default, or that may thereafter become due and payable to us on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that all such moneys, and the proceeds of such payments and properties, shall be the sole property of the said United States Fidelity & Guaranty Company, and to be by it credited upon any loan, cost, damage, charge, and expense sustained or incurred by it as above under its bond of suretyship."

Misho & Co. did not keep and perform their contract with the city, but made default therein, with the result a representative of defendant proceeded to the city of Edmonton, took charge of the work of constructing the sewer, also took possession of all tools, appliances, apparatus, machinery, etc., of Misho & Co. there found, and completed the work of constructing the sewer to the satisfaction of the city, but at a very considerable loss to itself. Among the tools, apparatus, and appliances left by Misho & Co. on the job when the company abandoned its contract was the trenching machine in dispute in this case. The history of this machine may be stated as follows:

As Misho & Co. were in need of a machine of this character in the performance of the contract with the city, a soliciting agent of plaintiff entered into a contract with Misho & Co. at Edmonton for its purchase, subject, however, to the approval of plaintiff at the city of New-

ton, this state, the home and principal place of business of plaintiff. This contract was approved by plaintiff at the city of Newton June 3, 1913. Among other things it is therein provided the purchase price of the trenching machine was the sum of $7,000, $1,500 cash, which was paid, balance evidenced by three promissory notes, dated June 11, 1913, one for $1,300 and two for $1,350 each, and a check for $1,500, which notes and check were not paid, except a credit thereon of $300. Delivery of machine was made f. o. b. Newton. By the terms of this contract title to the trenching machine was reserved in plaintiff until payment made, as follows:

"It is expressly agreed that the above specified machine and property shall be and remain the property and subject to the order of the first party until paid in full, and that if promissory notes are given for the purchase money, or any part thereof, that the giving of the same, or any part payment thereon, shall not divert the title of the party of the first part, until said promissory notes and said purchase money is paid in full. Nor shall any payment on account and the receipt thereof divert such title until the whole purchase price is fully paid, and all payments less than the whole sum shall be considered as being for the rent of such machinery and for damages thereto by wear."

The machine was shipped from Newton to Edmonton, the freight paid by Misho & Co., and it was used by that company in the work of constructing the sewer until such work was abandoned by Misho & Co., when it was left in the trench, where found by defendant when it assumed control of the work, and it was used by defendant in the doing of the work until completed, when it was sold by defendant for the sum of $3,500, and the account of defendant with Misho & Co. was credited with such amount. The contract between plaintiff and Misho & Co. for the sale and purchase of the machine was neither filed nor recorded in the appropriate office in Jasper county, this state, nor in the province of Alberta, Canada.

The question presented on this record for decision is: Which has the better right to the machine—plaintiff, under its contract of sale reserving title until payment of purchase price made, or defendant, under its contract of indemnity with Misho & Co? The plaintiff claims the value of the machine to the extent, but not in excess of, the unpaid purchase price of $5,500, with interest thereon to date, less a credit of $300 admitted, and the reasonable expenditures by it made in endeavoring to recover the machine, not in excess of $200. Defendant bases its right to the machine and its proceeds on its contract of indemnity with Misho & Co. The case has been heard and stands submitted for decision on the evidence and briefs and arguments of counsel for the respective parties. Of necessity, the decision of the controversy thus presented must rest on the legal effect to be given to the contract of sale and purchase made between plaintiff and Misho & Co., on the one hand, and the contract of indemnity made between defendant as surety for Misho & Co. on the other.

[1] Turning, now, to the provisions of the contract of sale and purchase made between plaintiff and Misho & Co., it is quite too clear for argument it in ample terms expressly reserves the title to the machine in dispute in plaintiff until full payment shall have been made, as stipulated in the contract. That this contract is in all its parts valid

and enforceable between the parties is not only conclusively settled by authority, but is in effect conceded by defendant. Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339; Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; Warner v. Johnson, 65 Iowa, 126, 21 N. W. 483; Zacharia v. Cohen Co., 140 Iowa, 682, 119 N. W. 136; Cline v. Russell, West Law Rep. (Canada) vol. 10, 666.

On what valid ground, therefore, does or can defendant contend its rights to the machine in question rise higher than the rights of Misho & Co. by its contract with plaintiff? As I understand the contention made by defendant in this respect, it is by reason of the provisions of the contract of indemnity above quoted, through which it claims to occupy the relation to the machine of a purchaser in good faith or subsequent mortgagee without notice of plaintiff's interest in the machine, because the contract under which title is reserved to plaintiff until full payment made was not recorded, to give constructive notice, and it did not have actual knowledge or notice of such right.

[2, 3] This brings me to a consideration of the language above quoted from the agreement, by which Misho & Co., in indemnifying defendant, attempted to pledge all tools, apparatus, machinery, materials, etc., to defendant. This contract reads:

"And for the better protection of the said company we do, as of the date hereof, hereby assign, transfer, and convey to it, the said United States Fidelity & Guaranty Company, *all our right, title, and interest in and to all the tools, plant, equipment, and materials of every nature and description*," etc., including the machine in question.

However, as Misho & Co. purchased the machine from plaintiff long after the contract of indemnity on which defendant relies was made, it is clear the making of the bond by defendant was not in any manner induced by any supposed ownership of the machine by Misho & Co.; hence defendant is in no sense a purchaser in good faith. Holt v. Henly, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767. The logic of defendant's argument is based on the following premise: It contends, by virtue of the covenants of the contract of indemnity made it by Misho & Co., it became a mortgagee in good faith of the machine thereafter acquired from plaintiff without notice or knowledge of plaintiff's reserved title contract; hence, at the time it took possession of the machine under its mortgage, it took the legal title thereto, and the undisclosed interest of plaintiff was thus cut off and destroyed. The fallacy of this contention I conceive to lie in the fact the major premise on which it rests is unsound. A chattel mortgage of personal property passes the legal title to the mortgagee, subject to defeasance by payment of the debt secured. In this case the trenching machine in dispute was not in existence at the time the contract of indemnity was made by Misho & Co. to defendant; hence defendant assumed no risk and incurred no liability in the making of the bond to the city, acting in reliance on the assumption of ownership of the machine by Misho & Co. It follows, therefore, defendant is in no sense a purchaser in good faith for value without notice, as has been seen.

When Misho & Co. thereafter purchased the machine and took it into possession, it did not take the legal title thereto, for title was ex-

pressly reserved by plaintiff under its contract of sale to Misho & Co. Hence it follows defendant did not and could not receive the legal title to the machine by taking possession from Misho & Co., for Misho & Co. at no time had this legal title. What defendant did receive on taking possession of the machine under the express terms of its contract of indemnity was all the right, title, and interest which Misho & Co. took from plaintiff. As Misho & Co. at no time took or had title to the machine in controversy, because this was expressly reserved to plaintiff, it had no interest in or right to the machine in question, except an interest to the extent to which it had paid the purchase price of the machine, or had paid freight for its shipment. In other words, the entire right, title, and interest of Misho & Co. in the machine rested in its right to use the machine in its possession and to pay the remainder of the purchase price to plaintiff, and thus acquire the title reserved by plaintiff from it until payment made. Hence it is clear all the right, title, or interest possessed by Misho & Co., which passed to defendant under the express terms of the contract of indemnity above quoted was such, and only such, as Misho & Co. possessed at the time defendant took possession of the machine in question. That is to say, the right to pay the remainder of the purchase money according to the terms of the contract, and interest thereon, less the credit of $300 conceded by plaintiff. In default of such payment plaintiff was entitled to recover the machine, if found in possession of defendant, in the same manner and to like effect as though it had remained in the possession of Misho & Co.

As defendant had sold the machine and appropriated the proceeds to its own use, plaintiff must have judgment for the value of the same at the time it came into the possession of defendant, not, however, exceeding the amount of its unpaid demand, together with interest thereon, less the sum of $300 credit admitted by plaintiff in repairing the machine, at the time and place it was appropriated by defendant to its own use. Considering the evidence of all of the witnesses, the condition of the machine at the time, the special service it is designed to perform, its distant location, and all other matters and things, I am of the opinion the sum of $5,000 was its reasonable value when defendant took possession.

[4] It follows the plaintiff must have judgment for $5,000 and costs of this action. I do not allow plaintiff its expenses incurred in its endeavor to possess itself of the machine. It was not successful in this attempt.

It is so ordered.

A. M. BRIGHT GROCERY CO. v. LINDSEY et al.

(District Court, S. D. Alabama, S. D. June 3, 1915.)

No. 1523.

MARITIME LIENS ⟸35—PROPERTY AFFECTED—INSURANCE MONEY.

The lien of one who furnished supplies to a vessel at the request of its owner or master does not, after the destruction of the vessel by fire, attach to the insurance money, which is the proceeds of a collateral personal contract between the owner and the insurer, and not of an interest in the vessel.

[Ed. Note.—For other cases, see Maritime Liens, Dec. Dig. ⟸35.]

In Admiralty. Libel by the A. M. Bright Grocery Company against H. M. Lindsey and others. On exceptions by the respondents to the libel. Exceptions sustained, and libel dismissed.

Webb & McAlpine, of Mobile, Ala., for libelant.

Hanaw & Pillans, of Mobile, Ala., for respondents.

TOULMIN, District Judge. This is a libel filed by the A. M. Bright Grocery Company, on its own behalf and of all other creditors similarly situated, who may desire to intervene in their interests, against H. M. Lindsey, as owner of the steamboat American, and against the fire insurance money under a policy of fire insurance issued by Phœnix Assurance Corporation of Liverpool, through W. K. P. Wilson & Son, as agents of said Assurance Corporation, seeking to subject said insurance money to the payment of its claim for groceries and supplies furnished in the years 1914 and 1915 to said steamboat on the request and order of the master or owner of said steamboat. The libel alleges that the said steamboat was destroyed by fire in April, 1915. The libelant prays that process be issued by the court to and against said Lindsey and said Assurance Corporation, with said agents in the City of Mobile, and against the fire insurance money payable under said policy, and that they be cited and required to show cause why they should not pay the said insurance money into this court, in order that the right of the libelant may be determined according to the nature and priority of such claim as it may or claim to have. And libelant prays that the court will decree a prior lien in its favor against said insurance money, and also may condemn the same to pay the libelant's demand, and will decree the full payment of its claim out of said money.

The defendants have duly appeared, and have filed exceptions to the libel, alleging cause why they should not be required to pay said insurance money into the court as prayed. The exceptions filed by the defendant Lindsey are as follows:

First. That this honorable court is without jurisdiction to hear and determine the subject-matter sought to be heard and determined by the said proceeding, for that the libel is in fact a creditors' bill in equity seeking to impress an equitable lien upon certain funds which are not subject thereto.

Second. That this court is without jurisdiction to hear and determine the matters sought to be by said libel heard and determined in this court, for the

reason that the libel is not a libel in personam against Henry M. Lindsey, seeking to recover for a debt due him, but is a libel in rem against moneys upon which, on the facts stated, there is no maritime lien, and the said Lindsey, and other parties in the caption of the libel mentioned, are made parties simply as incidents to the impressing of the lien on the money arising from the insurance policy on the steamer American, and not in an effort to procure any personal judgment against Mr. Lindsey or the other parties.

Third. If the libel be treated as in part a libel in personam against Lindsey, and as such a proceeding of which the admiralty court has jurisdiction, then the libel is bad, in that it seeks to bind in one proceeding a libel in personam, of which the court has jurisdiction, with a libel in rem against the proceeds of insurance of the steamer American, on which libelants had a lien, and which steamer was destroyed by fire, and libelants have no lien by substitution on the insurance money or proceeds of the insurance.

Fourth. The libel is bad, for that it confuses a cause of action against Henry M. Lindsey in personam with an effort, that cannot be sustained in law, to fix or impress a maritime lien by substitution upon the proceeds of the insurance of the burned steamer American in lieu of the vessel herself, which was destroyed by fire.

Like exceptions were filed by the other respondents.

The libelant's attorney has based his claim and his right to a decree in his favor on a decision in the case of The Conveyor, opinion by Judge Anderson, of the United States District Court in Indiana, reported in 147 Fed. 586. I have carefully read and considered that opinion, I have quoted largely from the opinion of Judge Anderson to learn the facts of the case, and his argument and reasons on which he based his opinion and decree, which I will now read and endeavor to show wherein the case now before the court is so entirely different in its facts and circumstances as to render said opinion inapplicable to the instant case, and without authority in it:

Semonin & Ott were owners of the steamboat Conveyor, which was insured against perils of the river (Ohio) for $4,500. The boat was sunk. The loss on the boat was adjusted at the sum of $2,000. The boat was raised at a cost of $400, and was then sold for $900. At the time the wreck occurred, the Farmers' Bank of Uniontown, Ky., and Englebright & Jenkins held each a mortgage on the boat. The $2,000 was paid by the insurance company to the owners of the boat, Semonin & Ott. Said bank's and said Englebright & Jenkins' mortgages contained a covenant on the part of the owners of the boat that they (the owners) would insure the boat, and they did so. The policy was made payable to said owners, and had never been assigned to either of the mortgagees; but at the time the wreck occurred the policy was in the possession of the Farmers' Bank of Uniontown, Ky., who claimed to hold the same as collateral for its loan. At the time the wreck occurred a controversy arose between the mortgagees and the owners of the boat as to how the insurance money ought to be paid and applied. The owners of the boat held the money. There were also intervening claims of various seamen and materialmen for wages and supplies, for which libels had been filed. Upon a conference between all the parties in interest it was believed that the wreck of said boat could be raised and repaired and sold and its debts paid; that for the purpose of making an effort to raise the said boat and repair her, and to discharge the admiralty liens, the liens for

wages and supplies done and furnished to said boat, it was agreed by and between the holders of both of said mortgages and said owners of the boat and the holders of said liens against the boat that such steps as were necessary should be taken to procure the payment of the amount of the policy as the same should be finally adjusted and agreed upon, and when the amount was paid by the insurance company upon said loss the same should be delivered to and placed in the hands of one Clark, who should hold the same for the uses and purposes, as follows: First, to pay the expenses of raising said boat; second, to pay all of said maritime, labor, and supply liens against said boat; third, to repair said boat; and, fourth, the balance remaining, after the payment of the items hereinbefore set out, should be delivered to the said mortgagees.

The boat was raised; one of the libelants filed a petition for the sale of the boat, which was consented to by the owners of the boat; an order of sale was made by the court, and the boat was sold for $900 cash. This sum was paid to said Clark, and the $2,000 insurance money was also placed in the hands of said Clark, in accordance with the agreement of all the parties in interest. It was found impracticable to repair the boat, but $400 was paid for raising her out of the $900 realized from the sale of the wreck. Whereupon a controversy arose between the libelants on claims for labor on and supplies to the boat, and the holders of the said mortgages on said boat; the libelants contending that by agreement of the parties in interest the $2,000 stood in lieu of the boat to the extent of being liable for the payment in full of the balance due on their claims after applying thereto the amount realized from the sale of the wreck. On the other hand, it was contended by the mortgagees that the admiralty court had no jurisdiction to foreclose mortgages; therefore it was without jurisdiction to administer the fund of $2,000 insurance money, since the policy was under the terms of the two mortgages issued for the exclusive benefit of the mortgagees and owners.

The court stated that it is well settled that liens on a vessel under maritime or state laws have priority over mortgages. The court held that, though a court of admiralty has not jurisdiction to foreclose mortgages on vessels, yet when it has a fund to dispose of it may entertain claims based on mortgages, and also held that the law of Indiana, enforceable in admiralty, makes seamen's wages and supplies furnished in ports of the state prior in equity to the lien of the mortgagees. If, therefore, jurisdiction in admiralty to administer the insurance money exists in this cause, it is not affected by the fact that the mortgagees may also have claims against the same fund. The court said:

"The policy of insurance was payable to the owners, Semonin & Ott, who were liable in personam as well as in rem to claims for seamen's wages. The insurance company refused to pay the mortgagees, and paid the owners on surrender of the policy. * * * The owners placed the money in the hands of Clark under an express agreement (1) that at least $400 thereof should be expended in raising the vessel; (2) that the liens for wages and supplies should be paid; (3) that the boat should be repaired; (4) that the remainder should be paid to the mortgagees."

The libelants were parties to this agreement. So were the mortgagees and the owners of the boat. The court said that:

Jurisdiction to reach the "proceeds of the insurance policy in the hands of said Clark, placed with him pursuant to the agreement pleaded, depends upon the determination of the questions: (1) Whether the agreement under which the money was placed in the custody of Clark, and providing for the disposition thereof, was a maritime contract; and (2) whether the libelants have any interest in the fund by virtue of that contract and their liens. Whether a contract is maritime or not depends * * * on the subject-matter of the contract. * * * It is plain that the agreement pleaded, being for the raising of the vessel, the payment of maritime liens for labor and supplies, the repair of the vessel—all to be paid out of the proceeds of the insurance policy, and the remainder to be paid to the mortgagees—constituted a maritime contract." The Conveyor (D. C.) 147 Fed. 590; Insurance Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90; The Iris, 100 Fed. 104, 40 C. C. A. 301.

The court, in the case of The Conveyor, said that:

"Independently of the agreement pleaded, the seamen who have filed claims for their wages are entitled to resort to the insurance money in the hands of the respondent Clark, for the full payment of their claims," and, "independently of any agreement of the nature pleaded, gives the court jurisdiction to cause the insurance money as a part of the proceeds of the wreck, to respond to claims for seamen's wages."

I do not agree with the court in its opinion that "independently" of the agreement the seamen and the supply claimants were entitled to resort to the insurance money in the hands of Clark for the full payment of their claims; nor do I agree in the opinion that "independently of any agreement" the court had "jurisdiction to cause the insurance money, as a part of the proceeds of the wreck, to respond to claims for seamen's wages." I consider that the proceeds of the wreck was the purchase money paid for it, and the insurance money was due and paid to the owners of the boat to indemnify them for their loss in the sinking of the boat. The money paid them was their money, and was voluntarily placed by them in the hands of said Clark for certain uses and purposes in compliance with the agreement by and between said owners, both of the mortgagees and the holders of said liens against the said boat. In view of the *agreement,* the claimants had the right to resort to the insurance money for the payment of their liens.

The controversy in The Conveyor Case was between the holders of said liens against the vessel and the mortgagees, and I think the decree rendered was right. As hereinbefore stated, I differ with the court in the opinion that the holders of the liens were entitled to resort to the insurance money for the payment of their claims *independently of the agreement pleaded.* I am rather inclined to think that that statement by the court was inadvertently made. Moreover, the court in its opinion said:

"The seamen in the libel * * * have elected to treat the insurance money placed in the hands of the respondent Clark as a substitute for the body of the boat; and, in the opinion of the court, the agreement in question warrants such substitution on principle and * * * authority." 147 Fed. 594.

I consider that the gist of the opinion is that the agreement controlled the decision of the case so far as the insurance money was concerned.

"The insurance is no part of the owner's interest in the ship * * * within the meaning of the law, and does not enter into the amount for which the owner is held liable." It is "perfectly well settled * * * that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guaranteeing him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property." Insurance is required "to be for indemnity merely. * * * The contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred. * * * The insurance does not follow" the property when sold, "unless the insurer consent to the transfer of the policy to the grantee of the property. * * * The owner of the property is under no obligation to have the property insured. It is purely a matter of his own option, and, being so, it would seem to be only fair and right, and a logical consequence, that if he chooses to insure he should have the benefit of the insurance." City of Norwich, 118 U. S. pages 494–495, 6 Sup. Ct. 1150, 30 L. Ed. 134.

In the case here the facts and circumstances are different from those in The Conveyor Case as they appear from the pleadings here. The facts here are that the steamboat American was owned by H. M. Lindsey, one of the respondents. She was engaged in the navigation of the rivers of Alabama as a carrier of passengers and freight. Her owner had her insured against loss by fire and other casualties. In the business and operation of the boat, the Bright Grocery Company furnished her with necessary supplies on the order of her owner, and acquired, under the law, a lien on the boat for payment for the supplies. The boat was subsequently totally destroyed by fire, before the supplies were fully paid for. The libel was filed by the Bright Grocery Company to subject the insurance money to the payment of the debt due him, claiming a lien on said money therefor. The insurance company, a foreign corporation, and also its local agent in Mobile, are made respondents to the libel. They respectively except to the libel, and to the claim therein set up to a lien on said insurance money.

It does not appear that said insurance money has been paid to the owner, but is still in the hands of the insurance company or its agent, doubtless due to the bringing of this suit. It does not appear that any other creditor with a lien, if any, is interested in the suit. There is no agreement or obligation on the part of the owner of the boat to pay said insurance money, when collected, into court for the payment of the debt sued for, and the court is of the opinion that it is without authority or jurisdiction to order it to be done.

The exceptions to the libel are sustained, and the libel is dismissed. It is so ordered.

In re FLOYD & HAYES.

Ex parte AMERICAN AGR. CHEMICAL CO.

(District Court, E. D. South Carolina. July 12, 1915.)

1. COURTS ⊜365—UNITED STATES COURTS—FOLLOWING STATE DECISIONS.
Federal courts are bound to assume that, when a question arose in a state court, it was thoroughly considered by that tribunal, and that the decision rendered by it embodied its deliberate judgment.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⊜365.]

2. COURTS ⊜366—UNITED STATES COURTS—FOLLOWING STATE DECISIONS.
Unless some federal question is involved, the interpretation placed upon a state statute by the highest appellate tribunal of the state is binding and conclusive upon all federal courts, including the United States Supreme Court.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⊜366.]

3. COURTS ⊜368—UNITED STATES COURTS—FOLLOWING STATE DECISIONS.
It is the duty of a federal court to follow the latest decision of the state court, though it may differ from prior decisions of that court, and though the federal court may have previously come to a different conclusion.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 951; Dec. Dig. ⊜368.]

4. ASSIGNMENTS ⊜98—VALIDITY—NECESSITY OF RECORDING.
Under the recording act of South Carolina (Civ. Code 1912, § 3542), as interpreted by the Supreme Court of that state, assignments of notes, mortgages, and open accounts as collateral security for a debt were not required to be recorded, to be valid as against subsequent creditors or purchasers.
[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 176; Dec. Dig. ⊜98.]

In Bankruptcy. In the matter of Floyd & Hayes, bankrupts. On petitions to review an order of the referee relative to the claim of the American Agricultural Chemical Company. Order approved and confirmed in part, and disapproved and overruled in part.

Willcox & Willcox, of Florence, S. C., for trustee in bankruptcy.
Sellers & Moore, of Dillon, S. C., for claimant.

SMITH, District Judge. This matter comes up for a hearing upon two petitions to review an order made by the referee in bankruptcy herein on the 3d day of March 1915, holding that the assignment of certain notes and mortgages made by the bankrupt to the American Agricultural Chemical Company were good, although the assignments were not recorded, and holding, also, that the assignment of certain accounts made by the bankrupt to the American Agricultural Chemical Company were not good, because neither the agreement to assign the same nor the assignments had been recorded.

From the facts it appears that the American Agricultural Chemical Company, a company carrying on a fertilizer manufacturing and selling business in the state of South Carolina, entered into a written

agreement with the bankrupts, Floyd & Hayes, dated January 14, 1914, whereby the American Agricultural Chemical Company, agreed to furnish or ship to Floyd & Hayes certain fertilizers at an agreed price; Floyd & Hayes agreeing on May 1, 1914, to pay or deliver to the American Agricultural Chemical Company all cash received on sales of the fertilizers so shipped to them, and also to deliver all the notes and mortgages that they had taken from purchasers of the fertilizers, and to assign all accounts that were due from the purchasers of the fertilizers for the gross amount of the time sales of the same as made by Floyd & Hayes. It was further agreed that all fertilizers shipped to Floyd & Hayes, as well as all notes, accounts, cash, or cash proceeds from the sale of such fertilizers, which might at any time be in their possession or in the possession of their representative, should remain the property of the American Agricultural Chemical Company, to be held by Floyd & Hayes as their agents in trust for the payment of their obligations to the Chemical Company for the fertilizers shipped at the agreed price, the title thereto not to pass from the Chemical Company to Floyd & Hayes until their obligations to the Chemical Company were paid.

Pursuant to this contract the American Agricultural Chemical Company shipped and delivered to the bankrupts fertilizers of the value of $9,358.16, which fertilizers Floyd & Hayes sold and disposed of to their customers. This agreement was not recorded. On June 20, 1914, and more than four months prior to the filing of the petition in bankruptcy herein, Floyd & Hayes executed and delivered to the American Agricultural Chemical Company an assignment of all the notes, mortgages, and open accounts taken by them from the purchasers of the fertilizers so shipped to them and representing the proceeds thereof. The notes and mortgages were actually turned over to the American Agricultural Chemical Company, but in the case of the open accounts there was turned over to the Chemical Company a list, with a written assignment of all these accounts; that being the only delivery which, from the nature of the case, was possible, there being no other written evidence of the indebtedness which Floyd & Hayes could turn over to the American Agricultural Chemical Company. About September 1, 1914, the notes and mortgages and assigned accounts were returned by the American Agricultural Chemical Company to Floyd & Hayes for collection, and a trust receipt given by Floyd & Hayes to the American Agricultural Chemical Company, stating that they had received all such from it for the purpose only of collection and remitting the proceeds to the American Agricultural Chemical Company. The bonds and mortgages and accounts so assigned were under the agreement of January 14, 1914, in effect collateral security for the obligations of Floyd & Hayes to the Chemical Company for the fertilizers at the agreed price. Floyd & Hayes were on the 1st day of January, 1915, adjudicated bankrupts in this court on their own petition.

At the first meeting of the creditors, which was held on the 18th day of January, 1915, the American Agricultural Chemical Compand offered for proof its claim against the bankrupt estate for $7,381.-

98, claiming to hold as security for the debt the open accounts, notes, and chattel mortgages assigned to it as before recited, and alleging that the value of the security did not exceed $1,800, and asking that the value of the security be fixed and its claim be allowed as unsecured at the difference between the value of the security held by it and the amount due it by the bankrupts. The allowance of this claim was objected to by certain other creditors, and also by the trustee, on the ground that the alleged assignments were invalid under the laws of the state of South Carolina as against the trustee in bankruptcy and the creditors of Floyd & Hayes, because neither the assignments nor the agreement to assign had been recorded in the office of the clerk of the court for Dillon county, the county of the residence of the bankrupts; and said objecting creditors also moved that the American Agricultural Chemical Company be required to surrender to the trustee all proceeds collected by Floyd & Hayes on the assigned accounts, notes, and mortgages and paid to the Chemical Company, as well as the notes and mortgages and accounts so held by the Chemical Company, to be collected by the trustee for the benefit of the general estate of the bankrupts.

Upon this application and objection the referee ruled that the notes and mortgages, having been actually assigned and delivered to the American Agricultural Chemical Company, were in its possession from the time of assignment until they were returned to the bankrupts for the purpose of collection, and that under the law of South Carolina the assignments of notes and mortgages were not necessary to be recorded, and therefore the assignments of those notes and mortgages to the American Agricultural Chemical Company were valid against all parties under the decision made by the Supreme Court of South Carolina in Bank v. Greenville, 97 S. C. 299, 81 S. E. 634. The referee also ruled, however, with regard to the open accounts, that the same rule did not apply. He based this ruling upon the decision of the Circuit Court of Appeals of the United States for the Fourth Circuit in the case of Townsend v. Ashepoo Fertilizer Company, reported 212 Fed. 97, 128 C. C. A. 613, which holds such an assignment to be a transaction in the nature of a mortgage, and necessary to be recorded under the provisions of the recording act of South Carolina. Civ. Code 1912, § 3542. It will be thus seen that the decision in the present controversy depends upon the question whether or not the decision of the Supreme Court of the state of South Carolina in Bank v. Greenville is to be held as controlling upon this court in this matter, or whether the decision of the Circuit Court of Appeals of this circuit in the case of Townsend v. Ashepoo Fertilizer Company is to be held as controlling.

The two decisions are irreconcilable. In the case of Townsend v. Ashepoo Fertilizer Company the Circuit Court of Appeals for this circuit held that accounts or debts were embraced within the meaning of the word "property," and as such, when assigned by way of security, they were included within the operation of the statute of the state of South Carolina requiring mortgages of all personal property to be recorded. In the case of Bank v. City of Greenville, 97 S. C.

291, 81 S. E. 634, the Supreme Court of South Carolina came to exactly the opposite conclusion, holding that the assignment of choses in action is not embraced within the provisions of the recording acts of the state of South Carolina, and is not required by those acts to be recorded, and that the assignment by way of security of a chose in action in that case was valid, although not recorded. The decision in the Townsend Case by the Circuit Court of Appeals for the Fourth Circuit was filed February 6, 1914, and was prior to the decision of the Supreme Court of the state in the case of Bank v. City of Greenville, which was not filed until April 29, 1914.

[1] Whether or not the case decided in the Circuit Court of Appeals was drawn to the attention of the Supreme Court of South Carolina does not appear, as it is not mentioned in the decision in the case; but it is not material in considering the effects of that decision, any more than it is material to consider whether or not the Circuit Court of Appeals considered the prior decisions rendered by the Supreme Court of the state of South Carolina, and referred to by it in its last decision, and which are not mentioned in the decision of the Circuit Court of Appeals for this circuit. All federal courts are bound to assume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment. Cross v. Allen, 141 U. S. 539, 12 Sup. Ct. 67, 35 L. Ed. 843; Southern Ry. v. N. C. Corp. Com. (C. C.) 99 Fed. 165.

[2, 3] It appears that there is a conflict in the conclusions arrived at by the two appellate tribunals, and it is necessary for this court to follow one or the other in rendering judgment in the present case. It is a settled rule of law that, unless some federal question is involved, the interpretation placed upon a state statute by the highest appellate tribunal of the state is binding and conclusive upon all federal courts, including the United States Supreme Court. Mead v. Portland, 200 U. S. 164, 26 Sup. Ct. 171, 50 L. Ed. 413; Wadley Southern Ry. v. Georgia, 235 U. S. 659, 35 Sup. Ct. 214, 59 L. Ed. 405; Noble v. Mitchell, 164 U. S. 372, 17 Sup. Ct. 110, 41 L. Ed. 472; Osborne v. Florida, 164 U. S. 654, 17 Sup. Ct. 214, 41 L. Ed. 586; Manley v. Park, 187 U. S. 551, 23 Sup. Ct. 208, 47 L. Ed. 296; Price v. Illinois, 238 U. S. 446, 35 Sup. Ct. 892, 59 L. Ed. ——, decided June 21, 1915. And it is the duty of the federal court to follow the latest decision of the state court, although it may differ from prior decisions of the latter tribunal. Sioux Remedy Co. v. Cope, 235 U. S. page 201, 35 Sup. Ct. 57, 59 L. Ed. ——. It is likewise the duty of the federal court to follow the last decision of the state court, although the federal court may have previously come to a different conclusion. Southern Ry. Co. v. N. C. Corp. Com. (C. C.) 99 Fed. 165; Morley v. Railway Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925. The whole doctrine is discussed by the late Judge C. H. Simonton in Southern Railway Co. v. North Carolina Corp. Commission (C. C.) 99 Fed. 162, where he went so far as to change a decree already rendered in the case before him, so as to conform to the interpretation placed on a state statute by a later ruling of the Supreme Court of North Carolina.

[4] Under these decisions it would appear that in the present case it is the duty of this court to follow the conclusions arrived at by the Supreme Court of South Carolina in its interpretation as to what instruments are required by the law and statutes of South Carolina to be recorded, in order to be valid against subsequent creditors or purchasers. That tribunal having found that under the statutes of South Carolina the assignments of choses in action are not bound to be recorded, so as to be valid in such cases, it would appear that the assignments in this case of the accounts, as well as the assignments of the bonds and mortgages, were not necessary to be recorded in order to be valid in the hands of the assignee as against subsequent creditors or purchasers.

It is therefore ordered and decreed that the order of the referee, made March 3, 1915, and sought to be reviewed herein, is hereby approved and confirmed as to so much as holds that the assignment by the bankrupts, Floyd & Hayes, of the notes and mortgages referred to in the report, to the American Agricultural Chemical Company, are good and valid in the hands of the American Agricultural Chemical Company as against all parties. It is further ordered and decreed that the order and ruling of the said referee that the assignments of the open accounts were not valid as against the trustee in this case, because the assignments were not recorded, be and the same is hereby disapproved and overruled. It is further ordered and adjudged that the said referee do allow the American Agricultural Chemical Company to prove its claim against the bankrupt estate, after deducting therefrom the value of all open accounts, notes, and chattel mortgages assigned to it as collateral security, as being duly and properly assigned to it, and that such open accounts, notes, and chattel mortgages be and the same are hereby decreed to be the property of the said American Agricultural Chemical Company, who are entitled to possess, sue for, and recover upon the same to the extent that may be necessary to fully pay and discharge the obligations of Floyd & Hayes for which the same are held as collateral security.

SANDEN v. MORGAN.

(District Court, S. D. New York. June 7, 1915.)

1. JUDGMENT ⊂=648—CONCLUSIVENESS—ACQUITTAL IN CRIMINAL CASE—INJUNCTION.

A verdict of acquittal in a criminal prosecution for a violation of Cr. Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10385]), for fraudulent use of the mails, is not res adjudicata, and, even assuming that inquiry was made into the same kind of appliance as that in controversy, would not be relevant on the trial of a suit by the accused, after acquittal, to enjoin the postmaster from carrying out a fraud order, issued under Rev. St. §§ 3929, 4041, as amended (Comp. St. 1913, §§ 7411, 7573) by the Postmaster General pending his trial on the indictment, and continued after his trial and acquittal; but on a motion for a prelim-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

inary injunction, the court might consider the proceedings in and the result of the prosecution under the indictment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. ⊂⊃648.]

2. POST OFFICE ⊂⊃26—FRAUD ORDER—ACTION TO ENJOIN—BURDEN OF PROOF. Plaintiff, in an action against the postmaster to enjoin the enforcement of a fraud order, issued under Rev. St. §§ 3929, 4041, as amended (Comp. St. 1913, §§ 7411, 7573), pending his trial for a fraudulent use of the mails, had the burden of overcoming the presumption that the conclusion of the Postmaster General was right, or of pointing out his excess of statutory power or his wanton or malicious exercise thereof, and a preliminary injunction will not issue unless the court is clearly convinced that plaintiff would ultimately prevail; and hence, where it appeared that in the proceeding upon which the Postmaster General acted, due notice was given to plaintiff and an extensive and elaborate hearing was held on the merits, the motion should be denied.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. ⊂⊃26.]

In Equity. Suit for an injunction by Albert T. Sanden against Edward M. Morgan. On motion for a preliminary injunction to restrain defendant from enforcing a fraud order issued against the plaintiff herein. Motion denied.

Motion for a preliminary injunction to restrain defendant from interfering with the delivery to plaintiff of mail matter addressed to plaintiff or the Sanden Electric Company, and, in brief, to enjoin the carrying out of a so-called "fraud order" issued by the Postmaster General pursuant to the provisions of sections 3929 and 4041 of the Revised Statutes as amended (Comp. St. 1913, §§ 7411, 7573).

The papers presented for consideration are: (1) Plaintiff's bill of complaint; (2) defendant's answer thereto; (3) affidavit on behalf of plaintiff of Gideon H. McIvor, verified May 18, 1915; (4) affidavit on behalf of plaintiff of Albert T. Sanden, verified May 18, 1915; (5) hearing before the acting Assistant Attorney General at Washington "in the matter to show cause why a fraud order should not issue against the Sanden Electric Company and A. T. Sanden;" (6) order of the Postmaster General No. 8460, dated November 6, 1914; and (7) opinion of W. H. Lamar, solicitor for the Post Office Department, dated October 31, 1914, recommending the issuance of a fraud order.

Strictly speaking, the affidavits of McIvor and Sanden should not be read in support of the motion, as they were submitted after the motion was argued, and without leave; but, in order to avoid any technicalities, these affidavits are read.

An outline of the allegations of the bill shows as follows: Plaintiff is a citizen of the state of New York and an inhabitant of the Southern district. Defendant is United States postmaster for the borough of Manhattan, city of New York. About 1880, plaintiff, as he alleges, devised a belt for generating and conveying electric currents to the impaired or diseased portions of the body, and began the manufacture and sale of the said belt, and claims that human ailments of divers and sundry kinds are beneficially treated by the use of this belt. Plaintiff alleges, in effect, that he was in this business from 1880 until November, 1914, and during this period sold and delivered many thousands of belts to customers throughout the United States and elsewhere, giving to the great majority of people purchasing the same complete satisfaction and relief and, in many cases, curing the ailments of which they complained; that he was receiving about 500 letters per day, and his receipts were about $500 per day; that he was under heavy expense for offices and for employés; that his business is honest and legitimate and devoid of fraud, deceit, misrepresentation, or scheme or device to defraud, and in every way conforms with the laws of the United States; that plaintiff conducted the business under his own name and under the trade-name of Sanden

Electric Company, under which trade-name he also conducted correspondence with his customers, sending out letters and literature and receiving replies, money, money orders, drafts, and checks. He further states that in June, 1914, the postal authorities, and others acting in concert, caused plaintiff to be indicted by the grand jury of the United States in the Southern district of New York, for a violation of the provisions of section 215 of the United States Criminal Code; that on or about November 6, 1914, pending the trial of defendant on said indictment, the Postmaster General of the United States issued an order to defendant herein directing him to refuse to deliver to plaintiff any mail coming to the post office in the Borough of Manhattan, city of New York, directed to plaintiff in his own name, or in the name of the Sanden Electric Company, and to stamp the mail fraudulent, and to refuse to pay any money orders made payable to plaintiff under said names; that the defendant has carried out this order of his superior officer, to the great damage of the plaintiff; that on November 23, 1914, plaintiff was arraigned upon his indictment, interposed a plea of not guilty, was thereafter duly tried by a jury, which rendered a verdict of acquittal. Plaintiff alleges that his business on June 4, 1914, and at the times charged in the indictment, were identical with his business in November, 1914, when the Postmaster General issued his order, and in December, 1914, when defendant was tried and acquitted on the indictment referred to. Plaintiff insists that he is aggrieved by the continuance of the order of the Postmaster General, which remains unrevoked notwithstanding plaintiff's acquittal, and he asks in his bill for a permanent injunction, restraining the defendant from carrying out the order of the Postmaster General.

The defendant denies every material allegation in the bill of complaint, except that he does not deny that the plaintiff was indicted under section 215, supra, and acquitted.

The affidavits of McIvor and Sanden state, in effect, that the plaintiff has had in his regular employ a practicing physician, whose opinion and advice were always asked and had concerning the use of belts by parties applying for the purchase thereof.

The proceedings before the Assistant Attorney General upon which the Postmaster General acted show that due notice was given to plaintiff, and that an extensive and elaborate hearing was held on the merits. At this hearing experts were examined, and the literature used by plaintiff was comprehensively set forth.

John M. Coleman, of New York City, for plaintiff.

H. Snowden Marshall, of New York City (Robert P. Stephenson, Asst. U. S. Atty., and W. H. Lamar, both of New York City, of counsel), for defendant.

MAYER, District Judge (after stating the facts as above). This motion could readily be disposed of on strictly technical grounds, but I prefer to consider it on the merits. Sections 3929 and 4041 of the Revised Statutes as amended have come under the consideration of the courts on a number of occasions. Public Clearing House v. Coyne, 194 U. S. 497, 509, 510, 24 Sup. Ct. 789, 48 L. Ed. 1092; Bates v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894; In re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; In re Jackson, 96 U. S. 727, 24 L. Ed. 877; People's United States Bank v. Gilson (C. C.) 140 Fed. 1; Id., 161 Fed. 286, 88 C. C. A. 332; Missouri Drug Co. v. Wyman (C. C.) 129 Fed. 623; Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762; Hall v. Wilcox, 225 Fed. 333.

[1] If it were not for the acquittal of the plaintiff on the indictment referred to supra, the motion might be disposed of without further comment. The verdict of acquittal in the criminal case is in no sense

res adjudicata and, even assuming, for the purpose of the argument, that inquiry was made into the same kind of electric appliance which is here one of the subjects of controversy, the acquittal in the criminal case would not be relevant on the trial in this case. But in determining a motion for preliminary injunction, the court might very well take into consideration, as a persuasive argument, the proceedings in and result of the prosecution under the indictment.

[2] Of course, in the criminal case involving the trial of the indictment under section 215 of the United States Criminal Code, the government was bound to prove the guilt of the defendant to the satisfaction of the jury beyond a reasonable doubt. Here, under the most favorable construction to plaintiff, the burden is upon him, in effect, to prove a negative by a preponderance of evidence—that is to say, to overcome the presumption that the conclusion of the Postmaster General is right or to point out that the Postmaster General has exceeded the statutory grant of power or exercised it wantonly or maliciously. As Judge Hough puts it:

"The presumption, however, is ample to put upon a complainant a burden of proof which it is difficult to imagine him meeting on a motion for preliminary injunction."

The opinion of the solicitor for the Post Office Department, dated October 31, 1914, is a carefully considered and comprehensive review, judicial in tone, which aptly sets forth the facts disclosed by the record and states certain conclusions fully justified by that record. The proceeding before the Postmaster General was independent of the proceedings before the grand and petit juries, and the decision arrived at by the Postmaster General was an independent conclusion upon a full and fair hearing. Indeed, so far as the record shows, there was afforded to plaintiff opportunity for explanation, testimony, and argument quite as full as might be expected at the hands of a court. There are many acts of executive officials which are not reviewable by the courts, and in a case of this character, a preliminary injunction should not issue unless the court is clearly convinced that plaintiff will ultimately prevail. In my view, the Post Office Department should be encouraged in promptly stopping a fraudulent use of the mails, and should be restricted in its activities in that direction only where it is clear that the Postmaster General has gone beyond his power or (as is difficult to believe) has acted wantonly or maliciously. By the prompt as well as fair exercise of the power conferred by sections 3929 and 4041 of the Revised Statutes, supra, much damage to the public can be avoided, many unfortunate and foolish people may be spared from suffering what to them constitutes a considerable loss, and some long and tedious trials on indictments can be averted.

There is nothing in the case of School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, which entitles plaintiff to a preliminary injunction, for in the case at bar the Postmaster General has arrived at conclusions of fact based, as I may repeat, upon a full hearing. If the Postmaster General is right, then to abrogate the fraud order pending the litigation would result in subjecting the public to loss which probably could not be repaired. If

the Postmaster General is wrong, then the plaintiff may suffer some financial loss for the time being, and this he has already suffered for a number of months without application for relief to the courts.

In the circumstances, however, plaintiff, if he so desires, is entitled to a speedy trial, and, in denying the motion, the order may provide that the cause may be placed on the June equity calendar at the option of the plaintiff.

Motion denied. Settle order on two days' notice.

JOHANSON v. ALASKA TREADWELL GOLD MINING CO.

(District Court, W. D. Washington, N. D. April 7, 1915.)

No. 2953.

CORPORATIONS ⇐642—FOREIGN CORPORATIONS DOING BUSINESS WITHIN THE STATE.

Rem. & Bal. Code Wash. § 226, subd. 9, provides that summons shall be served by delivering a copy thereof, if the suit be against a foreign corporation doing business within the state, to any agent, cashier, or secretary thereof. The defendant corporation, which was chartered in Minnesota and conducted mining operations in Alaska, maintained a purchasing agent in Seattle, paying his salary, office rent, and expenses. The name of the agent and of the corporation appeared in the directories; but the purchasing agent could make no purchases which were not approved by the corporation. *Held*, that the corporation was not doing business within the state, so that service of summons upon the purchasing agent would give the court jurisdiction over the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520–2527; Dec. Dig. ⇐642.]

At Law. Action by Andrew Johanson against the Alaska Treadwell Gold Mining Company, a corporation, which appeared, specially challenging the jurisdiction of the court. Service ordered quashed.

John T. Casey, of Seattle, Wash., for plaintiff.

S. H. Piles, James B. Howe, and S. V. Carey, all of Seattle, Wash., for defendant.

NETERER, District Judge. The plaintiff, a citizen of Washington, brings this action against the defendant, to recover damages for personal injury alleged to have been incurred in Alaska through the negligence of the defendant, and alleges, among other things, that the defendant is a corporation authorized to do business in the state of Washington and in the territory of Alaska, and "operates mining property and quartz mines * * * in Alaska," and "that plaintiff was employed by defendant in the territory of Alaska." The return to the writ shows a service "on the therein named Alaska Treadwell Gold Mining Company by handing to and leaving a true and correct copy thereof with C. W. Russell, as purchasing agent of Alaska Gold Mining Company, personally, at Seattle, in said district, on the 9th day of February, 1915." The defendant appeared specially for the purpose of challenging the jurisdiction of the court.

The jurisdiction must be founded solely upon diversity of citizenship, and in such event suit may be brought in the district of the residence of either plaintiff or defendant, where service may be had. It appears that defendant is a corporation of the state of Minnesota; that it has not complied with the laws of Washington authorizing it to do business in this state; that it has general offices in Alaska, as also in San Francisco, Cal.; that C. W. Russell, upon whom service was made, "is authorized by the Alaska Treadwell Gold Mining Company to act as its purchasing and forwarding agent in Seattle"; that the defendant "pays his salary, office rent, and expenses"; that there is no one employed in connection with the office, except the said Russell; that the said Russell, as such agent, has purchased goods, wares, and merchandise in Seattle, with direction that same be shipped to defendant at Treadwell, Alaska; that all such purchases were subject to the approval of the defendant company on arrival in Alaska; that the duties of such forwarding agent are to see that goods ordered by the defendant itself at Treadwell from Eastern points or cities are transshipped or forwarded, when they arrive in Seattle, to Treadwell, Alaska, via steamship; that said Russell, as agent, does not pay for any goods or disburse any moneys whatsoever, or do any acts other than as stated; that all moneys are disbursed from the general office in San Francisco and in Alaska.

The question to be determined is whether service upon Russell was sufficient, and the element of sufficiency is whether the defendant corporation was doing business within this district. The plaintiff, in support of his contention, calls attention to subdivision 9, § 226, Remington & Ballinger's Code of Washington, which provides that summons shall be served by delivering a copy thereof, "if the suit be against a foreign corporation * * * doing business within this state, to any agent, cashier or secretary thereof," and contends that since the defendant maintains an office in Seattle, pays office rent and office expenses, and employs an agent and pays his salary, it is conclusive that it is doing business within this state, and it is immaterial whether the agent is buying or selling goods, and that a court will assume jurisdiction, unless it clearly appears that the corporation is not doing business in the state or district where it is sued, and cites Barrow v. Kane, 170 U. S. 112, 18 Sup. Ct. 526, 42 L. Ed. 964, Société Fonciere v. Milliken, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. Ed. 208, Conn. Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, and many others.

In Barrow v. Kane, supra, the action was brought by a citizen of the state of New Jersey in the Circuit Court of the United States, held in the city of New York, against a foreign corporation doing business in the latter state, for a personal tort committed abroad, and an action for which might have been maintained in any Circuit Court of the United States which acquired jurisdiction of the defendant. The summons was duly served upon the regularly appointed agent of the foreign corporation in New York.

In Société Fonciere v. Milliken, supra, the defendant was a foreign corporation organized under the laws of the republic of France, with

special reference to business in the state of Texas, America, and reciting in its charter that the object of the corporation was operations with relation to real estate, agriculture, and commercial operations of every nature whatsoever regarding the acquisition, in the way of grants and otherwise, and the improvement, as owners or otherwise, of lands within the state of Texas, America. The principal place of business was Paris. It had an agent in Texas, who seems to have had and exercised all of the powers of a general agent, and was empowered to borrow money, and the court held that it was doing business within the state.

In Conn. Mutual Life Ins. Co. v. Spratley, supra, the company had been doing an active business within the state for more than 20 years, and had issued many policies of insurance upon the lives of citizens of the state, and continued to collect premiums upon them and pay the losses thereunder, and was doing so at the time of the service of process upon its agent within the state. The other cases cited are all readily distinguishable from the facts in this case.

The Supreme Court of Washington, in Rich v. C., B. & Q. Ry. Co., 34 Wash. 14, at page 16, 74 Pac. at page 1008, says:

"In no event can a foreign corporation * * * be required to answer in an action in personam in this state, unless it be engaged in business herein."

Section 3714, Rem. & Bal. Code of Washington, requires the payment of an annual license fee by domestic corporations and by every foreign corporation having its articles of incorporation on file in the office of the secretary of state; and section 3715 provides that no corporation shall be permitted to commence an action without alleging and proving that it had paid its annual license fee. The Washington court, in Lilly-Brackett v. Sonnemann, 50 Wash. 487, 97 Pac. 505, held that the provision of section 3715 refers only to corporations "doing business in this state."

In Smith & Co. v. Dickinson, 81 Wash. 465, 142 Pac. 1133, the respondent, a foreign corporation, had filed no copy of its articles of incorporation with the secretary of state of Washington, nor had it paid its license fee. The Supreme Court (81 Wash. at page 466, 142 Pac. at page 1134) says:

"The evidence shows that respondent is manufacturing merchandise in the state of Nebraska, and is selling merchandise at wholesale in that state and other states, including the state of Washington; that its representatives take orders for merchandise and forward the same to respondent at Omaha for acceptance or rejection; that, if the order is accepted, the merchandise is shipped from Omaha, Neb., to the purchaser, to whom it is sold upon credit; that the contract of sale is consummated in Omaha; that respondent has salesmen who solicit orders in the state of Washington; that its principal salesman is one Edward J. Bussey, who has offices in the cities of Seattle and Spokane, where he keeps and exhibits samples belonging to respondent; that he solicits orders throughout the state, sometimes taking trips to do so; that sometimes, in the interest of economy, he pays the expenses of proposed customers from their places of residence to Spokane or Seattle, where he exhibits the samples and receives their orders; that all such orders, when taken, are forwarded to respondent at Omaha, for its approval and for shipment of goods; that respondent's agents are not entitled to complete sales, to extend credit, or make collections, but that they represent respondent only in soliciting orders."

It further appeared that "the names of respondent and its agent appeared in the telephone and city directories." The Supreme Court held that respondent was not doing business in the state of Washington. The facts in that case are stronger than in the instant case, except that in the instant case it appears that the defendants paid office rent and salary, and in the case cited it does not appear who paid the rent or whether the compensation was salary. In the instant case the agent's authority and power is circumscribed and limited to specific acts for placing orders for the purchase of goods, wares, and merchandise necessary in the conduct of defendant's business in Alaska, which goods are subject to approval, and to the forwarding of goods ordered by the defendant from Eastern points and shipped to Seattle, all of which acts appear to be entirely incidental to the business of the defendant, which is gold mining in Alaska.

"The phrase 'doing business,' * * * with relation to foreign corporations doing business in the state, does not include a foreign railroad corporation having the road and traffic without the state, but having an office therein which sells tickets over its lines." Doty v. Michigan Central Ry., 8 Abb. Prac. (N. Y.) 427, 428.

The Supreme Court of the United States, in Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, seems to have concluded the issue here presented. That is a case founded upon diversity of citizenship, and service was made upon a reputed agent. The court (205 U. S. at page 532, 27 Sup. Ct. at page 596 [51 L. Ed. 916]) says:

"The Eastern point of the defendant's line of railroad was at Chicago, whence its tracks extended westward. The business for which it was incorporated was the carriage of freight and passengers, and the construction, maintenance, and operation of a railroad for that purpose. As incidental and collateral to that business, it was proper, and, according to the business methods generally pursued probably essential, that freight and passenger traffic should be solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this incidental business the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as district freight and passenger agent, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers and freight to be transported over the defendant's line. For conducting this business several clerks and various traveling passenger and freight agents were employed, who reported to the agent and acted under his direction. He sold no tickets and received no payments for transportation of freight. When a prospective passenger desired a ticket, and applied to the agent for one, the agent took the application and applicant's money and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order, which gave to the applicant. upon his arrival at Chicago, the right to receive from the Chicago, Burlington & Quincy Railroad ticket over that road. Occasionally he sold to railroad employés, who already had tickets over intermediate lines, orders for reduced rates over the defendant's lines. In some cases, for the convenience of shippers who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor bills of lading over the defendant's line. In these bills of lading it was recited that they should not be in force until the freight had been actually received by the defendant"

—and then stated that the business shown was in substance nothing more than that of solicitation. In the instant case, every established fact is conclusive that the duties performed by C. W. Russell, agent,

were entirely incidental to the business of the defendant in Alaska, and in no sense comprehended "doing business" within contemplation of law.

Reason and precedent, it seems to me, preclude any conclusion other than that challenge to the court's jurisdiction must be sustained. An order may be presented accordingly.

In re METROPOLITAN MOTOR CAR CO.

(District Court, W. D. Washington, N. D. July 12, 1915.)

No. 5393.

1. BANKRUPTCY ⟸114—RECEIVERS—DUTIES—ORDER OF APPOINTMENT.
   The duties of a receiver of a bankrupt's assets are limited by the powers given him in the order of appointment, and he cannot exceed the powers of the appointment and demand compensation for acts not authorized thereby.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164–166; Dec. Dig. ⟸114.]

2. BANKRUPTCY ⟸484 — RECEIVERS — APPOINTMENT — COMPENSATION —"MERE CUSTODIAN"—"CONDUCTING OF THE BUSINESS."
   A receiver, appointed to take charge of the assets of a bankrupt and preserve the same pending the election and qualification of a trustee, or until dismissal of the petition in bankruptcy, who takes possession of book accounts and bills receivable, may, when necessary to preserve the estate, collect the accounts; and he is, when doing so, more than a mere custodian, though not conducting the business, within Bankr. Act July 1, 1898, c. 541, § 48, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 9, 36 Stat. 840 (Comp. St. 1913, § 9652), fixing the compensation of receivers acting as mere custodians and additional compensation for conducting the business, and the court must make a reasonable allowance within the statutory limits, as required by section 2, subd. 5, as amended in 1903 (Act Feb. 5, 1903, c. 487, § 1, 32 Stat. 797) and 1910 (Act June 25, 1910, c. 412, §§ 1, 2, 36 Stat. 838, 839 [Comp. St. 1913, § 9586]) authorizing the appointment of receivers, and additional compensation, as provided in section 48.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. ⟸484.]

In Bankruptcy. In the matter of the Metropolitan Motor Car Company. On petition to review an order of the referee fixing the allowance of the receiver. Referred back to the referee, to make a reasonable allowance within the statutory limits.

Walter Schaffner, of Seattle, Wash., for receiver.

NETERER, District Judge. On the 12th of January, 1915, upon affidavit and petition of creditors, a receiver was appointed to "take charge of all of the assets of said bankrupt and preserve the same pending the election and qualification of the trustee herein, or until the dismissal of the petition," and it was further ordered that the receiver take an immediate inventory of the assets of the bankrupt. The receiver qualified and entered upon the discharge of his duties. The bankrupt estate consists of automobile supplies, etc., together with

books of account and bills receivable. The receiver, instead of merely holding possession of the accounts and bills receivable and the personal property, and appreciating that a large portion of the accounts would become utterly lost, unless immediate collection was made, set about and collected many of the accounts, pending the election of the trustee, and saved to the estate a considerable sum of money by reason of his conduct. The referee, in certificate on petition for review, states:

"There is no question in my mind, from the showing made, that this receiver spent a great deal of time looking after the affairs of the bankrupt, and performed services of substantial value to the estate, and that, while he did more than to act as a mere custodian, he did less than carry on the business of the bankrupt"

—and limited the receiver's compensation to 2 per cent. on the first $1,000 and one-half of 1 per cent. on all above $1,000 on money disbursed by him, or turned over by him to the trustee, or realized from property turned over by him to the trustee.

[1, 2] It is contended that the referee erred in not allowing the receiver additional compensation for conducting the business, as provided in subsection "e" of section 48 of the acts of Congress relating to bankruptcy. There is no question but that a receiver's duties are limited by the powers given him in the order of appointment. A receiver could not exceed the powers of the appointment, and expect compensation for any activities not authorized. His duties under the appointment in this case were to preserve and keep the estate. That did not simply mean to hold the accounts and the bills receivable as evidence of indebtedness and turn them over in that condition to the trustee when elected, but comprehended more than the mere holding of the tangible evidences of the estate, and did require him to preserve the estate—which is the money represented by these various funds—and if activity was required upon his part, realizing that this estate was about to be lost by debtors moving away, or changing their financial status or relation to property, he should set about to conserve this estate, and in performing such duties he would be doing more than a "mere custodian," but would not be within the definition of conducting the business, as set forth in section 48, supra. There is a zone of activity of a receiver between a "mere custodian" and the "conducting of the business" (3 Remington on Bankruptcy, par. 390½, p. 105); and the proviso limiting the compensation of the custodian was undoubtedly meant to cover cases where the services performed were merely those of a "keeper" (In re Ginsburg [D. C.] 208 Fed. 160; In re Griesheimer [D. C.] 209 Fed. 134).

Section 2, subd. 3, of the Bankruptcy Act of 1898 gives the court power to:

"Appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."

Subdivision 5 of the same section:

"Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interest of the estates."

The compensation of officers in the administration of bankruptcy estates was fixed by section 48a of the Bankruptcy Act of 1898, but this did not provide any compensation for receivers; and courts granted compensation under the general equitable powers of the court, and limited the amount received to reasonable compensation for the services performed. In re Scott (D. C.) 99 Fed. 404; In re Adams Sartorial Art Co. (D. C.) 101 Fed. 215. In 1903 subdivision 5, supra, was amended by adding the following:

"And allow such officers additional compensation for such services, but not at a greater rate than in this act allowed trustees for similar services."

Section 48a, supra, provides for compensation as follows:

"Trustees shall receive for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. * * *"

In 1910 subdivision 5, supra, was further amended so as to read:

"Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section forty-eight of this act."

It will be observed that the amendment of 1903 to subdivision 5, supra, limited the discretion of judges in allowing fees to receivers to the maximum for compensation to trustees provided in section 48a, supra. By the act of 1910 section 48 was amended with relation to compensation of receivers and marshals, so as to provide (subdivision "d"):

"* * * That when the receiver or marshal acts as a mere custodian and does not carry on the business of the bankrupt as provided in clause five of section two of this act, he shall not receive nor be allowed in any form or guise more than two per centum on the first thousand dollars or less, and one-half of one per centum on all above one thousand dollars on moneys disbursed by him or turned over by him to the trustee and on moneys subsequently realized from property turned over by him in kind to the trustee. * * *"

And it then provides that no allowance shall be made, however, until notice shall be given to the creditors, provided in the act.

Subdivision "e" of section 48, supra, provides:

"Where the business is conducted by trustees, marshals, or receivers, as provided in clause five of section two of this act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them, and, in cases of receivers or marshals, also upon the moneys turned over by them or afterwards realized by the trustees from property turned over in kind by them to the trustees; such commissions not to exceed six per centum on the first five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. * * *"

Light will be thrown upon the intent of the lawmakers upon the enactment of this amendment by reference to the report of the Senate judiciary committee of the Sixty-First Congress (Rep. No. 691), which appears in the footnote of page 46 of Collier on Bankruptcy (10th Ed.), as follows:

"The present amendment fixes the maximum compensation that can be allowed receivers for the performance of the ordinary duties at precisely this same rate [the rate allowed trustees under section 48a], instead of leaving it to the unlimited discretion of the court. It also fixes the extra compensation, whether it be to the receiver or trustee, for the conducting of the business, to once again this same compensation; so that, at best, the ordinary and extraordinary compensation, taken together, in the event both a receiver and trustee have successively had charge of the estate, and even have both conducted the business, cannot exceed four times the amount allowable to a trustee by section 48a of the act for the performance of his ordinary duties. The practical difficulty in allowing commissions to receivers, where the receivers turn over to the trustee in specie the property which they have been taking care of, is obviated by the provision that the commissions are to be figured upon the amounts thereafter actually realized upon the sale of such property so turned over in specie. Thus the bill seeks to reduce to one rational basis of commissions, on moneys actually realized, the compensation, both ordinary and extraordinary, of both trustee and receiver; and by this is done away with also the unlimited discretion of the courts in the allowance of compensation to such officers. Of course, the rates of commission prescribed are maximum limitations. Less, but not more, may be allowed, and it is hoped the courts will exercise their discretion still in allowing less amounts where proper."

It is thus seen that the intent was to fix a maximum limit to compensation, and the discretion to be exercised in allowing the lesser amounts. A fair consideration of this report, together with the powers, duties, and limitations prescribed in the act with relation to the compensation fixed, leads me to the conclusion that there was an intermediate zone between the powers and duties prescribed by subsections 3 and 5, supra, for the compensation of services rendered in behalf of the estate, in which the discretion of the court must be exercised. In re Kirkpatrick, 148 Fed. 811, 78 C. C. A. 501; In re Richards et al. (D. C.) 127 Fed. 772; In re Ginsburg, supra; In re Griesheimer, supra.

Upon the record and the certificate of the referee, I am convinced that the receiver in this case occupied that intermediary zone in which he was more than a custodian, and should be compensated for the services which he actually rendered which were of benefit to the estate. The matter is referred back to the referee, with instructions that notice be given to all creditors, pursuant to the provisions of subdivision "d," § 48, supra, and determine such sum, within the limitations of the act, as will reasonably compensate the receiver for the services rendered.

CAMBRIA STEEL CO. v. McCOACH, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. July 28, 1915.)

No. 2984.

1. INTERNAL REVENUE ⟸38—PENALTIES—PAYMENT UNDER DURESS—RECOVERY.

Plaintiff company leased for 999 years all the property constituting the manufacturing plant of another corporation, its manufacturing sites, mines, roads, and ways, and not to exceed 10,000 acres of coal and other lands, and took possession of the property, and took over the cash, contracts, and entire business of the lessor, agreeing to pay as rental 4 per cent. of the lessor's outstanding capital stock directly to its stockholders, and a further amount to cover the cost of maintaining the lessor's organization, and to pay all taxes on the lessor's property. On demand against the lessor for a special excise tax, for which the lessor's property was liable to a lien and distraint under Rev. St. § 3186 et seq. (Comp. St. 1913, § 5908 et seq.), and after the lessor's claim for an abatement was rejected, and to avoid the penalty threatened by the defendant as collector, and distraint and sale of the leased property, the lessee paid the taxes under protest. *Held*, that the payment was not voluntary, but was made under duress, so that the plaintiff was entitled to sue for its recovery, without regard to privity of contract between it and the defendant collector.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

2. CORPORATIONS ⟸459—PROPERTY—LEASE.

Under Act Pa. Feb. 25, 1862 (P. L. 50), expressly authorizing an iron company to sell and dispose of its real and personal property, and without such authority, in the absence of express legislative restraint, the company's lease of all its property, after which it quit carrying on business, though it maintained its corporate organization out of an amount paid by the lessee, so that its only income was the rental, paid directly to its stockholders, was not ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1811, 1812; Dec. Dig. ⟸459.]

3. INTERNAL REVENUE ⟸9—EXCISE ON CORPORATIONS—"DOING BUSINESS."

An iron company, which, with the approval of its stockholders, leased to another company for 999 years all the property constituting its manufacturing plant, sites, mines, and roads, and coal and other lands, not to exceed 10,000 acres, and assigned to the lessee all its cash, contracts, and entire business, in consideration of a rental equal to 4 per cent. on its outstanding stock, payable directly to its stockholders, together with an additional amount to cover the cost of maintaining its organization, after which it merely existed as landlord and lessor, and had no other income than the rent, was not "doing business," within the meaning of Corporation Tax Act Aug. 5, 1909, c. 6, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), imposing an excise upon the doing or carrying on of business in a corporate capacity in a state.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

At Law. Action by the Cambria Steel Company against William McCoach, Collector of Internal Revenue. Upon rule for judgment for want of a sufficient affidavit of defense. Rule absolute.

Henry, Pepper, Bodine & Pepper, of Philadelphia, Pa., for plaintiff.
Edward S. Kremp, Asst. U. S. Atty., of Reading, Pa., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This suit is brought to recover from a former collector of internal revenue the amount paid by the plaintiff under protest as a special excise tax assessed against the Cambria Iron Company under the Corporation Tax Act of 1909, with interest.

From the statement of claim it appears that the Cambria Iron Company, hereinafter referred to as the Iron Company, on December 1, 1898, with the approval of its stockholders, entered into an agreement with the plaintiff, the Cambria Steel Company, hereinafter referred to as the Steel Company, under which it leased to the Steel Company for the term of 999 years all the property constituting the manufacturing plant and works of the Iron Company, the occupied or unoccupied manufacturing sites connected therewith, the mines and quarries connected therewith, the roads and ways connecting the same, and such additional amount in acreage of coal lands and other lands connected with the said mines and works as not to exceed in the aggregate 10,000 acres of land, and assigned, transferred, and set over to the Steel Company all its cash, bills receivable, accounts, licenses, leases, contracts, agreements, judgments, mortgages, stocks and bonds (except certain stocks and bonds through which the control of the necessary water supply and the supply of materials for manufacturing purposes was secured). Pursuant to the lease, the Iron Company delivered to the Steel Company possession of all the property mentioned.

The Steel Company, as lessee, agreed to pay as rental a sum equal to 4 per cent. upon the outstanding capital stock of the Iron Company, together with a further sum, not exceeding $5,000, to cover the cost of the maintenance of the organization of the Iron Company, the rental, except the $5,000, to be paid direct to the stockholders of the Iron Company. Since the date of the lease the Iron Company has maintained its corporate existence merely that it may exist as landlord and lessor, and to this end its stockholders have annually elected a board of directors and other officers, and it has maintained books for the transfer of its capital stock; but it has received no income other than as above set forth, and has done nothing else whatsoever, and has no quick assets, cash, or bank account.

The defendant, as collector of internal revenue, made demand upon the Iron Company for a special excise tax of $3,337.20 assessed against it by the Commissioner of Internal Revenue as a corporation having a capital stock and engaged in business in Pennsylvania. The Iron Company filed a claim for abatement of the tax, upon the ground that it was not engaged in business and not subject to the tax. The Commissioner of Internal Revenue rejected the claim for abatement, and on August 26, 1913, the defendant notified the Iron Company that the claim for abatement had been examined and rejected, and that, if the amount of the tax, together with interest at the rate of 1 per cent. per month, were not paid within 10 days, he would take steps to collect the same, with penalties. The plaintiff, in order to avoid

the penalties threatened by the collector, and because it knew that, if it did not pay the tax, the defendant would collect by distraint upon and sale of the property leased by the plaintiff from the Iron Company, paid the tax, with interest, under protest.

[1] The defenses set out in the affidavit of defense are that the plaintiff is not entitled to recover, for the reason that there was no privity of contract, express or implied, between the plaintiff and defendant in the matter of the payment or the subsequent claim for refund; that the taxes were due by the Iron Company, and were paid by the Steel Company, acting as agent for the Iron Company; that the Iron Company executed the agreement referred to as a lease without lawful authority, and that it was therefore ultra vires; that the agreement does not constitute the Steel Company tenant of the Iron Company, but its agent; and that the sums paid by the Steel Company to the Iron Company, or its stockholders, semiannually, were the Iron Company's share of income from the operations of the Iron Company's property, lands, and franchises by its agent, the Steel Company, under the agreement. The defendant also sets out certain provisions of the agreement in support of its averment that the agreement is not a lease, but a mere contract of agency, and in support of the further averment that the plaintiff, under the terms of the agreement, has been engaged in business.

Under the terms of the lease (article 6), the rental was to be paid "free from all taxes or deductions whatsoever, payment of all such taxes and charges having been assumed by said Steel Company, as in the seventh article of this lease is more particularly stated." By article 7 the Steel Company "agrees to pay all taxes, charges and assessments upon the property, stocks and capital stock, bonds, and loans of the Iron Company, and *all legal claims and demands whatsoever* which may be made against said Iron Company."

The Iron Company had by the lease stripped itself of all of its income, except that of $5,000 for maintaining its corporate existence, and the result of nonpayment by the Steel Company would have been the enforcement of payment by collection out of the property of the Iron Company in possession of the Steel Company and with which the latter was carrying on its business. It was therefore confronted with a situation amounting in law to duress when it paid the tax under protest made to the defendant.

"When taxes are paid under protest that they are being illegally exacted, or with notice that the payor contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although, generally speaking, even a protest or notice will not avail, if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than such payment." Chesebrough v. United States, 192 U. S. at page 259, 24 Sup. Ct. at page 264, 48 L. Ed. 432.

When, however, such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not

to be regarded as voluntary. Robertson v. Frank Bros., 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236. What may constitute duress is stated by Judge Gray, speaking for the Circuit Court of Appeals for this circuit, in Herold v. Kahn, 159 Fed. 608, 86 C. C. A. 598:

"Every demand by one clothed with official legal authority to make the demand, imposes a certain compulsion on the one upon whom the demand is made. Such a demand is always exigent, and places a recusant in a position of disadvantage. Especially is this so in regard to the payment of taxes, state or national. The proper administration of the fiscal affairs of the government require that the payment of taxes should not be delayed by disputes as to their legality, but that the taxes should first be paid, and all questions in regard to them be determined in suits brought for their refunding. It is a wise policy, therefore, that encourages the payment under protest of disputed taxes. Though there is some conflict in the dicta of the Supreme Court, we think that the true doctrine is that, when taxes are paid under protest that they are being illegally exacted, or with notice that the payor contends that they are illegal and intends to institute suit to compel their repayment, a sufficient foundation for such a suit has been established."

In the present case, under the acts of Congress relating to collection of taxes (Rev. St. § 3186 et seq.), the property of the Iron Company of which the plaintiff was in possession under its lease was liable for the tax, together with interest, penalties, and costs. Upon failure of the Iron Company to pay the tax, the Steel Company, knowing that the Iron Company could not pay, and being bound by its agreement to pay for it, was therefore confronted with the threatened sale by the collector of the property which it held under its lease. Such circumstances were sufficient to constitute the payment one enforced by duress or compulsion, and not voluntary, and the Steel Company was therefore entitled to sue, without regard to privity of contract between it and the collector.

[2] It is contended by the defendant, however, that the agreement under which the plaintiff was possessed of the Iron Company's property did not operate as a lease, because it was ultra vires, and the District Attorney cites, in support of that contention, the language of Mr. Justice Pitney in McCoach v. Minehill Railway Co., 228 U. S. at page 304, 33 Sup. Ct. at page 423, 57 L. Ed. 842, referring to the business of the Minehill Company, as follows:

"This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor, or at least the lessor held estopped to deny such agency. But the lease was made by the express authority of the state that created the Minehill Company, conferred upon it its franchise, and imposed upon it the correlative public duties."

But the lease to the Steel Company was not made without authorization of law, for the Iron Company is expressly authorized by the Legislature under the Pennsylvania act of February 25, 1862 (P. L. 50), "to sell and dispose of the property, real and personal, of said company." But no such legislative authority was necessary to empower the Iron Company to lease its property. The law is thus stated by Mr. Justice Sharswood in Ardesco Oil Co. v. North American Oil & Mining Co., 66 Pa. at page 382:

"Corporations, unless expressly restrained by the act which establishes them or some other act of assembly, have and always have had an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property."

And the rule is stated to the same effect by the same authority in Pittsburgh & Connellsville Railroad Co. v. Bedford & Bridgeport Railroad Co., *81 Pa. at page 111; but it was held in that case that a railroad company could not lease to another its franchise of operating a road built or authorized to be built, unless by a legislative grant in express terms, or by necessary implication.

In citing that case in support of the contention of the defendant that the Iron Company could not without express legislative enactment dispose of its property or franchises by lease, the District Attorney has failed to distinguish between the powers of a corporation performing by authority of the Legislature a public duty, such as building and operating a railroad, and a corporation organized for private purposes, as is the Cambria Iron Company, and the language of Mr. Justice Pitney in the Minehill Case, supra, was applied to the former and not the latter class of corporations. It cannot be doubted, therefore, that the Iron Company was within its corporate rights when it leased its property to the plaintiff and quit carrying on the business which it was authorized to do by its charter.

[3] Under the decisions in McCoach v. Minehill Railway Company, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, and U. S. v. Whitridge, 231 U. S. 144, 34 Sup. Ct. 24, 58 L. Ed. 159, as applied to the facts in this case, it is clear that the Iron Company has not been engaged in business under its charter since 1898, when it leased and delivered its corporate property to the plaintiff. That the land leased to the Steel Company is not to exceed 10,000 acres, and that the Iron Company under the lease is to hold any other land which it possesses or may hereafter acquire for the purpose of supplying from time to time to the plaintiff lands and mines in lieu of lands and mines then demised, which may from time to time be surrendered to the Iron Company by the Steel Company, and that it is then to transfer the reserve lands to the Steel Company is not material, for as to these lands it is not carrying on any business, for mere ownership of lands does not constitute carrying on business, neither does it derive any income therefrom by which a tax for business might be measured. The further fact that certain stocks and securities essential to the control of the water supply and supply of materials for manufacturing purposes remain in the name of the Iron Company, and the income is paid by it to the Steel Company, is not indicative of the carrying on of business.

"The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business, in which event the investment income may be added to the business income in order to arrive at the measure of the tax; and (b) the receipt of income from property or investments by a company that is not engaged in business, except the business of owning the property, maintaining the investments, collecting the income, and dividing it among its stockholders. In the former case the tax is payable; in the latter, not." McCoach v. Minehill Railway Co., supra.

The further provisions of the lease upon which the defendant relies relate to acts to be done by the Steel Company in its occupation and operation of the properties under the lease. None of these are in any way inconsistent with a mere relation of landlord and tenant between the parties. Under the facts in this case, therefore, it is held that the Iron Company, having leased its property to the plaintiff, and its sole income consisting of the rental, which is distributed to the Iron Company's stockholders, and its corporate existence being maintained merely for the purpose of carrying out the terms of the lease, is not doing business within the meaning of the Corporation Tax Act, and that the plaintiff, having paid under duress the tax unlawfully assessed, is entitled to recover.

Rule absolute.

UNITED STATES v. GRAND TRUNK RY. CO. OF CANADA et al.

(District Court, W. D. New York. June 8, 1915.)

1. COMMERCE ⟸31—INTERSTATE COMMERCE—STATUTES.

Imports from a foreign country to the United States are not included in Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379; but commerce of a domestic origin, transferred into or through a foreign country, falls within its provisions.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 24; Dec. Dig. ⟸31.]

2. CARRIERS ⟸30—INTERSTATE COMMERCE ACT—APPLICABILITY OF STATUTES.

Though Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, par. 2, 24 Stat. 380, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 (Comp. St. 1913, § 8569), does not specifically provide for the publication of passenger rates where the journey is through a foreign country to another point in the United States, yet in view of the entire provision for the publication of freight rates for shipments over such a route, the carrier must publish passenger rates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. ⟸30.]

3. CARRIERS ⟸32—INTERSTATE COMMERCE—OFFENSES.

Where a theatrical company, by promise of rebates, was induced to route its shows over a railroad line which ran between two points in the United States, though part of the route lay through the Dominion of Canada, the rebates being made from the aggregate fares for the entire journey, the agreement was in violation of Interstate Commerce Act, § 6.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. ⟸32.]

4. CONSPIRACY ⟸40—GIVING OF REBATES—AGREEMENT.

Interstate Commerce Act, § 6, makes it unlawful for a railroad company to give or a shipper to receive rebates, but does not provide any punishment for receiving rebates. A railroad company and a shipper entered into a conspiracy for the giving of rebates. *Held*, that both could be prosecuted, under Rev. St. § 5440, making a conspiracy to violate the laws of the United States an offense.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 73, 75–78; Dec. Dig. ⟸40.]

5. CONSPIRACY ⟸45—PROSECUTION—EVIDENCE.

In a prosecution for conspiring to violate the laws of the United States by giving and receiving rebates, alleged overt acts, which were in them-

selves lawful, being connected with the object of the conspiracy, may be shown in evidence.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100–104; Dec. Dig. ⊂⊃45.]

Indictment by the United States against the Grand Trunk Railway Company of Canada, Frank P. Dwyer, and the Empire Circuit Company, to which defendants demurred. Demurrers overruled.

John Lord O'Brien, of Buffalo, N. Y., for the United States.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (Adelbert Moot, of Buffalo, N. Y., of counsel), for defendants.

HAZEL, District Judge. The indictments against the defendants, Grand Trunk Railway Company of Canada, the Empire Circuit Company, and Frank P. Dwyer, contain two counts, each substantially alleging a conspiracy to violate section 6 of the act to regulate commerce, approved February 4, 1887, as amended; the first count alleging that in 1908 an agreement was made between the Grand Trunk Railway Company, a corporation of the Dominion of Canada operating a railway from Detroit to Buffalo, Buffalo to Toronto, Toronto to Montreal, and Montreal to Boston, and the defendant the Empire Circuit Company, for the exclusive right to transport shows owned by the stockholders of the latter in return for a rebate of $200 a month to be paid or remitted to the Empire Circuit Company out of the lawful fares for such transportation, the existence of such agreement to be concealed by a pretended contract for advertising. The second count alleges a similar conspiracy, entered into on May 1, 1910, except that the refund or rebate was to be at the rate of $300 per month, which was to be "ostensibly in return for the publication in theatrical programs of certain advertising matter which was greatly in excess of the true and actual worth" thereof. Overt acts are alleged, which, it is claimed, were committed with the intention of effectuating the conspiracy, and consisted, inter alia, of the transportation of the shows from Detroit to Buffalo, and from Buffalo to Toronto, Canada, at the rate of fare published and filed with the Interstate Commerce Commission.

The principal grounds of demurrer are: (a) That the indictment charges no crime, as the filing or publishing of tariffs relating to transportation of passengers from one point to another in the United States is not required where the destination is reached through a foreign country; (b) that the indictment is defective, in that it fails to charge that the rebates were to be paid out of fares for transportation solely within or from the United States; (c) and that, if a statute was violated, it was section 6 of the Interstate Commerce Act, conspiracy for the violation of which will not lie.

[1, 2] 1. Imports from a foreign country to the United States concededly are not included in the act to regulate commerce; but commerce of a domestic origin, although transported into or through a foreign country, is unquestionably included within its provisions. It makes no difference that section 6 (second paragraph) provides for the

publication of tariff rates on the transportation of freight, making no mention of passenger rates. To properly interpret such paragraph, the entire section must be read and considered in connection therewith, when it will clearly appear that the provision for publishing and posting rates is not limited to the shipment of merchandise, but by implication, if not in terms, includes passenger service. In the recent case of Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, the Supreme Court has emphatically held that commerce among the states consists in intercourse and traffic between their citizens, and includes the transportation of persons and property

[3] 2. Counsel for defendant contends that if any discriminatory rates were given, by means of advertising contracts, on journeys originating in the United States, but including trips and stops at points in Canada, or originating at points in Canada and terminating in the United States, this did not constitute a crime, and that the indictment must allege that the payment of rebates was on the American portions of the journey. The question thus presented is perhaps not wholly free from difficulty, but it must be considered in connection with the intention of Congress to make provision for the transportation of commerce, not only between states and territories, but to and from foreign countries, and broadly for "the whole field of commerce," excluding intrastate. Texas & P. R. R. Co. v. I. C. C., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The indictment is not open to the inference that the transportation in question was for separate completed journeys in Canada. The offense consisted of a plan to divert passenger traffic to the lines of the defendant company which extended from points in the United States through Canada to other points in the United States. The question, however, of the payment of rebates or refunds on fares between points in Canada exclusively arises only as an incident of the entire transportation which originated in the United States, for the indictment, as I read it, substantially charges that the rebates were to be paid from the aggregate fares for the entire journey under an agreement devised to evade the statute. The route from Detroit to Boston was evidently regarded by the parties to the agreement as a theatrical circuit for shows of the Empire Circuit Company, and, although stops were made along the way for the giving of performances, the idea no doubt was that the journey was to be practically continuable. It would, of course, make a difference if the rebates were to be paid out of the rates or charges for traveling within the limits of Canada alone, or even from Montreal to Boston; but as the indictment alleges with particularity that the rebates were to be paid out of the total fares collected, it is sufficiently alleged, I think, that the rebating was on fares for transportation from Detroit to Buffalo, and thence to Toronto, in Canada, and not, as demurrants seem to think, out of fares covering journeys originating in Canada.

[4] 3. It may be safely held, I think, that the defendants can be prosecuted under section 5440 of the Revised Statutes for conspiring to commit an offense against the laws of the United States, regardless of the penalty. Thomas v. United States, 156 Fed. 897, 84 C. C. A.

477, 17 L. R. A. (N. S.) 720; Clune v. United States, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269. See, also, Toledo, A. A. & N. M. v. Penn Co. (C. C.) 54 Fed. 730, 19 L. R. A. 387; Waterhouse v. Comer (C. C.) 55 Fed. 150, 19 L. R. A. 403. The case of the United States v. Dietrich (C. C.) 126 Fed. 664, upon which defendants place reliance, is not on a parity with the case at bar. There the indictment charged the giving and receiving of a bribe, and both parties were liable for a substantive offense, while in this case the indictment does not indicate the commission of a substantive offense by each defendant. The defendant Dwyer is charged simply with participating in the original agreement, and not with paying the unlawful rebates, the payment of which is a necessary ingredient of the substantive offense. Nor has the Empire Circuit Company committed an act for which an indictment against it alone would lie. It is true enough that as a participant in the asserted conspiracy the Empire Circuit Company has received or is to receive a rebate or refund from the lawful passenger rate under the guise of a payment for advertising, still as section 6 of the Interstate Commerce Act provides for punishing only the giver, and not the receiver, of a rebate on passenger fares, apparently a substantive offense has not been committed by it.

[5] There was also much discussion at the bar regarding the alleged overt acts which were in themselves lawful, and by reason of which the defendants urge the indictment for conspiracy must fall. It is true the overt acts, unconnected with the conspiracy, were of themselves innocent and commonplace; but this does not invalidate the indictment, since they were done pursuant to a conspiracy and to effect an unlawful purpose. Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. If the conspiracy was conceived with wrongful intent, all acts done in furtherance thereof, or in its accomplishment, are essential elements of the offense. There are many adjudications in the federal courts in support of this doctrine. Hyde et al. v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. It is unnecessary to discuss the possible bearing on the case at bar of the decision of the Supreme Court in Nash v. United States, 229 U. S. 376, 33 Sup. Ct. 780, 57 L. Ed. 1232, holding that under the Sherman Anti-Trust Act an overt act is not essential to complete the charge of conspiracy, as the present indictment is under another provision of the Revised Statutes, namely, section 5440, and to insure its validity must contain a definite charge of conspiracy either to defraud the United States, or to commit an offense against the United States, and an averment of an overt act to constitute the offense.

I think the indictment sufficiently states the offense, and that defendants are fairly apprised of the charge they will be required to meet at the trial. The demurrers are overruled.

UNITED STATES, to Use of FOWDEN et al., v. EMERY et al.

(District Court, E. D. Pennsylvania. July 23, 1915.)

No. 3524.

1. PLEADING ⟸348—AFFIDAVIT OF DEFENSE—NECESSITY.

Under the Pennsylvania statutes, authorizing judgment for plaintiff without other proof of the demand than the averments in the statement of claim filed in accordance with the statutes, unless the averments are appropriately denied by an affidavit of defense, the affidavit of defense must set forth such facts which would, if true, constitute a defense, and if no real defense is presented, judgment may be entered notwithstanding.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. ⟸348.]

2. PLEADING ⟸156—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In an action against the surety on a contractor's bond, the contract, as set up by plaintiff and averred in the statement of claim, was evidenced by writings bearing the signature of the contractor. The affidavit of defense denied the contract in general terms and demanded proof, but did not deny the validity of the signatures, and merely averred that plaintiff had not duly performed his contract. *Held*, that under the Pennsylvania affidavit of defense law, the affidavit was insufficient, being no more than a mere general denial.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 312; Dec. Dig. ⟸156.]

3. UNITED STATES ⟸67—CONTRACTOR'S BOND—SUFFICIENCY.

In an action on a government contractor's bond, a denial that final settlement was made March 13, 1914, without more, is insufficient to present any defense, for the date of final settlement would be immaterial, unless it were more than a year before the commencement of the action.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⟸67.]

4. PLEADING ⟸288—STATEMENT OF CLAIM—SUFFICIENCY.

Under the Pennsylvania statutes, a statement of claim, bearing the signature of two of plaintiff's counsel, who described themselves as his attorneys, and verified by plaintiff, is sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 854, 855, 857, 858; Dec. Dig. ⟸288.]

5. PLEADING ⟸350—RULE FOR JUDGMENT—EFFECT.

A rule for judgment on the pleadings is, in legal effect, a demurrer to the affidavit of defense, and consequently puts the sufficiency of the statement of claim in issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070–1077; Dec. Dig. ⟸350.]

6. UNITED STATES ⟸67—CONTRACTOR'S BONDS—STATEMENT OF CLAIM—SUFFICIENCY.

The act of Congress Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), requiring bonds by public contractors, gives the United States the first right of action, and provides that if no action be brought within six months after completion of the work, the subcontractors may, within a year, sue in the name of the United States to their use, but if action be brought, they may intervene as use plaintiffs. The statement of claim, in an action brought by a subcontractor in the name of the United States to his use, failed to aver that no action had been instituted by the United States. *Held*, that as the existence of a fact must be averred by the party upon whom rests the affirmative, and a negative need not be pleaded, the statement of

claim need not deny that the United States had instituted an action, for that is a matter which defendant could plead in abatement.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⟸67.]

7. PRINCIPAL AND SURETY ⟸73—LIABILITY FOR INTEREST.

While a surety is not liable for interest on the penal amount of the bond until default, a surety on a contractor's bond is, where the subcontractor was entitled to interest from the date the amount became due, liable for interest on the debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 114, 115, 455; Dec. Dig. ⟸73.]

At Law. Action by the United States, to the use of William T. Fowden and others, against J. W. Emery and the Fidelity & Deposit Company of Maryland. Rule for judgment for part of the claim, the affidavit of defense to which is insufficient. Judgment entered for part of the claim, and trial on the remainder directed.

Harvey F. Heinly, of Reading, Pa., and George H. Stein, of Philadelphia, Pa., for use plaintiffs.

Stanley Williamson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The facts of this case, as disclosed by the statement of claim, modified by the affidavit of defense, are as follows:

John W. Emery, one of the defendants, entered into a contract with the United States for the construction of an extension to the post office building in Chester, Pa. Emery was what is ordinarily called the "general contractor." He entered into contracts with the plaintiff and others to do work and furnish materials toward the erection of certain parts of the entire construction. These use plaintiffs come under the designation of what are ordinarily called "subcontractors." Emery, as general contractor, entered into a formal contract in writing with the United States, and in conformity with the regulations of the Treasury Department, the provisions of his contract and of the statutes of the United States relating to the subject, executed the usual form of bond, the pertinent features of the condition of which are that he would perform the contract entered into with the United States, and would pay for all labor and material which entered into the construction to the persons supplying the same. The Fidelity & Deposit Company of Maryland, the other defendant, joined with the contractor in this bond as his surety. The contract was performed so far as it affects the United States, and settlement was made between the government and the contractor. The subcontractors, not having been paid, however, caused this action to be brought on the bond in the name of the United States to their use, in conformity with the provisions of the statute, and the Reading Chandelier Works, one of the intervening plaintiffs, filed a statement of claim, in accordance with the Pennsylvania practice, in which is set forth a demand for the payment of $1,247.22, with interest. The basis of the demand is the execution, under date of August 5, 1912, of the contract above referred to between Emery and the United States, and delivery under date of Au-

gust 7, 1912, by Emery as principal and the Fidelity & Deposit Company of Maryland as surety of a bond in the sum of $18,000, with the condition above stated.

There is a further averment that the other contract as above outlined was entered into between Emery and the plaintiff in the form of the exchange of letters of proposal and acceptance. The work thus contracted for was for the round sum of $1,225. There is a further quantum meruit claim for extra work performed by the plaintiff at the defendant Emery's request.

The statement of claim alleges performance of the contract, and an averment of nonpayment after demand made, and that the defendant's contract with the United States had been performed and final settlement therefor made with the United States on March 13, 1914. The significance of the latter date is to show a compliance with the provisions of the federal statute in respect to the time of the commencement of this action.

No affidavit has been filed on behalf of the contractor. The defense interposed is by the surety company. The latter would seem to be in the situation of being without definite information on the subject of the merits of the present claim and to be seeking to put up such a defensive position as will call upon the plaintiff to make proof at the trial of the case of all the averments of fact upon which the claim is based.

[1] It may serve to bring the averments of the affidavit of defense into a clearer light to pause here to view the respective positions of parties plaintiff and defendant. In the absence of the requirement to file an affidavit of defense plaintiff could recover only by proof of his claim. To save the time of courts, however, and for other reasons of convenience, statutes have been passed under the provisions of which plaintiffs are entitled to judgment without other proof of their demands than the averments in statements of claim filed in accordance with the requirement of the statutes. A plaintiff, therefore, in such cases becomes entitled, as a matter of right, to secure a judgment in his favor unless the required affidavit of defense is filed. It follows that the affidavit must set forth such facts which would, if true, constitute a defense to the claim presented in the action brought. If no real defense is presented by the affidavit, it is as if no affidavit had been filed. Hence grew up the practice of entering judgments for want of sufficient affidavits of defense, which practice was extended by acts of assembly in Pennsylvania, first, to the entry of judgment for any part of the claim admitted to be due, and afterwards for any part of the claim with respect to which the affidavit is insufficient. As before stated, the predicament in which the defendant finds itself placed is ignorance of such facts as would present a real defense. The logical relief from such a situation is to ask for such extension of time as will enable a defendant so situated to learn what the real facts are. The suggestion of such relief was met by the defendant with the statement that it preferred to have the question determined upon the present state of the record. It only remains, therefore, to inquire whether the affidavit of defense is insufficient to any part of the claim. It is con-

ceded that it is good as to all the claim, except that for the contract price of $1,225, with interest, and that it is good as to this claim to the extent of $183.38, the amount of a counterclaim made by way of set-off.

[2, 3] An analysis of the affidavit of defense shows it to consist of certain general denials to the effect that the defendant is not indebted to the plaintiff in any sum whatever, and a formal denial of the execution of the contract with a demand for proof thereof. It is well settled, under the affidavit of defense law of Pennsylvania, that these general denials in themselves are insufficient. The denial of the indebtedness is nothing more than a statement of the legal conclusion by which the defendant seeks to justify its refusal to pay. The denial of the contract is in such general terms, and is so coupled with the demand for proof, that it would seem to be nothing more than the assertion of the legal position assumed by the plaintiff that the plaintiff is required to prove its contract by testimony and evidence to be submitted to a jury.

The contract as set up by the plaintiff and as averred in its statement of claim is evidenced by paper writings bearing what is averred to be the signature of the contractor, out of which, if genuine, a contract arises. There is no denial of the existence of these writings, no questioning of the correctness of the copies submitted, and no denial of the signatures attached. The only feature of the affidavit which suggests a defense to the contract part of the plaintiff's claim is an equivocal denial of the performance of the contract which the plaintiff averred. If such a denial could fairly be extracted from the affidavit, it might be held to set up a defense. When read, however, it can be understood to have no other meaning than the reiteration of the defendant's legal position that the plaintiff is not entitled to judgment until after he had made proof of his claim before a jury. If such a position could be successfully asserted, it would result in a practical repeal of the affidavit of defense law. A defendant must do something more than deny and demand in such general terms. He must, on his part, introduce through the medium of his affidavit a statement of facts or raise an issue of fact under which, if he be right, he would be entitled to judgment in his favor. The only averment of fact set forth, and the only issue of fact raised by this affidavit, is "that the said plaintiff has not, in all respects, duly performed and complied with his contract," etc. This, under the Pennsylvania practice, is clearly not sufficiently specific. If it was intended to mean that the plaintiff had furnished none of the material called for by his contract, the affidavit should so state. If it means that some of the material claimed to have been furnished was not supplied, the affidavit should state in what the deficiency consisted. It cannot be determined with any certainty from this affidavit whether it is intended to aver an omission in the supply of material, or whether the quoted phrase is completed by that which follows and is meant merely to be a denial that the material which the plaintiff admittedly furnished was up to the specifications of the contract. If the latter is the true meaning of the affidavit, then

the respect in which the material supplied fell short of the requirements of the contract should be set forth. On the whole, we cannot read this part of the affidavit of defense as having any other meaning than that in the judgment of the defendant the plaintiff should be required to secure the verdict of a jury before he can take judgment. The same observations apply to the denial of the affidavit in connection with the time of the final settlement with the government. The averment in the statement of claim is that such final settlement was made March 13, 1914. The denial is that it was made on that date. For defense purposes this is no denial at all, for the reason that the date of final settlement would not enter into a defense unless, for illustration, it were more than a year before the commencement of the action. There is no averment or suggestion even that the true date would have any defensive value.

[4] We note a paragraph in the affidavit of defense, not adverted to in the argument or in the paper books filed, which challenges the sufficiency of the statement of claim in the respect that it is not signed by plaintiff or his counsel. As the statement is of record, we can only infer that this was either an inadvertent statement, or that its meaning is that the statement is not signed in compliance with the requirements of the Pennsylvania statute. The statement bears the signatures of two of plaintiff's counsel, who describe themselves attorneys for the plaintiff. It is sworn to by the plaintiff himself and the jurat bears his signature. We think this to be a substantial compliance with the Pennsylvania Procedure Act (Act May 25, 1887 [P. L. 271]).

[5] As a rule for judgment is, in legal effect, a demurrer to the affidavit of defense, the principle that plaintiff is entitled to judgment, if at all, upon the whole record, applies, and therefore the sufficiency of the statement of claim itself is put in issue.

[6] The argument addressed to us is that this statement of claim is insufficient because the act of Congress (Comp. St. 1913, § 6923) gives a right of action which did not before exist, and that its existence is conditional, one of the conditions being that the United States shall not of itself bring suit upon the bond, and that there is no negativing of such an action in this statement of claim.

It is to be observed that the act of Congress indicates an alternative procedure. The United States is given the first right of action, and the subcontractor no right of action at all until six months after the final settlement with the general contractor. If the United States has exercised the right of action given to it by bringing its suit within the six months, then the subcontractors are permitted to intervene as use plaintiffs. If, however, the United States does not bring its action, then after the expiration of the six months the subcontractors may bring the action in the name of the United States to their use. The latter course was adopted in this case. If, therefore, the fact is that there is a pending action brought by the United States, this action brought by the use plaintiffs cannot be maintained, and the defendant could set up the fact by what would be, in substance, a plea in abatement, and the summary judgment asked for could not properly be entered.

The point raised, however, is not precisely this, but a much sharper one. There is no averment of the fact that a suit was commenced by the United States within the six months, but we are asked to hold that the statement of claim is insufficient because the pendency of such action is not negatived therein. This we cannot do.

A general principle of pleading is that the existence of a fact must be averred by the party upon whom rests the affirmative and that a negative need not be pleaded. The jurisdictional fact upon which the right of action in this respect is granted is that the action cannot be commenced at the instance of the subcontractor within six months, nor after a year from the date of final settlement between the United States and the general contractor. These facts are averred in the statement of claim, and there is no presumption that the United States has brought its suit. Indeed the issuance of the certificate provided by the act itself negatives the fact of action by the United States because, under the provisions of the act, it is only to issue where no such action has been brought. The procedure contemplated by the act of Congress is somewhat anomalous. A logically evolved system is that which pertains to suits on official bonds under the Pennsylvania practice under which judgment may be taken on the bond against the defendants and then the use plaintiffs be brought upon the record by suggestion and the amount of each of their claims thereunder found through sci. fa. proceedings. The anomaly suggested is in the entry of more than one judgment in the action and thereby having several judgments each in favor of a different use plaintiff. The authority for it is found in the statute, and such a practice under this act of Congress has been fully sanctioned.

[7] It only remains, therefore, to determine the sum for which judgment should be entered. The only controversy in this respect is over the question of interest. The argument addressed to us against the allowance of interest seemingly proceeds by ignoring the distinction between the allowance of interest on the penal sum of the bond as against the surety and the allowance of interest on the debt due by the contractor to the use plaintiff where the total sum for which the surety is held to be liable is less than the amount of the bond. As between the general contractor and the subcontractor, the latter is entitled to interest on the amount due him from the time it became payable. When the amount of the indebtedness to the use plaintiff is ascertained, the obligation which rests upon the surety under his bond is to pay it.

The cases to which we have been referred as authority for the disallowance of interest are cases in which interest was claimed as against the surety on the amount of the bond. Such interest does not begin to run until default, and default does not arise until the aggregate sum to be paid is determined. The surety is given the right to withhold payment until the total amount to be paid is known, so that it may then exercise the further right given it of paying the penal sum of the bond for pro rata distribution among the use claimants in the event of the aggregate claims exceeding the bond in amount. This distinction is pointed out in American Surety Co. v. Lawrenceville Co. (C. C.) 110 Fed. 717.

The rule for judgment is made absolute for the part of the claim as to which the affidavit of defense is adjudged to be insufficient, damages to be assessed as follows:

Amount of contract claim	$1,225 00
Less set-off	183 38
Balance	$1,041 62

Interest on $937.45 (90 per cent.) from July 31, 1913, and on $104.17 (10 per cent.) from March 23, 1914, and plaintiff has leave to enter judgment in accordance herewith, and to proceed to trial for the balance of plaintiff's claim.

TRIUMPH ELECTRIC CO. v. THULLEN.

(District Court, E. D. Pennsylvania. August 10, 1915.)

No. 1143.

1. SPECIFIC PERFORMANCE ⟸1, 4—CONTRACTS ENFORCEABLE—GROUNDS.

A party seeking specific performance of a contract, and asserting a breach by the adverse party to the contract, must, to obtain relief, show that his right is so clear that the denial of it by the adverse party affronts against good conscience, and calls for a decree prayed for, and that the party has no other adequate remedy, though formal technical grounds of equitable jurisdiction exist.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 1, 4; Dec. Dig. ⟸1, 4.]

2. MASTER AND SERVANT ⟸62—CONTRACT OF EMPLOYMENT—ASSIGNMENT OF PATENTS.

A contract of employment, terminable at the will of the employer, bound the employé, while in the employ, "in the event of any design by him capable of being made the subject-matter of a patent," to assign the application and patent to the employer; but the agreement to assign should not apply to any patentable design which the employer might discover, not applicable to the line manufactured by it. The employé was discharged, but before his discharge he had perfected an invention and had applied for a patent. The shop work involved was done by the employer at the employé's expense. The expense of securing the patent was paid by the employé, and the patent was issued after the termination of the employment. The purpose of the invention was to automatically control electric motors. The employer was a manufacturer of generators, or dynamos, and motors. It bought from others the control apparatus, and what it manufactured and what it bought were sold together as units. Some years before the employment the employer had manufactured control apparatus, and after the termination of the employment the employer made switchboards for use with generators. *Held*, that the contract, interpreted in the light of conditions existing when made, did not bind the employé to assign to the employer the patent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 71; Dec. Dig. ⟸62.]

In Equity. Suit by the Triumph Electric Company against Louis H. Thullen. Heard on bill, answer, and proofs. Specific relief prayed for denied, with leave to plaintiff to have the cause transferred to the law side of the court, or for relief under the general relief prayer.

See, also, 209 Fed. 938.

Henry N. Paul, Jr., of Philadelphia, Pa., and Edwards, Sager & Wooster, of New York City, for plaintiff.

Furth, Singer & Bortin, J. Bonsall Taylor, and E. Hayward Fairbanks, all of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The purpose of this bill is to enforce specific performance of a contract. The contract is one between an employer and employé. The decision of the case involves a finding of the rights acquired by the employer in an invention made by the employé.

The defendant is an engineer of experience, possessing the ability called for by the position he filled. He entered the plaintiff's employ November 22, 1909, under a contract of that date, which is the basis of the plaintiff's claim of right. During the time of his employment he conceived the idea of an improved apparatus for automatically controlling electric motors. Letters patent did not issue until August 19, 1913. The application and grant of letters patent having come to the notice of the plaintiff, it demanded to have the patent assigned, and, upon defendant's refusal, has filed this bill. The pertinent provisions of the contract upon which this demand is based are that the defendant would devote himself to the interests of the plaintiff, and "while in its employ, in the event of any design being capable of being made the subject-matter of a patent application, such application and patent shall be assigned to the company."

The defendant denies the plaintiff's claim of ownership of this invention. This denial is based upon a further provision of the contract that the agreement to assign did not apply to "any patentable design" which the defendant might "discover, not applicable to the line manufactured by" the plaintiff, and the asserted fact that this invention is outside of the employer's line of manufacture. There is a further denial of plaintiff's right to the equitable remedy invoked by this bill, on the ground that this is a deprivation of defendant's right, confirmed by the act of Congress, to have the facts, from which the legal rights of the parties flow, tried at law, and that neither the relations of the parties nor the certainty of the contractual obligations of the defendant are such as to confer upon plaintiff the right to the extraordinary relief sought.

[1] The case is of that type in which the opposing positions of the parties may each be plausibly supported by arguments based upon general principles and by a reference to precedents. On the whole, however, it seems the more satisfying conclusion to refuse the interposition of a chancellor and leave the parties to the assertion of their legal rights. In the first place, the case is one of an asserted breach of contract. This suggests an action for damages. A right springing from contract may be so clear that the denial of it by a defendant may be an affront to good conscience and call for a decree to enforce its performance. It may further be that no other remedy will answer the ends of justice. Each of these grounds of chancery jurisdiction implies an exception to the general rule. The first recognizes that the existence of the right withheld must clearly appear, and the act

of withholding must have in it something of the element of the unconscionable. The latter is dependent upon the former, although it may go also to the measure of redress and the ascertainment of the amount.

It must, of course, be admitted that formal technical grounds of equitable jurisdiction here exist. The title asserted is an equitable title, and the relief prayed is through a purely equitable remedy. The basis of the whole case is none the less, as already stated, a contract and its averred breach. It is not enough that a court of equity has jurisdiction and a chancellor the power to interfere. No complainant can successfully assert a right to such interference. A litigant has a right to his action at law. He has none to equitable relief through chancery forms. The most he has is a justified expectation that a chancellor will grant such relief, if grounds for it exist. The legal right, as has been stated, must be shown. In some cases, if his right is doubtful, he must first establish it at law. Even then more is required of a complainant than the mere possession of a legal right. If that is all he has, he is left to its assertion. Before a decree in equity will be awarded, the defendant must be convicted of an offense against equity, or the plaintiff be without other adequate remedy. These doctrines have the sanction of abundant authority, recognition of which is given in Dalzell v. Dueber, 149 U. S. 315, 13 Sup. Ct 886, 37 L. Ed. 749, Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975, and Colson v. Thompson, 15 U. S. (2 Wheat.) 336, 4 L. Ed. 253.

[2] What are the facts here? The parties had a contract of employment which the defendant thought gave him the right to employment for a year. The plaintiff treated it as an employment at will and discharged the defendant. The latter then brought his action. The court held the employment to have been terminable at will and and entered judgment accordingly. Before his discharge the defendant had perfected the invention now claimed by plaintiff and had applied for letters patent. The shop work involved was done by plaintiff at defendant's expense, a bill for which was rendered and paid. The expense of securing the patent was likewise paid by defendant. The patent issued after the employment had ended. The general purpose to be met by the invention is to automatically control electric motors. Its operation in connection with electrically driven feed carriages for saws will show its claim to utility. It is apparent that, when the substance to be sawed presents a large section through which the cut is to be made, it should be fed to the saw more slowly than when a relatively small section is presented. By means of the system of control which the defendant invented, the speed is regulated by coupling the action of the motor which drives the saw with the action of the motor which propels the carriage, so that as the load on the one is increased the speed of the other is decreased. There is a like related action in reverse. This system of control is especially "applicable"—to quote the phrase in the contract—to feed carriages for saws. It is not, however, limited to such use, but in the words of the application is a "control system for electric motors."

The business of the plaintiff is to manufacture generators, or

dynamos, and motors. It manufactured motors to drive all kinds of motor-driven machinery. It furnished to its customers the means of supplying themselves with electric power, and of applying that power to the driving of machinery or other applied use of electric force. The motors were furnished ready for use. This included all auxiliary devices for applying, releasing and regulating the current. A general word which is expressive of their different functions (beside its use as a technical engineering term) is the word "controller." In their more technical sense the terms applied to such apparatus are starters or controllers, when referred to motors, and rheostats, when used with generators. A number of years before this contract was entered into, the plaintiff had made these devices. Afterwards, for commercial reasons, it purchased them from others. Just before 1909 it had made a starter for an alternating current motor, and the manufacture of this was continued. It also supplied and has since manufactured switchboards, which may be part of what may be termed the generator unit in use. The plaintiff's business was also to repair and overhaul and to act as a trouble finder and remover for any of their customers who met with difficulties in operating machines driven by electricity. The evidence, however, justifies the finding that this division or classification of the business of the plaintiff was recognized. It manufactured generators and motors. It also bought from others the control apparatus which went with them. What it manufactured and what it bought, it is true, were then sold together as units, but the distinction notwithstanding existed.

This prelude, which has been already unduly lengthened, brings us to the query of whether the invention of such auxiliary devices is within the terms of this contract. In the effort to find the meaning of the contract, we have the fact that the language employed is that of the plaintiff. The pivotal point is the thought meant to have been expressed by the concluding sentence. After the event, criticism of what was done before is never gracious and seldom just. We do not mean it as a criticism, but merely note the circumstance that, in view of the controversy which has arisen, the words used in the sentence quoted were not happily chosen. Was it intended that patents relating to control apparatus should be the property of the plaintiff, or was its ownership to be limited to generators and motors? In the light of the distinction between control apparatus, which it bought, and generators and motors, which it manufactured, the use of the latter word at least introduces an ambiguity.

The mere reading of the contract would call for a broader view of it. Indeed, the distinction adverted to, when first suggested to the mind, seems almost finical. We have been compelled, however, to make the finding from the testimony of the chief witness for the plaintiff. His testimony was not only frank and candid, but clear-cut as well. He seems to have been impelled to state the distinction by his transparent truthfulness. He should be given further credit for appreciating the at least possible value of the fact, because he stated also that some years before the defendant was employed the company had manufactured control apparatus, and after the relations be-

tween the company and the defendant had been severed it had made switchboards for use with generators, and has continued to manufacture them. It is clear, however, that the contract must be interpreted in the light of conditions existing when it was entered into.

We do not feel called upon to interpret this contract further than to state the conclusion reached that we cannot find it was the intendment of the defendant that patents relating to control devices, as distinguished from generators and motors themselves, should be assigned to plaintiff, and, in the absence of such a finding, we must refuse the specific relief prayed for, which is to enter a mandatory order that the defendant assign this patent to plaintiff.

We do feel called upon to state, however, that the evidence introduced by each of the parties tending to impeach the good faith of the other has failed in its purpose. There is no occasion to discuss it in detail, nor to refer to the interpretation which each side to the controversy is wrongly asserted by the other to have placed upon this contract inconsistent with the one now advanced. The view of the case above expressed would call for a decree dismissing the bill under the former equity rules. The case is, however, within the spirit of rules 22 and 23 of the present rules. Further than this, there is a prayer here for general relief. No other decree than specific performance has, however, either been asked for or discussed, and we do not feel free to make it.

The disposition now made of the case is to grant leave to plaintiff to ask to have the case transferred to the law side of the court, or for relief under its general relief prayer. If no such action is taken within 30 days, defendant may submit a decree in accordance with this opinion. It should, perhaps, be added that the decree of the court awarding a preliminary injunction, of which we have been reminded, was confined to preserving the rights of both parties, and a construction of the contract was expressly withheld until final decree.

MURRAY et al. v. SOUTHERN PAC. CO.

(District Court, S. D. California, S. D. May 24, 1915.)

1. CARRIERS ⇐303—INJURIES TO PASSENGERS—NEGLIGENCE.

A brakeman, when informed that a passenger desired to alight at a station and go to a hotel there, informed him that the station was on one side of the track and the hotel on the other, and that when the train reached there he would show the passenger where to get off. The brakeman, on the train reaching the station, at or about the time he opened the door leading down to the steps of the car, said to the passenger, "There is your hotel." The passenger alighted while the train was in motion, and was injured. *Held*, that the carrier was not guilty of any negligence, for the conduct of the brakeman was not an invitation or instruction to the passenger to alight, nor an inducement to the passenger to get into a place of danger causing him to fall from the car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1218, 1224, 1226–1232, 1234–1240, 1243; Dec. Dig. ⇐303.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. CARRIERS ⊂=333—PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A passenger, who alighted on a dark night from a train moving at considerable speed, and who was unfamiliar with the condition of the ground, and who was incumbered with a grip in one hand, was guilty as a matter of law of contributory negligence, precluding a recovery for injuries sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1385, 1386, 1388–1397; Dec. Dig. ⊂=333.]

At Law. Action by Mary Murray and another against the Southern Pacific Company. Judgment for plaintiffs set aside, and motion for new trial granted.

Theodore A. Bell, of San Francisco, Cal., and Milton K. Young, of Los Angeles, Cal., for plaintiffs.

W. I. Gilbert and W. I. Foley, both of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. In this case, upon a trial, a verdict was rendered in the favor of plaintiffs in the sum of $5,000, as for the death of plaintiff's intestate, and motion is now made for a new trial by the defendant. After careful consideration of the motion, I believe that it would result in substantial injustice being done to the defendant to permit the verdict to stand, and therefore I am moved to grant the motion of defendant setting aside the verdict herein.

Plaintiff's intestate was killed while alighting from one of defendant's trains at Santa Margarita, in this state. Murray, the deceased, was traveling with a companion from San Francisco to Santa Margarita, and arrived at the latter station about half past 11 at night. The most favorable evidence to plaintiff's contentions in the case is that furnished by Murray's companion, a witness named Moran, and he testifies to the effect that he and Murray were sitting in the smoking car, and that Murray and the defendant's brakeman recognized one another as old acquaintances, and Murray informed the brakeman that he and the witness, Moran, desired to get off at Santa Margarita, and wanted to go to the Santa Margarita Hotel, to which the brakeman replied:

"'The Santa Margarita Hotel is on the opposite side from the station. The station is on the left side, and the Santa Margarita Hotel is on the right-hand side, and when we get there I will show you where to get off.' So that was about all of the conversation I paid attention to there, for that was all I was interested in."

The witness then continued:

"The whistle blew, and very soon afterwards Mulville, defendant's brakeman, came in from the rear of the smoker, and came down, and called and beckoned to us, and says: 'This is where you fellows get off.' We went back to the rear end of the smoker, and Murray was first, and I followed him. The brakeman was ahead of Murray. He opened the gate, the trap, and the door, on the forward end of the coach immediately behind the smoker, or at the rear end of the smoking car, as we have reference to, and he pointed out and said, 'There is your hotel up there,' and he left at once, and went to the front end of the smoking car. Murray started down the steps, and the train was slowing down, and in fact it was just gliding along, and I was going down after him; but I knew that he was very close to the bottom—must have been on the last

step, and I happened to glance up and saw the light from the car window out on the ground, and I saw we were going quite fast, a great deal faster than I ever thought we were going, and Murray at the same time made an effort to step or get off, or something, and I called to him, and it was too late; he was overbalanced, and he went off. He had a grip in his left hand, and had hold of the hand-hold on the right-hand side. He went to go off, and as I called to him, of course, his grip came down, and he would let it rest on the step, and then pick it up, and he raised his foot to go off, and he started straight back, and the grip swung out, and his left hand swung around, and he just went as quick as that (snapping fingers); he was gone. His back was toward the engine when he fell. When the brakeman pointed out to him and said, 'There is your hotel,' I was immediately back of Murray. We were all pretty well crowded on the platform there. The brakeman was down the steps a ways, and he had to stoop down to point to it, when we were coming in to it. We hadn't got abreast of it. I saw lights, but I couldn't distinguish which one he was pointing out to. It was dark; you couldn't see a thing there. It was very dark, excepting where the lights of the train. * * * It was too dark to see the ground immediately below the step. The only reason why I knew that Murray was making a mistake was because I got a glimpse of the ground from the lights of the car windows down below, the way it would shine out below. * * * I saw then it was going much faster than— Over on the street there were lights, but the street is a considerable distance from the car tracks. I believe they are coal oil or gas lights. They were very dim; they did not flash on the ground; there was no light immediately in front of the steps when he stepped off—absolutely. The brakeman pulled up the trapdoor first and swung that back, then he opened the door, the outside door, of the car; he was in a hurry at the time. He immediately left. After I saw Murray disappear, I went down the steps, and got off, and ran back along until I found him. He was unconscious and died before regaining consciousness. * * * At the time Murray got off, the trapdoors and vestibule doors on the right-hand side of the train were closed. I do not know if they were opened at all. The train had not come to a standstill when I got off. Up to that time the doors on the station side between the smoker and first coach had not been opened, to my knowledge. They were not opened at the time Murray started to descend. Murray was a large man, 5 feet 11 inches high, and weighed about 230 pounds, a great, big, strapping man. * * * There was no platform provided for passengers alighting where Murray attempted to alight; the ground was just the same as you will get along any railroad track where they haven't made provisions for passengers to get off—just like anywhere along the last 50 miles back. * * * Murray was standing as close to the step there as he could, when the brakeman said, 'There is your hotel up there.' I was standing about on the bumpers, just between the cars, or perhaps a little bit over on that car that followed the smoking car. The brakeman was down on the steps. He pointed up, because we hadn't got up there yet. He leaned out and pointed up to the hotel, where we could see the lights of the hotel. He says, 'There is your hotel.' The brakeman then got out; he was in a hurry. That is all the conversation I heard on the platform by any one. * * * Before we reached the station he pointed out the hotel on the opposite side of the station, saying, 'There is your hotel.' Then he turned and walked away after he opened the vestibule door. He didn't say anything about getting off, which side we should get off on, while we were on the platform; just opened the door and walked away. Murray then descended the steps with his grip in his left hand. * * * The train was going perhaps 12 miles an hour, perhaps more; I could not tell. I happened to look out. I was standing back from the steps, and I had to glance up that way to where the light was cast out of the car window, and there I saw the ground. I saw Murray step off; he stepped like he thought there was another step or the ground. I think the train was going 12 miles an hour, fully that. He heard my warning, and tried to recover himself. I was standing behind him. As soon as I saw the rapidity with which the train was moving, I saw it was dangerous, and I knew it wouldn't do for him to attempt to alight, and I called to him. He tried his best to recover himself, but he could not get back. The train ran about seven coaches from where he got off."

[1] Plaintiff's contention at the trial was that defendant was guilty of negligence, in that the words and conduct of its brakeman constituted an invitation or instruction from him to the deceased to alight from the train at the time and place at which he attempted to alight, and, such place being a place of danger, it was neglect for the brakeman thus to indicate to the deceased the duty of alighting thereat. With respect to this, however, it is difficult to see how the suggestion made by the brakeman could be construed into a request or invitation by him for the deceased to alight at the precise time and place at which the accident occurred. It will be noticed from the testimony of deceased's companion that there was no direction on the part of the brakeman that Murray should alight, no suggestion so to do, and the most that was said and done was the statement by him to Murray, "There is your hotel," at or immediately subsequent to the time when he opened the door leading down to the steps of the car. The brakeman's statement to the deceased, in the light of the circumstances as they existed, and assuming that the deceased exercised the due and ordinary care which was required of him, amounted to no more than an invitation or request to alight at a time when the movement of the train would make it safe for him so to do. His companion, Moran, standing behind him, observed that it was dangerous to attempt to alight at the time he actually did, so he, therefore, must have observed the same conditions that Moran observed, there being no evidence to the contrary, and he must have understood, even if he took the brakeman's statement as an invitation to alight, that it was dangerous for him so to do, and he should have refrained from alighting at that time.

[2] It is probably true, as contended by plaintiff, that it is not negligence per se for a passenger to alight from a train while the train is moving. The presence or absence of negligence in such a case would depend upon the concomitant circumstances. The Supreme Court of California in Carr v. Eel River Railway Company, 98 Cal. 366, 33 Pac. 213, 21 L. R. A. 354, approved of an instruction to the effect that:

"Ordinarily a passenger would be held not to be justified in getting off the train while it is in motion, except at his own risk. Unless the train is moving very slowly, and the circumstances are specially favorable, it would be deemed prima facie negligence."

Construing this instruction further the court said:

"A passenger's act in jumping from a moving train may be grossly negligent, and thereby release the carrier from all liability, notwithstanding it was done at the suggestion or upon the assurance of safety by the employé. The employé's advice at the moment is in no sense conclusive upon the passenger as to his negligence or nonnegligence in jumping from the train. Like every other circumstance surrounding the transaction, it casts some light upon the scene, and thereby aids the court, according to the power and brilliancy of its light in each particular case, to determine what a careful, prudent man would have done, placed in the position of the unfortunate passenger. * * * The earlier cases in many instances recognize the principle of negligence per se in alighting from a moving train, but modern authority to a great extent has supplanted that doctrine with broader views upon the question."

Surely in the case at bar there were no circumstances "specially favorable," as referred to by the California Supreme Court, which would tend to remove the prima facie impression of negligence, caused

by one who assumes the risk of attempting to alight from a moving train. On the contrary, the circumstances herein were to my mind more than ordinarily unfavorable. The night was dark, the train was moving at a considerable rate of speed, and the deceased was entirely unfamiliar with the condition of the ground upon which he was to alight. In addition, he was incumbered with a grip or valise in one hand. The danger of attempting to alight under such circumstances was obvious to his companion, who was behind him, and it must have been obvious to him. To attempt to alight in the face of such danger, and in the face of such unpropitious circumstances, was substantially to take his life in his own hands.

The suggestion is made by plaintiff's counsel that he may not have noticed his position and danger, or that he may have lost his hold upon the car, and have fallen off accidentally. There is no proof, however, to support the inference that he fell off accidentally. In any event, there was nothing in the conduct of the brakeman to justify him in placing himself in, or permitting himself to get into, a place of danger, which by the use of the most casual observation and prudence upon his part could have been plainly obvious to him. I can come to no other conclusion than that the death of plaintiff's intestate was due to his want of care, and that to permit the verdict of the jury to stand, and the defendant to be holden responsible therefor, would be to give countenance to a manifest and profound injustice.

For these reasons, the motion for a new trial is granted, and the verdict and judgment heretofore rendered are hereby set aside.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. July 29, 1915.)

Nos. 18–20.

1. CRIMINAL LAW ⟸281—PLEAS IN ABATEMENT—GROUNDS—DEMURRER.

That accused, filing pleas in abatement to an indictment on the ground of irregularities in the constitution and summoning of the grand jury, had presented his objections to another district judge on challenge to the array before indictment, and that his objections had been overruled, may be the subject of replication, but is not available on demurrer to the pleas.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 652; Dec. Dig. ⟸281.]

2. CRIMINAL LAW ⟸280—PLEA IN ABATEMENT—GROUNDS.

A plea in abatement to an indictment on the ground of the production of documentary evidence in violation of the professional privilege of counsel for accused and of the rights of accused under the fourth amendment to the Constitution, which shows a compulsory production, by the chief clerk of the legal department of accused, of records, documents, and confidential papers of accused and in the official custody of the chief clerk, in which they were placed by counsel for accused for use in the preparation of defense of accused to the offense charged in the indictment, is insufficient to bring the matter within Const. U. S. Amend. 4, relating to unreasonable searches and seizures.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645–651; Dec. Dig. ⟸280.]

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8. WITNESSES ⊂=304—SELF-INCRIMINATION—PRIVILEGE.
The right, under Const. U. S. Amend. 5, to refuse to incriminate oneself, is purely a personal privilege of an individual witness, and is not without the aid of the fourth amendment to be extended to a corporation defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1051, 1052; Dec. Dig. ⊂=304.]

4. CRIMINAL LAW ⊂=280—PLEA IN ABATEMENT—CALLING OF UNSWORN WITNESS.
A plea in abatement to an indictment for calling an unsworn witness before the grand jury, but which does not aver that the witness testified without being sworn according to law, is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. ⊂=280.]

5. CRIMINAL LAW ⊂=280—PLEA IN ABATEMENT—PRESENCE OF UNAUTHORIZED PERSON IN GRAND JURY ROOM.
A plea in abatement to an indictment because of the presence of a person not authorized by law in the jury room is insufficient for not specifically averring the capacity in which the person acted while so present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. ⊂=280.]

6. CRIMINAL LAW ⊂=280—PLEA IN ABATEMENT—GROUNDS—PRODUCTION OF IMPROPER DOCUMENTARY EVIDENCE.
A plea in abatement to an indictment because of the production of improper documentary evidence before the grand jury is insufficient for failing to allege that there was no other competent evidence to warrant the finding of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. ⊂=280.]

7. CRIMINAL LAW ⊂=280—PLEA IN ABATEMENT — GROUNDS — POSSESSION OF STENOGRAPHIC NOTES OF TESTIMONY BEFORE PRIOR GRAND JURY.
A plea in abatement to an indictment on the ground of the possession by the United States attorney, or his assistant, of stenographic notes of testimony taken before a previous grand jury, is insufficient, where it does not aver that the grand jury considered the notes, or that any one called their attention to any fact set out therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. ⊂=280.]

8. CRIMINAL LAW ⊂=280—PLEA IN ABATEMENT—GROUNDS—IRRELEVANT OPINION EVIDENCE.
A plea in abatement to an indictment because of the asking of witnesses questions as to irrelevant opinion evidence is insufficient for failing to aver that the witnesses answered the questions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645-651; Dec. Dig. ⊂=280.]

9. CRIMINAL LAW ⊂=280—PLEA IN ABATEMENT—GROUNDS—IMPROPER PRODUCTION OF TESTIMONY.
A plea in abatement to an indictment which avers the improper production before the grand jury of a photographic copy of a demurrage tariff, alleged to have been in force during the time set forth in the indictment, and that the United States attorney improperly questioned witnesses to show that accused violated the tariff, though the attorney knew that the tariff was not the tariff filed with the Interstate Commerce Commission and was not the tariff covering the shipments during the times set out in the indictment, but that another tariff was filed and was then in force, goes to the want of proof of the copy as evidence, and its irrelevancy based on the time during which the tariff was in force, but is

insufficient for want of averment that other tariffs were not produced or that there was not other legal evidence on which the grand jury could find the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 645–651; Dec. Dig. ⊂=280.]

10. GRAND JURY ⊂=26—POWERS—INQUISITORIAL PROCEEDINGS.

The grand jury possesses the broadest kind of inquisitorial powers and has jurisdiction to proceed without any specific charge against any one.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 64, 65; Dec. Dig. ⊂=26.]

11. CRIMINAL LAW ⊂=1166—EVIDENCE BEFORE GRAND JURY—REVIEW—PREJUDICE.

While the prosecuting officer conducting a proceeding before the grand jury is presumed to be familiar with the rules of evidence, and while he must take care that no inadmissible evidence is received, yet the court will not review the testimony taken before the grand jury in the same manner as before a petit jury on motion for new trial, and will not review the conduct of an officer in his presentation of evidence unless accompanied by some impropriety by which the grand jury is shown to have been influenced to the prejudice of accused, or of such nature that prejudice will be presumed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100–3102, 3107–3113; Dec. Dig. ⊂=1166.]

The Philadelphia & Reading Railway Company was indicted. On demurrers to pleas in abatement. Overruled in part and sustained in part.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. Pleas numbered 1 to 10, inclusive, are identical as to each of the three indictments. To indictment No. 18 additional pleas Nos. 11 and 12 and 13 have been filed, and plea 11 to indictment No. 19 is identical with that filed to indictment No. 20. Pleas Nos. 1, 2, 3, and 4 to each indictment relate to irregularities in the constitution of the grand jury and summoning of the grand jurors. Nos. 5 and 6 to the production of documentary evidence in alleged violation of the professional privilege of counsel for the defendant and of the rights of the defendant under the fourth and fifth amendments to the Constitution. No. 7 relates to calling an unsworn witness. No. 8 to the presence of a person not authorized by law in the jury room. No. 9 to the production of improper documentary evidence. No. 10 to the possession by the United States attorney or his assistant of stenographic notes of testimony taken before a previous grand jury. Nos. 11, 12, and 13 to indictment No. 18 relate to asking witnesses questions as to irrelevant opinion evidence. Plea No. 11 to indictments Nos. 19 and 20 relate to improper production of a photographic copy of a tariff alleged to be improper and irrelevant as evidence.

[1] The district attorney has called the attention of the court to the fact that the questions raised by pleas Nos. 1, 2, 3, and 4 were decided adversely to the defendant by Judge Dickinson upon challenge to the

array before the indictments were presented to the grand jury and that these questions are therefore res judicata.

If the defendant has had its day in court and full opportunity to present its objections, and this court by Judge Dickinson has disposed of its challenge, such fact might have been the subject of replication; but is not before the court on the demurrers. I am not convinced that the pleas are bad upon their face upon any of the grounds set out in the demurrers.

[2] The fifth and sixth pleas relate to the production under subpœna by Henry Kellerman, Jr., chief clerk of the legal department of the defendant company, of records, documents, and confidential papers of the defendant and in the official custody of Kellerman, in which they were placed by counsel for the company for use by them in the preparation of the defense of the defendant to these proceedings.

As I understand the ruling of the Supreme Court in the case of Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, reviewing the previous cases in their bearing upon the application of the fourth amendment to a requirement to produce papers under a subpœna duces tecum and holding that, under the circumstances in that case, the order for production of books and papers constituted an unreasonable search and seizure within the fourth amendment, the fifth plea, even giving effect to what is inferentially pleaded, does not set up sufficient facts to bring the averments in the plea within the doctrine of that case, nor is there sufficient set out to bring it within the decision of the Supreme Court in the case of United States v. Louisville & Nashville Railroad Company, 236 U. S. 318, 35 Sup. Ct. 363, 59 L. Ed. 598 (No. 499, October term 1914, decided February 23, 1915), in its ruling upon the production of confidential communications between attorney and clients. If the depositing of records, documents, and papers of the railway company with the chief clerk of the legal department for use by counsel is sufficient upon an averment that the papers are "confidential" to justify the refusal of an officer of the corporation to produce them, then a defendant railroad company may secure itself against the production of any documents bearing upon its transactions which involve violations of any of the laws relating to interstate commerce. It is not intended to be decided that, in a case where confidential communications between attorney and client are in the hands of counsel for the corporation, the refusal of their production under a subpœna duces tecum would not be justified by reason of the privilege of counsel. Facts necessary to bring it within that rule are not, however, sufficiently pleaded. Grant v. U. S., 227 U. S. 79, 33 Sup. Ct. 190, 57 L. Ed. 423.

[3] The question of the right of the government to compel the railway company to incriminate itself by producing its records, documents, and papers has not been decided by the Supreme Court in any case in which the corporations whose papers were sought to be produced was the defendant charged in the indictment. As I understand the decisions, however, in Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, Wheeler v. United States, 228 U. S

489, 33 Sup. Ct. 158, 57 L. Ed. 309, and B. & O. v. I. C. C., 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878, the right under the fifth amendment to refuse to incriminate oneself is purely a personal privilege of an individual witness, and is not without the aid of the fourth amendment to be extended to a corporation defendant.

In Hale v. Henkel the Supreme Court said:

"While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

And in Wilson v. United States the court said:

"That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made."

And in Wheeler v. United States it was held that:

"As against the corporation, the true owner of the books and papers, their production might lawfully be compelled, and that there was no self-incrimination of such officer, because he was not compelled to produce his private books, but the books of the corporation, which were not within the protection given to the private books and papers of an individual."

If I am wrong in the conclusion that a corporation is not protected from self-incrimination under the fifth amendment and the defendant is injured thereby, it will have its opportunity to have the question more definitely settled in a higher court. Under the authority of the cases cited, pleas 5 and 6 are held insufficient.

[4] Plea No. 7 is insufficient, in that it is not averred that Henry Kellerman, Jr., testified without being sworn according to law.

[5] Plea No. 8 is insufficient in not specifically averring the capacity in which the person alleged to be present aiding in the production of evidence before the grand jury was acting while so present.

[6] Plea No. 9 is insufficient because it does not allege that there was no other sufficient competent evidence before the grand jury to warrant the finding of the indictment than that charged to be incompetent as not consisting of original records, documents, and papers properly admissible in evidence. Hillman v. U. S., 192 Fed. 264, 112 C. C. A. 522; Chadwick v. United States, 141 Fed. 234, 72 C. C. A. 343; McKinney v. United States, 199 Fed. 25, 117 C. C. A. 403.

[7] The tenth plea sets up that the United States attorney or his assistant had in his possession within the grand jury room certain stenographic notes of testimony of certain witnesses appearing before a grand jury at a prior term. There is no averment that the grand jury did consider or observe the notes or that any one called their attention to any facts set out in such notes. The statement that, by the production of the record, the attention of the members of the grand jury was called to the previous consideration of the matters then before them by a former grand jury of the court, is argumentative; for

from all that appears in the plea the notes were in the possession of the prosecuting officer for his own use, and there is no direct averment that the notes were presented to the grand jury for their consideration. The plea must therefore be held insufficient.

[8] Pleas 11, 12, and 13 to indictment No. 18 are insufficient, in that it is not averred that the witnesses, of whom the alleged irrelevant opinion evidence was asked, answered the questions; so that there is nothing in the pleas to show that improper opinion evidence was introduced before the grand jury. It is entirely supposable from the averments in the pleas that, upon the questions being asked, the prosecuting officer realized the impropriety of attempting to introduce evidence which could have no legal bearing upon the guilt or innocence of the defendant and withdrew the question, or that the grand jury itself declined to hear the witnesses in reply on the the ground of the answers to such questions being immaterial and irrelevant.

[9] The eleventh plea to indictments Nos. 19 and 20 avers the improper production by the attorney representing the United States before the grand jury of a photographic copy of a demurrage tariff alleged to have been in force during the time set forth in the indictment, and avers that the attorney then improperly questioned certain witnesses to show that the defendant had violated the tariff by failure to charge certain demurrage upon certain cars, although the attorney knew at the time that the tariff represented by the photographic copy was not the tariff filed by the attorney with the Interstate Commerce Commission and was not the tariff covering the shipments during the times set forth in the indictment, but that another and different tariff was filed with the Interstate Commerce Commission and was then in force, and by the terms and conditions of such tariff the charges made by the defendant were just and proper. This plea goes to the want of proof of the copy as evidence, its irrelevancy based upon the time during which it was in force, and the intention of the prosecuting officer in introducing it. As to the production of a copy of the tariff, it is entirely supposable under the averments in the plea that the original had been lost, or destroyed, and that the photographic copy was properly proved. It is entirely supposable that it was relevant by reference to it in a later tariff which may have been produced, or upon some other ground. Moreover, it is not averred in the plea that other tariffs were not produced or that there was not other legal evidence upon which the grand jurors could have found a true bill. There is no averment in this or in any of the other pleas relating to the evidence that the bill of indictment which the grand jury returned was framed at the time of the evidence before it was being produced.

[10] The power of the grand jury extends to the broadest kind of an inquisitorial proceeding, and it may, before a bill of indictment is framed, investigate at the instance of the court, or the district attorney, or at their own instance, a suspected or alleged crime, and determine whether it has been committed, and, if so, who committed it. The grand jury has jurisdiction to proceed under its inquisitorial

powers without any specific charge against a particular person or corporation being before it, and it would be impracticable, as well as unwise from the standpoint of requiring the proceedings before the grand jury to be made public, for the court to pass upon every item of evidence introduced or considered before the grand jury.

[11] While the prosecuting officer who is conducting the proceedings before the grand jury is presumed to be familiar with the rules of evidence and it is his duty to take care that no evidence is received that would not be admissible before the court upon the trial of the case (1 Wharton, Crim. Law. § 493), there may be as many differences of opinion among counsel as to what is and what is not admissible in proceedings before the grand jury as are apparent in trial before the court and a petit jury. Owing to the secret nature of the proceedings before the grand jury, however, and the fact that they need only be prima facie satisfied of the guilt of the defendant, it has been the recognized policy of the courts not to review the testimony taken before the grand jury in the same manner as before a petit jury upon a motion for a new trial, and not to review the conduct of the prosecuting officer in his presentation of evidence unless accompanied by some impropriety by which the grand jury is shown to have been influenced to the prejudice of the defendant, or of such nature that such prejudice will be presumed.

The demurrers are overruled as to the first, second, third, and fourth pleas to each indictment. As to the remaining pleas, the demurrers are sustained.

In re BRADLEY.

(District Court, N. D. Alabama, S. D. August 18, 1915.)

No. 14121.

1. LANDLORD AND TENANT ⊂=105, 199½—LIABILITY FOR RENT—"SALOON."
A lease of premises, made when it was lawful to sell intoxicants, to be occupied and used only for the purposes of a saloon, which were in fact used for the sale of nonintoxicants, cigars, and tobacco, was not terminated by a subsequent law prohibiting the sale of intoxicants, as the word "saloon" includes a place for the sale of nonintoxicants as well as intoxicants; and, as the destruction of the leased premises was partial and not total, there was no remission or apportionment of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 329, 330, 761; Dec. Dig. ⊂=105, 199½.

For other definitions, see Words and Phrases, First and Second Series, Saloon.]

2. COURTS ⊂=366—UNITED STATES COURTS—DECISIONS OF STATE COURTS.
Where a lease of premises for use only as a saloon was executed after decisions of the Alabama court of last resort that the prohibition law did not forbid the sale of nonintoxicants upon such premises and that their sale did not release the tenant from rent, such decisions should be followed by the United States District Court in bankruptcy in determining the tenant's liability for rent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⊂=366.]

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3. ATTACHMENT ⟸161—LEVY—POSSESSION OF PREMISES.
A sheriff levying upon personal property has the right to the temporary possession of the premises long enough for him, in the exercise of reasonable diligence, to inventory and remove for storage the property levied upon.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 457–459; Dec. Dig. ⟸161.]

4. LANDLORD AND TENANT ⟸190—EVICTION—LEVY OF ATTACHMENT.
An attachment and levy in aid of the collection of rent under which the sheriff, after the filing of a petition in bankruptcy against the tenant, without objection by the tenant and with the acquiescence of the landlord's agent, locked the storehouse in which the tenant's stock of goods was kept, and surrendered possession to the receiver in bankruptcy appointed the following day, did not amount to an eviction, so as to defeat a claim for rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 765–769; Dec. Dig. ⟸190.]

5. LANDLORD AND TENANT ⟸109—RENT—SURRENDER OF PREMISES.
The tenant's surrender of the key of premises on demand of a sheriff attaching his personal property could not be construed as a surrender of the premises, nor could the sheriff's acceptance of the key in the presence of the landlord's agent be construed as an acceptance of a surrender.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350–360, 363–365, 368–371; Dec. Dig. ⟸109.]

In Bankruptcy. In the matter of Ben R. Bradley, bankrupt. Petition of Mrs. K. D. Wilcox, landlord, to review order of referee disallowing lien for rent. Petition granted, and lien allowed.

Needham Graham, Jr., of Birmingham, Ala., for petitioner.
S. B. Stern, of Birmingham, Ala., for trustee in bankruptcy.

GRUBB, District Judge. This is a petition to review the order of the referee, disallowing the lien of the petitioner, Mrs. K. D. Wilcox, for rent of the premises occupied by the bankrupt. It is conceded by the trustee that the petitioner would be entitled to the lien but for two reasons: In the first place, it is contended that the lease contract was avoided by the going into effect of the Alabama prohibition law, which prevented the operation of saloons in Alabama after June 30, 1915; the lease providing that the leased premises should be occupied and used only for the purpose of a saloon. In the second place, it is contended that there was an eviction by the landlord of the tenant, through an attachment which the landlord caused to be levied on the personal property of the tenant situated on the leased premises, to satisfy the landlord's lien for rent.

[1, 2] First. The lease contained a provision that the premises should be used by the tenant as a saloon and for no other purpose. The use of them for the sale of intoxicating liquors was prohibited by the Alabama prohibition law, which went into effect July 1, 1915. The contention is that this had the effect to destroy the entire subject-matter of the lease, since the only purpose for which the premises could be used, as limited by the terms of the lease itself, was for the sale of intoxicating liquors. Whether this contention is correct depends upon the meaning to be given the word "saloon" as used in the lease. The

tenant's contention is that this word, as used in the lease, is confined to a place where intoxicating liquors are offered for sale. The landlord's contention, on the other hand, is that the word "saloon" means a place where nonintoxicating liquors, as well as intoxicating liquors, are sold, together with cigars, tobacco, and cigarettes. If the word "saloon" applies only to a place where intoxicating liquors are sold, inasmuch as such a place could not have been legally operated after June 30, 1915, and inasmuch as the premises could have been, consistently with the terms of the lease, used by the tenant for no other purpose, they could not have been used by him at all, and hence it is argued that the entire subject-matter of the lease was thereby destroyed. On the other hand, if the word "saloon" applied as well to a place where nonintoxicants were sold, as to one where intoxicants were sold, then there would be, at most, but a partial destruction of the subject-matter of the lease, which would not excuse the payment of rent. It is conceded that the tenant in fact used the premises for the sale of nonintoxicating drinks and cigars and tobacco while he was in possession.

The Supreme Court of Alabama, in the case of O'Byrne v. Henley, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496, has decided that the word "saloon" includes a place for the sale of nonintoxicants as well as intoxicants, and that a lease, in the terms of the one in this case, was binding on the tenant after the prohibition of the sale of intoxicating liquors took effect in Alabama. The case of Griel Bros. Co. v. Mabson, 179 Ala. 444, 60 South. 876, 43 L. R. A. (N. S.) 664, while giving a different meaning to the word "barroom," reaffirms the construction given the word "saloon" in the former case.

In view of the fact that the question is one involving the tenure and right of possession to real estate, and a local one, the decision of the court of last resort of Alabama should be followed by this court, especially as the lease in this case was executed after the decision of the Supreme Court of Alabama in the case of O'Byrne v. Henley, and very probably in reliance upon it. Abraham v. Casey, 179 U. S. 210, 21 Sup. Ct. 88, 45 L. Ed. 156; Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028; Old Colony Trust Co. v. City of Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410; Brown Forman Co. v. Kentucky, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883.

The law of Alabama is also equally well settled that, where the destruction of the leased premises is partial and not total, there is no remission or apportionment of rent because of such partial destruction, unless the lease itself so stipulated. McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; Chamberlain v. Godfrey, 50 Ala. 530; Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446; Cook v. Anderson, 85 Ala. 99, 4 South. 713. The intimation of the court in the opinion in the case of O'Byrne v. Henley, as to a possible right of the tenant to an apportionment of the rent obligation in such a case, in the face of the settled rule in Alabama to the contrary, would seem unwarranted. The tenant is liable for the stipulated rental in full or for none, under the Alabama decisions cited.

[3, 4] Second. This leaves for solution the inquiry as to whether there was an eviction of the tenant by the landlord, through the instru-

mentality of an attachment, which the landlord caused to be levied upon the personal property of the tenant, situated upon the rented premises. The evidence tends to show that the bankrupt advised the agent of the landlord, before the attachment was issued and before bankruptcy intervened, to take steps to secure and collect his rent. The petition in bankruptcy was filed on the day preceding the suing out and levying of the attachment. A receiver in bankruptcy was first appointed after the sheriff had levied the attachment. It is conceded that the mere exercise of the landlord's undoubted right to levy an attachment to secure and collect past-due rent would be no indication of a purpose and intent to evict his tenant. In this case the sheriff executed the attachment by locking up the storehouse in which was located the personal property levied upon. The bankrupt, without objection, turned the key over to the sheriff on his demand, and all persons then in the saloon left with the sheriff, when the premises were by him locked up. The landlord's agent was in the saloon at and before the time the levy was made and the saloon closed, and made no objection to the manner of the levy. If the acts of the sheriff, even though they were approved or acquiesced in by the agent of the landlord, did not constitute an eviction of the tenant, then the other questions presented need not be decided. The sheriff surrendered possession of the premises the day succeeding the day of the levy to the receiver in bankruptcy.

Without passing upon the right of a sheriff to permanently close premises upon which is situated personal property upon which he has levied, it seems reasonable that he should have the right to the temporary possession of the premises, long enough for him in the exercise of reasonable diligence to inventory and remove for storage the property levied upon. This is the effect of the cases of Daniels v. Logan, 47 Iowa, 395, and of Wolf v. Ranck, 161 Iowa, 1, 141 N. W. 442.

In this case, all of the personal property on the premises was levied upon, so that the premises could not have been longer used by the bankrupt for the conduct of his business, since his entire stock was in the possession of the sheriff. If the sheriff had placed a bailee in possession of the personal property, as he had the undoubted right to do, the result would have been exactly the same to the tenant. In this case, the tenant was foreclosed from continuing business, even before the levy, by the filing of the petition in bankruptcy. There is no evidence of any declaration of the landlord or her agent, from which it could be inferred that the purpose of the attachment was other than the collection of the rent. Indeed, it seems quite clear that there was no other purpose on her part than to secure her rent in response to the invitation of the tenant to do so. Nor did the sheriff, while the agent was present, do anything inconsistent with a purpose merely to take possession of the personal property on the premises against which the levy was directed. At most, it can only be said that he selected a method of retaining custody of the property levied upon that was irregular, but which evinced no intent either upon his part or that of the agent to close up the premises for any other purpose than to keep safely the goods levied upon. Nothing was done by the sheriff that is not reasonably referable to a custody of the goods levied upon, and for this reason

no inference can be drawn that there was an intent by what was done to oust the tenant. His acts might constitute a trespass, but could not amount to an eviction.

[5] The fact that the tenant surrendered the key to the sheriff on his demand, conceding that it amounted to an abandonment of the premises, would only be significant, under the Alabama decisions, in the event that the acts of the sheriff, done with the acquiescence of the agent, amounted to a partial eviction of the tenant. The delivery of the key to the sheriff by the bankrupt was not done with the intent to surrender his possession of the premises as tenant to the landlord, but in response to the demand of the sheriff, made in pursuance of the writ of attachment. It cannot therefore be construed as a surrender, nor can the acceptance of the key by the sheriff, in the presence of the agent of the landlord, be construed as an acceptance of a surrender.

The petition for review is granted, and an order will be here made establishing the lien of the petitioner upon the fixtures of the bankrupt (or the proceeds of their sale) that were located on the leased premises during the term.

In re LANGFORD, FELTS & MYERS. In re HANSLEY & ADAMS. In re COHN.

(District Court, S. D. California, S. D. June 16, 1915.)

BANKRUPTCY ⊂=481—COMPENSATION OF REFEREE—APPOINTMENT AS SPECIAL MASTER.

Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, and especially in view of the provision of section 72, added by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (Comp. St. 1913, § 9656), that a referee shall not "in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed by this act," the court has no power to allow a referee additional compensation for the doing of anything which it is expressly by the act or by the general orders made his duty to do, or which it is by such act or general orders made permissible with the judge to refer to him for hearing and report; but the court may under its general powers refer matters not within the scope of such express or permissive provisions, although arising in a bankruptcy proceeding, to a referee or another as a special master, and may allow the usual compensation of special masters for his services therein.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 886; Dec. Dig. ⊂=481.]

In Bankruptcy. In the matters of Langford, Felts & Myers, a corporation, of Hansley & Adams, and of Samuel B. Cohn, bankrupts. On motions to fix fee of referee for services as special master.

Carlos S. Hardy and Rex G. Hardy, both of Los Angeles, Cal., for petitioning creditors In re Langford, Felts & Myers.

Sanson, Cass & Shelton, of Los Angeles, Cal., for bankrupts Hansley & Adams.

Harry C. Levey, for bankrupt Cohn.

BLEDSOE, District Judge. Motions have been made in each of the above-entitled proceedings to fix and assess the special master's fee of Mr. Lynn Helm, referee in bankruptcy of this court, alleged to be due because of his acting as special master in the matters in bankruptcy theretofore referred to him. Because of the fact that the question has been raised in these three proceedings as to the right and authority of this court to assess and fix special master's fees in bankruptcy proceedings, I will, for purposes of convenience and a saving of time, consider them all herein.

In the case first above entitled, a petition in involuntary bankruptcy was filed against the corporation, and, no opposition appearing, an order of adjudication, followed by the appropriate order of reference, was made by the judge. Thereafter there was presented to the District Court (Judge Wellborn presiding) by certain creditors a petition or motion to set aside and vacate the order of adjudication theretofore made, on the ground of alleged fraud in the matter of the presentation of the original involuntary petition. In due course this motion came on for hearing, whereupon, as appears from the minutes, the following order was entered:

"* * * And it appearing to the court that this matter has been improperly presented to the judge of this court, now, pursuant to General Order in Bankruptcy No. 12, it is presented to Lynn Helm, Esquire, the referee in bankruptcy herein, to whom this matter was heretofore generally referred."

Thereupon the matter was heard and considered by the referee, much evidence was taken, and a report incorporating findings and conclusions was prepared and filed by Mr. Helm as "referee in bankruptcy," and in which the referee made the recommendation that "judgment be entered" denying the motion to vacate, etc. Thereafter appropriate proceedings were had as for a "review" of "findings of fact and conclusions of law" of the referee. Upon this review coming on for hearing before this court, the report was confirmed and the motion to vacate was thereupon denied. Thereupon a "report of the referee" was filed and presented to the court, setting up the fact hereinbefore referred to, and specifying with some particularity the labors performed by the referee, and concluding with the following statement:

"Inasmuch as the matters involved in the petition of J. D. Langford and G. W. Felts were not matters which would come before me in the ordinary administration of said bankruptcy proceeding as referee, but pertained to matters with reference to the adjudication, I am of the opinion that an allowance should be made to me for hearing said matter as a special master, and if it is proper that such an allowance should be made I ask that the court fix a reasonable fee, to be taxed as costs, against the petitioners for said master's fee.

"Of course, if it was within my duty as referee in charge of said proceedings to hear said matter, I do not ask for any allowance, and no allowance should under any circumstances be made. If there is any doubt about the matter, it should be resolved against me; but the matter is submitted to the judge of this court for such order as to him shall seem meet."

In the Hansley & Adams Case it appears that, upon a petition in voluntary bankruptcy being filed by one of the members of a part-

nership, opposition thereto, together with a denial of bankruptcy, was filed by another partner. Thereupon the issues thus raised were, pursuant to the stipulation of the parties, referred to Mr. Helm as "special master" to hear and report his findings and conclusions. Thereupon such a hearing was had, and upon the findings thereof, after a subsequent re-reference, an order of adjudication was finally made by the court.

In the matter of Samuel B. Cohn, the referee in his report recites the fact of an order having been made in the proceeding referring to him as "special master," a petition for discharge, together with the opposition thereto.

The regular fees as for "full compensation for their services" for the referees are fixed by the Bankruptcy Act itself. Section 40 (Comp. St. 1913, § 9624). In 1903, because, apparently, of the low fees theretofore obtaining, and also because of many abuses by way of special references and otherwise which had crept into the administration of the Bankruptcy Law in an effort to provide additional compensation, it was provided by an entirely new section in the Bankruptcy Law (section 72) that:

"Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

The language of this section is unambiguous and very emphatic. From its terms it is obvious that Congress intended that a referee should, without receipt or expectation of compensation in addition to that provided by the act, perform all the services that might be required of him by the terms of the act. It should be noted also, in passing, that this important amendment was ingrafted upon the Bankruptcy Law after the Supreme Court of the United States had made and promulgated their general orders hereinafter referred to. It thus becomes necessary to consider what duties or services are impressed upon referees by the act, the full burden of which, it must be assumed, each referee in accepting his trust agreed to perform without other compensation than that prescribed in the act itself.

By section 38 of the act (section 9622) referees are invested with jurisdiction to do and perform certain things, and among others:

(4) "Perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

By section 39 certain specific duties are enjoined upon referees: none of them, however, are germane to the inquiries herein.

By section 18 (9602), subdivision "d," of the act it is provided that upon the filing of a petition for involuntary bankruptcy:

"If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the *judge* shall determine, as soon as may be, the issues presented by the pleadings, * * * and make the adjudication or dismiss the petition."

By subdivision "e" it is provided that:

"If on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the *judge* shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition."

By subdivisions "f" and "g" of said section 18 it is provided that if the judge is absent from the district, and if no opposition has been filed by the bankrupt or any of his creditors, or in the case of a filing of a voluntary petition and in the absence of a judge, the clerk shall forthwith refer the case to the referee, upon whom, therefore, in consequence of the provisions of clause 1 of subdivision "a" of section 38 of the act, is cast the duty of considering the same and making the adjudication or dismissing the petition.

Section 30 of the act (section 9614) ordains that:

"All necessary rules, forms, and orders, as to procedure and for carrying this act into force and effect shall be prescribed, * * * by the Supreme Court of the United States."

By General Order No. 12 (89 Fed. vii, 32 C. C. A. vii), promulgated by that court in November, 1898, and effective from and after January, 1899, pursuant to the authority conferred by section 30, it was provided that after the order of reference by the judge to the referee:

"All the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee."

It was, however, provided in the same General Order that:

"Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be held and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."

By General Order No. 35 (98 Fed. xiii, 32 C. C. A. xiii), promulgated at the same time, it was provided in paragraph 2 thereof that:

"The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, *or under these General Orders*, but shall not include expenses necessarily incurred," etc.

These General Orders of the Supreme Court, being expressly provided for in the act, "have the force and effect of law" (In re Gerber, 186 Fed. 693, 108 C. C. A. 511), at least in so far as they are not in conflict with express provisions of the act.

Upon a consideration of the above-mentioned provisions of the Bankruptcy Act and of the orders of the Supreme Court promulgated in furtherance thereof, it would seem as if the court had no power to allow fees or compensation for a referee, "in any form or guise," in addition to that expressly provided by the act, for the doing of anything which it is expressly, by the act or by the General Orders, made the duty of the referee to do, or which it is by such act or General Orders made permissive with the judge to refer to the referee for hearing and report. In other words, taken together, the act and the General Orders provide what a referee shall do or may be called upon to do in a bankruptcy proceeding referred to him. For the doing of

any or all of these things he is to receive certain fees fixed by the act, and for the doing of such things he cannot, directly or indirectly, "in any form or guise," be the recipient of additional compensation.

Congress enacted section 72 of the act *after* the Supreme Court had promulgated its general orders as hereinabove referred to, and it must be assumed that Congress at that time fully understood and appreciated, not only the duties which had been cast upon the referee in virtue of the provisions of the General Orders, but also the jurisdiction and authority of the judge under those orders to refer to the referees matters not included within their specific duties as laid down in the act; and it must be assumed, also, that Congress at the same time thoroughly appreciated the fact that the Supreme Court, in the selfsame orders, had provided that the compensation of the referees as prescribed by the act should be in full "for all services performed," either under the act or under the General Orders. In this view of the case, in my judgment, the performance by the referee of the ordinary services following a general reference, or of services following a special reference having to do with any of the matters which the Supreme Court have said *may be referred* to the referee by the judge (General Order No. 12, supra), authorizes the referee to receive only the compensation specially provided in the statute. As said, in Re Halbert, 134 Fed. 236, 67 C. C. A. 18, the language of section 72 "is so precise, so unambiguous, and so explicit as to preclude the allowance of additional compensation upon any theory of a dual personality." The performance of other services, not included within the above category, if referred to the referee, or to any other person, *as a special master,* pursuant to the general power of the court to call to its aid the services of a special master, would justify the allowance of special fees as compensation therefor.

In this connection I will suggest that I conceive it to be not improper, and the court will not hesitate, in cases where the business of the court demands it, to refer to a referee matters in bankruptcy not specially cognizable by him under the terms of a general reference. If, under the act or the General Orders provision is found for a permissive reference of such matters to the referee, no additional compensation will be allowed him. He will be considered as having accepted the office cum onere. If, however, as to such special matters no authority or permission is found in the law for their reference to the referee as such, they will be referred to him, or to any other person specially qualified, as the circumstances may require, *as special master,* and the usual compensation allowed to special masters will be awarded.

Cases can be found, doubtless, which go counter to these views. It seems to have been the practice of some jurisdictions, because of the small fees allowed the referees, to make references of the character involved in the proceedings herein to the referees as special masters, and allow additional compensation therefor. Under the controlling terms of section 72, however, and considering the time of its enactment with reference to the promulgation of the General Orders as hereinbefore pointed out, I cannot believe that the court possesses such a power otherwise than as indicated hereinbefore. My views

herein find support in the following cases: In re Wilcox (D. C.) 156 Fed. 685; In re Troth (D. C.) 104 Fed. 291; and In re Sweeney, 168 Fed. 612, 94 C. C. A. 90. The cases of In re Grossman (D. C.) 111 Fed. 507, and Fellows v. Freudenthal, 102 Fed. 731, 42 C. C. A. 607, called to my attention in behalf of the referee herein, were decided prior to the enactment of section 72 in 1903, and consequently are not applicable under the terms of that section.

In the matter of Langford Felts & Myers, it being a petition to vacate an order of adjudication, the proceedings should, of course, have been presented to the judge, because the referee would have no authority or jurisdiction to vacate an order made by the judge. Were it otherwise, the authority would be invested in the inferior to stay the judgment and vacate the orders of his superior. It follows, therefore, that the order made by Judge Wellborn hereinabove set out, to the effect that the petition to vacate the order of adjudication had been "improperly" presented to him, must have been an inadvertence. This petition, however, was referred to the referee *as such* and his report was rendered as "referee in bankruptcy," and not as special master. For this reason I am constrained to hold that he is not entitled to any special fee as for the consideration of, or rendition of his report upon, the matter submitted to him in connection with the petition to vacate the order of adjudication. Under the language of the reference, Judge Wellborn evidently did not consider that he was to receive any special compensation for the services to be performed.

In the Hansley & Adams Case the matter was submitted to the referee *as special master,* and was not a matter which could by the court have been referred to the referee under the act or under the General Orders. It had reference entirely to a petition in voluntary bankruptcy, the determination of which was committed solely to the judge. In this instance, therefore, without question, the referee as special master is entitled to a special allowance, and the same will be accorded to him as prayed for.

In the matter of Cohn it appears that the reference to the referee, although made to him as "special master," had to do with a petition for discharge, and as such was referable to him under the General Orders of the Supreme Court, and he is not, therefore, entitled to special compensation for the hearing and consideration of the same.

I am authorized to state that Judge TRIPPETT concurs in my views as announced herein, and the course of procedure as hereinabove outlined will be followed in both courts of this district.

In re TRAUNSTEIN et al.

(District Court, D. Massachusetts. May, 1915.)

1. BANKRUPTCY ⊂=210—JURISDICTION—POSSESSION—WHAT CONSTITUTES.
Petitioner sold a beer pump on conditional sale to bankrupts. After bankruptcy it was claimed by the bankrupts' lessor as a trade fixture, and possession thereof was delivered to the lessor. The seller filed a petition praying that the trustee be ordered to surrender the beer pump, and thereafter filed another petition, asking that the lessor show cause why petitioner should not be allowed to take possession. *Held* that, where the order giving possession of the pump to the lessor was, with its consent, revoked so as to revest possession in the trustee, and a new order, reserving to the court jurisdiction to determine title to the pump, was made, the court had jurisdiction of the pump and could determine all questions as to ownership.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321–323; Dec. Dig. ⊂=210.]

2. BANKRUPTCY ⊂=212—CLAIMS TO SPECIFIC PROPERTY—WITHDRAWAL.
Where the seller of property to the bankrupt by contract of conditional sale filed a petition in the bankruptcy court, praying for its possession, against the trustee and the bankrupt's lessor who claimed it as a trade fixture, the seller could not withdraw his petition over objection of the trustee, who claimed (1) that he might have an equity in the property; (2) that, if not, it should go to the seller to prevent his filing a claim as general creditor; and (3) that to remit the seller to an action against the bankrupt's lessor would delay settlement of the estate.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 236; Dec. Dig. ⊂=212.]

3. BANKRUPTCY ⊂=11—JURISDICTION—CLAIMS TO PROPERTY.
Custody of property by the bankruptcy court, though acquired by agreement of the person in possession, nevertheless confers jurisdiction to hear and determine claims to the ownership thereof.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⊂=11.]

In the matter of the bankruptcy of Max Traunstein and Joseph White. Petition by the E. R. Brown Beer Pump Company for property delivered by the trustee to the New England Trust Company. On review of the referee's denial of the petitioner's motion to discontinue its petition. Decrees of referee affirmed.

The following is the opinion of Referee Olmstead:

The facts in this review are not in dispute and may be gathered from the pleadings, record, and following findings: The petitioner, the E. R. Brown Beer Pump Company, had sold on conditional sale to the debtors, conducting business as the "Café Max," a beer pump. The petitioner sought to recover this pump from the possession of the trustee, and on July 16, 1914, filed a petition asking that the trustee be ordered to deliver it to it. Afterwards ascertaining that the trustee had delivered the possession of it to the New England Trust Company which claimed it as a trade fixture, the petitioner filed upon July 23d a petition in these proceedings, asking that the New England Trust Company be ordered to show cause why the petitioner should not be allowed to repossess itself of said property. The case subsequently came on for a hearing before me, and I intimated that as the controversy was between the E. R. Brown Beer Pump Company and the New England Trust Company, the lessor of the premises—the trustee having previously surrendered possession to the New England Trust Company—I might have no jurisdiction over this controversy between outsiders or third parties. Subsequently, on October 30th,

the trustee intervened in the proceedings, in order to protect the interests of the estate. At a subsequent hearing on November 4th, on the petition of the trustee and the New England Trust Company, an order was entered vacating the decree of July 7th, under which the possession of the pump was given to the New England Trust Company. The effect of the decree of November 4th was to revest possession of the pump in the trustee, and at the same time possession was again given to the New England Trust Company, "reserving, however, to this court jurisdiction to determine the question of title to said property, and any and all rights and interests therein." At the same time two motions by the petitioner to be allowed to discontinue his original petition were denied.

This "controversy arising in the bankruptcy proceedings" is of a triangular nature. On the one hand, there is the petitioner claiming title, the trustee acting for the creditors, and the lessor, the New England Trust Company, claiming title to the pump as a trade fixture. Had the E. R. Brown Beer Pump Company prior to the bankruptcy proceedings repossessed itself of the property, and had the trustee subsequently appointed brought suit against it to recover the pump, it would have presented a case of adverse claimants, and the court of bankruptcy would have had no jurisdiction except by consent of the respondent, inasmuch as such controversy would not have arisen under sections 60a and 60b, 67e, or 70e of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562, 564, 565 [Comp. St. 1913, §§ 9644, 9651, 9654]). When, however, the court is in possession of an asset, it draws to itself the right to determine all liens and rights claimed to assets in the possession thereof. In the case of Murphy v. John Hoffman Company, 21 Am. Bankr. Rep. 487, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, the facts were somewhat similar, although the proceeding was the converse of the present proceeding. The Dodge Dry Goods Company, the debtor, had bought on a conditional sale from the John Hoffman Company certain show cases which were subsequently claimed by the lessor, the Century Mercantile Company. One Murphy was appointed receiver and trustee of the Dodge Dry Goods Company, and the John Hoffman Company brought replevin in the state court. The controversy between the lessor, the Century Mercantile Company, and the trustee, was determined subsequently in favor of the trustee. The court held that replevin in the state court, being an interference with the possession of the trustee, could not be maintained.

In the present case the trustee had originally possession, and by the modified decree of November 4th this possession was restored to him. The decisions make it certain that court which has possession may determine the rights of parties claiming liens to property in its possession. In support of this proposition Mr. Justice Moody, in Murphy v. John Hoffman Company, supra, at page 568 of 211 U. S., at page 156 of 29 Sup. Ct. (53 L. Ed. 327), says: "But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them." And in Whitney v. Wenman, 14 Am. Bankr. Rep. 45, 198 U. S. 539, 552, 25 Sup. Ct. 778, 781, 49 L. Ed. 1157, Mr. Justice Day says: "We think the result of these cases is, in view of the *broad powers* conferred in section 2 of the Bankrupt Act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties" and individuals "for the *complete determination of a matter in controversy*, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held *by him or for him*, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

(Italics mine.) In re National Boat & Engine Co. (D. C., Me.) 33 Am. Bankr. Rep. 154, 216 Fed. 211, 212.

The petitioner complains that the trustee had no right to intervene. In the last-cited case Judge Hale says: "It is the duty of the trustee to appear and protect the fund in the custody of the court."

The petitioner insists that he has a right to dismiss his bill. It is to be borne in mind that the petitioner has voluntarily appeared in the bankruptcy court, appealed to and submitted to its jurisdiction, and sought relief from it. He now seeks to withdraw. The general rule is that a complainant may dismiss his bill upon payment of costs, unless there have been intervening rights, or the respondent would be prejudiced. City of Detroit v. Detroit City Ry. (C. C.) 55 Fed. 569; Electric Accumulator Co. v. Brush Elec. Co. (C. C.) 44 Fed. 602; Chicago & Alton R. R. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; Western Union Co. v. Am. Bell Telephone Co. (C. C.) 50 Fed. 662; Id., 69 Fed. 666, 16 C. C. A. 367; Bates on Federal Equity Procedure, vol. 2, § 659.

On three grounds the trustee as the representative and protector of the estate would be prejudiced by allowing the petitioner to discontinue: First, the trustee may have an equity in the pump; second, the trustee is desirous, if he has no equity, that the petitioner shall prevail, in order that he may not file a claim against the estate as a general creditor; and, thirdly, the trustee is interested to prevent delay which would be occasioned by the petitioner being allowed to resort to a suit in the state court, under which he might claim a trial by jury, and thus delay for an indefinite time the settlement of the estate. Inasmuch as the petitioner, having appealed to the bankruptcy court for relief, does not stand in the attitude of an adverse claimant, as he might have done under certain other conditions and contingencies, he certainly cannot complain that he is deprived of a trial by jury, having submitted himself to the equitable jurisdiction of this court.

Joseph B. Jacobs, of Boston, Mass., for petitioner.
Burton E. Eames, of Boston, Mass., for respondent.
Alfred W. Putnam, of Boston, Mass., for trustee.

MORTON, District Judge. [1, 2] Traunstein and White were adjudicated bankrupts, and a trustee was appointed. The beer pump, title to which is in question in these proceedings, had been bought by them on a conditional sale and installed on the premises where they conducted their café. These premises were owned by the New England Trust Company, trustee, and were leased to the bankrupts. In this situation, an order was made by Mr. Referee Olmstead, to whom the case was referred, that the trustee remove from the premises all goods and effects of the bankrupts, and deliver possession of the premises to the trust company. This was accordingly done. The beer pump was not removed by the trustee and passed into the possession and control of the trust company. Subsequently the Beer Pump Company filed with the referee a petition praying that the trust company be ordered to turn over the pump to it as owner thereof. Doubt was suggested whether under such circumstances the bankruptcy court had jurisdiction of the pump company's claim, as the pump itself was not at that time in the custody of the court. The trustee intervened, and the trust company agreed to surrender the pump to him. The pump was not detached from the real estate in making this surrender, nor did the trustee retake possession of the premises on which it was installed. When the trust company had made a formal oral surrender of the pump to the trustee, a decree was passed by the referee revesting possession of the pump in the

trust company, reserving to this court jurisdiction to determine the ownership thereof. This decree was agreed to by the trust company, and it now holds said pump subject to the order of this court. Before this last decree had been entered, the pump company had endeavored to discontinue its intervening petition or claim for the pump. There was no collusion or bad faith in the action of the trust company in endeavoring to surrender the pump to the trustee, and in agreeing to hold it subject to the order of this court.

[3] As appears by the foregoing statement, the pump is now under the control of this court, and all questions as to its ownership can be here determined. Re McMahon (C. C. A., 6th Cir.) 17 Am. Bankr. Rep. 530, 147 Fed. 684, 77 C. C. A. 668. The fact that such control, after having been relinquished by the trustee under the first decree, was only regained through agreement of the party into whose possession the property had been surrendered, does not impair the present jurisdiction of the court to determine the ownership thereof. Re Antigo Screen Door Company (C. C. A., 7th Cir.) 10 Am. Bankr. Rep. 359, 123 Fed. 249, 59 C. C. A. 248; Havens & Geddes Co. v. Pierek (C. C. A., 7th Cir.) 9 Am. Bankr. Rep. 569, 120 Fed. 244, 57 C. C. A. 37; Re Hymes Buggy & Implement Co. (D. C., Mo.) 12 Am. Bankr. Rep. 477, 130 Fed. 977.

It follows that the learned referee was right in holding that he had jurisdiction, and in declining to allow the pump company to withdraw its petition.

Decrees affirmed.

UNITED STATES v. WELLS (two cases).

(District Court, W. D. Tennessee, W. D. April 21, 1913.)

Nos. 191, 192.

1. INDICTMENT AND INFORMATION ⇐3—PURE FOOD LAW.
Violations of the Pure Food and Drug Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. 1913, §§ 8717-8728]), may be prosecuted by information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9-23; Dec. Dig. ⇐3.]

2. INDICTMENT AND INFORMATION ⇐52—VERIFICATION—PURE FOOD LAW.
An information for a violation of the Pure Food and Drug Act must, under Const. U. S. Amend. 4, providing that no warrant shall issue but upon probable cause supported by oath or affirmation, be supported by the oath of some one having knowledge of the facts showing the existence of probable cause, and the mere fact that the information is signed by the district attorney is not sufficient, although he is a sworn officer of the government.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. ⇐52.]

3. INDICTMENT AND INFORMATION ⇐40—LEAVE OF COURT—PROBABLE CAUSE.
In prosecutions for violation of the Pure Food and Drug Act, wherein defendant is charged with a crime, upon conviction for which he may be fined and imprisoned, the information should be presented to the judge,

supported by facts sworn to, showing the existence of probable cause, and the existence of such probable cause is for the determination of the court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 151; Dec. Dig. ⊂⊃40.]

J. Lindsay Wells was charged with violating the Pure Food and Drug Act, and he demurs to the information. Demurrer sustained, and information quashed.

Casey Todd, U. S. Dist. Atty., of Memphis, Tenn.
Frank S. Elgin, of Memphis, Tenn., for defendant.

McCALL, District Judge. This case is before me upon demurrer to the information, wherein J. Lindsay Wells is charged with violating the Pure Food and Drug Act. Comp. St. 1913, §§ 8717–8728.

There are two grounds of demurrer: First. The information fails to allege that the statements therein contained had been sworn to, or that they were made upon oath before a United States commissioner. In fact, no affidavit had been made, or examination had, before a proper officer, previous to the filing of said information, touching the matters and things therein set out. Second. The information is not issued in compliance with the fourth amendment to the Constitution of the United States.

The record shows that on February 15, 1913, Hon. Casey Todd, United States district attorney, filed with the clerk of this court an information, setting out certain acts of J. Lindsay Wells, which are alleged to be a violation of the statutes made and provided in such cases. Upon the filing of the information, and on the same day, there was issued by the clerk a capias out of this court for the arrest of J. Lindsay Wells, commanding that he be brought before this court on the fourth Monday in May, 1913, to answer the charges in said information. Also, on the same day, there was issued a summons for said J. Lindsay Wells to appear and answer said information. The summons and capias were executed as commanded by the United States marshal, and returned and filed in court on February 17, 1913. On said date Wells appeared before A. G. Mathews, United States commissioner, and gave bond for his appearance at the May term of the court to further answer said information. The demurrer raises the question of the validity of the information and the proceedings thereunder. There was no affidavit or other evidence, tending to support the statements contained in the information, which was signed by the United States district attorney, Hon. Casey Todd.

[1] There is no doubt that offenses of this character may be prosecuted upon information. The question here is, Is the proceeding by information in conformity with law?

[2] In the case of U. S. v. Morgan, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198, the Supreme Court, in passing upon the question whether or not it was necessary to give notice to the accused of the purpose of the government to indict him for a violation of the Pure Food and Drug Act, held that such notice was not necessary, and, among other things, said:

"A further answer is that as to this and every other offense the fourth amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an information unless it is supported by the oath of some one having knowledge of the facts showing the existence of probable cause."

The last sentence in the excerpt may possibly be dictum in that case, but it gives expression to the views of the Supreme Court touching the proper construction of the fourth amendment to the Constitution of the United States, in cases prosecuted upon information.

There is nothing in the case at bar that indicates that the information filed by the district attorney is supported "by the oath of some one having knowledge of the facts showing the existence of probable cause." Indeed, it is conceded by the government that no such affidavit or statement was made by any one and presented with the information when application was made either for the summons or capias for the defendant.

It is insisted by the government that the information filed, signed by the district attorney, is itself made under oath, since the district attorney is a sworn officer of the government, and it was not necessary for him to have had it further verified. I do not think this contention is in keeping with the language above quoted from the case of U. S. v. Morgan. For to so hold would be to say that the information is sufficient and needs no support by the oath of some one having knowledge of the facts, showing the existence of probable cause. This view is also sustained by Judge Ray, in the case of U. S. v. Baumert et al. (D. C.) 179 Fed. 735.

[3] In addition, it seems to me that the proceeding in this case is irregular and unauthorized by law. As has been seen, the district attorney prepared the information, filed it with the clerk of the United States District Court, which official thereupon issued the capias and summons for the defendant. The cases to which my attention has been called impress me with the idea that before a summons or capias is issued in cases of this character, wherein the defendant is charged with a crime upon a conviction for which he may be fined and imprisoned, the information should be presented to the judge, supported by the oath of some one having knowledge of the facts, showing the existence of probable cause. This evidence may be oral or by affidavits, upon the hearing of which the court may or may not cause the arrest of the accused, and have him brought before the court to answer the charge, just as he may believe that the evidence does or does not show probable cause. In other words, before a citizen is arrested, there should be facts, sworn to and presented to the court, showing the existence of probable cause for such arrest. U. S. v. Baumert, supra, and authorities there cited.

I think the demurrer in this case should be sustained, and the information quashed, and the defendant discharged. An order will be entered accordingly.

A like order will be entered in No. 192, U. S. v. J. Lindsay Wells.

In re ZIFF.

(District Court, M. D. Alabama, E. D. August 19, 1915.)

1. BANKRUPTCY ⟸399—RIGHTS OF BANKRUPT—EXEMPTIONS.
Where, under the law of the bankrupt's domicile, fraud does not deprive a debtor of his exemptions, the making of a false financial statement to mercantile agencies by the bankrupt does not prevent him from claiming and holding his exemptions.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

2. BANKRUPTCY ⟸399—RIGHTS OF BANKRUPT—EXEMPTIONS.
Creditors having no interest in exempt property, the fact that the bankrupt has given waiver notes in excess of the value of his exempt property does not disentitle him to exemptions.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

3. BANKRUPTCY ⟸399—RIGHTS OF BANKRUPT—EXEMPTIONS.
A bankrupt is not disentitled to his exemptions by failure to claim them in the probate court as required by Code Ala. 1907, § 4168, where such exemptions are of less value than the amount allowed by statute; the statute only applying where selection by the exemptioner is made essential by his ownership of property in excess of the amount allowed him as exempt.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

4. BANKRUPTCY ⟸399—RIGHTS OF BANKRUPT—EXEMPTIONS.
That a bankrupt has failed to itemize the articles claimed by him as exempt in his claim filed in the bankrupt court does not disentitle him to such exemptions, where his total personal property is less in value than the amount of his exemption; such itemized statement not being required by Code Ala. 1907, § 4164, exempting personal property to the amount of $1,000 to be selected by the debtor where the property does not exceed that amount.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

In Bankruptcy. In the matter of M. Ziff, bankrupt. Petition to review an order of the referee, overruling exceptions to the trustee's report and allowing exemptions to the bankrupt. Petition denied.

Mabry & Jones, of Montgomery, Ala., for petitioner.
Hines & Fuller, of Lafayette, Ala., for bankrupt.

GRUBB, District Judge. This is a petition to review the order of the referee, overruling exceptions to the report of the trustee setting aside to the bankrupt his exemptions, and allowing to the bankrupt his exemptions as claimed by and set aside to him.

The objecting creditors contend that the bankrupt disentitled himself to his exemptions (1) by making a false financial statement to the mercantile agencies, (2) by giving waive notes in excess of the value of his exempt property and so preferring the note holders, (3) by failing to claim his exemptions in the probate court, as provided by section 4168 of the Alabama Civil Code, and (4) by failing to itemize the articles claimed as exempt in his claim filed in the bankrupt court.

[1] First. Whether the fraud of the bankrupt is a sufficient reason for denying him his exemptions, when claimed in the bankrupt court, depends upon the rule under the statutes and decisions in the state courts of the bankrupt's domicile. The fraud of the bankrupt has been held in Alabama not to disentitle him to his exemptions, even in property fraudulently transferred, when recovered by the creditors. Kennedy v. First National Bank of Tuscaloosa, 107 Ala. 170, 18 South. 396, 36 L. R. A. 308. In the case of In re Cotton & Preston, 183 Fed. 190, the District Court for the Southern District of Georgia said:

"A bankrupt is not deprived of his right to exemptions under the exemption statute of Georgia because of a fraudulent transfer of real estate made more than four months prior to his bankruptcy, nor because of false statements in writing made to obtain credit; and fraudulent concealment of assets, if relied on to defeat such right, must be proved with reasonable certainty."

In the case of In re Denson, 195 Fed. 857, 858, the District Court for the Northern District of Alabama said:

"No property theretofore fraudulently transferred or parted with by the bankrupt in any way to prevent its application to the payment of his debts could be treated as part of his exempt property. Nor could his exemption be denied as a punishment for any conduct on the bankrupt's part, however reprehensible it might be as to his creditors. This is the effect of the Alabama decisions."

For these reasons the first ground of objection is untenable.

[2] Second. Ordinary creditors have no interest in exempt property. Its transfer, even with a purpose to hinder, delay, or defraud them, is not therefore an act of which they can justly complain. Cowan v. Burchfield (D. C.) 180 Fed. 614; Pollak v. McNeil, 100 Ala. 203, 13 South. 937; Kennedy v. Bank, 107 Ala. 170, 18 South. 396, 36 L. R. A. 308; Bank of Talladega v. Browne, 128 Ala. 560, 29 South. 552. It is also settled in this circuit that a bankrupt may claim an exemption in property, which he has made the subject of a preferential transfer. In the case of Bashinski v. Talbott, 119 Fed. 337, 56 C. C. A. 241, it was held by the Court of Appeals for the Fifth Circuit that:

"A bankrupt may claim his exemptions allowed by the laws of Georgia from the proceeds of a judgment which he assigned to a trustee for the benefit of creditors, although such assignment constituted a preference under the bankruptcy act, where the assignee never made any attempt to obtain the money or any claim thereto, but after the adjudication in bankruptcy it was paid over to the trustee, by direction of the court, by the bankrupt's attorney who had collected the same."

In the case of Goodman v. Curtis, 174 Fed. 644, 98 C. C. A. 398, the Circuit Court of Appeals for the Fifth Circuit held that:

"The fact that a bankrupt has given notes in which he waived his right to exemptions does not give the bankruptcy court jurisdiction to administer his exempt property, nor affect his right to have the same set apart to him."

The nonwaiver creditors having no interest in exempt property of the bankrupt are not injured by any disposition he may see fit to make of it, even though such disposition work a preference or be made with intent to hide it from creditors. If this be true, it must

be the more true that the giving of waive notes cannot defeat the bankrupt's right of exemption.

[3] Third. Section 4168, requiring a claim of exemption to be filed in the probate court of the proper county, only applies where selection of the exemptioner is made essential by his ownership of property in excess of the amount allowed him as exempt. This has been the holding of the Supreme Court of Alabama in regard to both real and personal property. Alley v. Daniel, 75 Ala. 406; Stephen-Putney Shoe Co. v. White, 172 Ala. 89, 55 South. 503, Ann. Cas. 1913C, 1278. It is conceded in this case that the entire personal property of the bankrupt is claimed by him as exempt and to be of a value less than $1,000. Only when shown to be in excess of that sum would the claim be invalid.

[4] Fourth. It is true that section 4164 exempts "the personal property of such resident to the amount of one thousand dollars, to be selected by him." In the bankruptcy court, as in the state court, where the personal property of the bankrupt exceeds in value $1,000, selection would be necessary, and a failure to exercise selection by filing an itemized claim would be fatal. However, where the debtor owns personal property of a less value than $1,000, being entitled to it all, no duty of selection rests upon him, and the exemption attaches to the property without selection and absolutely. Alley v. Daniel, 75 Ala. 405, 406. The same reason excuses the bankrupt from filing with his schedules an itemized list of the stock of goods claimed by him as exempt, in cases where his total personal property is less in value than the amount of his exemption. The requirement of a selection where the bankrupt is entitled to all would be a futile one, and this excuses him in the bankrupt court, as under the state rule, from filing with his schedule an itemized list of personal property claimed by him as exempt in such cases. It is sufficient for the bankrupt to file with his schedules a general claim to the exempt property, without specifically describing it by items.

The petition for review is denied, the order of the referee allowing the bankrupt's exemptions is confirmed, and the petitioner is taxed with the costs of the review.

In re HUDSON PORCELAIN CO.

In re PARHAM.

(District Court, D. New Jersey. July 24, 1915.)

1. BANKRUPTCY ⊂=340—PROOF OF CLAIM—ALLOWANCE—"DULY PROVED."

A proof of claim, which does not comply with Bankr. Act July 1, 1898, c. 541, § 57, subds. "a," "b," 30 Stat. 560 (Comp. St. 1913, § 9641), as to the statement of the claim and its consideration, is not prima facie evidence of the allegations therein made, and should not be allowed, in the absence of impeaching evidence, for section 57, subd. "d," declaring that claims which have been duly proved shall be allowed, impliedly requires the rejection of others.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⊂=340.]

2. BANKRUPTCY ⊜330—PROOF OF CLAIM—SUFFICIENCY.

A proof of claim recited that the consideration was for legal services in specified months, and that the claimant appeared for the corporate bankrupt during those months, and as its counsel prepared the schedules filed. Bankr. Act, § 57, subds. "a," "b," require proofs of claim to set forth the consideration therefor, and, if founded upon instruments in writing, to set forth such instruments. *Held* that, as the statement of claim and its consideration must be sufficiently specific to enable the trustee and creditors to make proper investigation as to its fairness and legality without inconvenience, the proof of claim was not sufficient, as it failed to disclose the nature of the services rendered, the time consumed, or give any standard as to their value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 517, 519, 521; Dec. Dig. ⊜330.]

In Bankruptcy. In the matter of the Hudson Porcelain Company, bankrupt. Petition by Frank E. Parham to review an order of the referee disallowing his claim. Order approved.

Frank W. Hastings, Jr., of Jersey City, N. J., for claimant.
Edwin C. Long, of Trenton, N. J., for trustee.

HAIGHT, District Judge. Frank E. Parham filed a proof of claim against the bankrupt's estate, based on legal services alleged to have been rendered to the bankrupt company. Thereupon the trustee filed objections to the allowance of the claim. At the time fixed for hearing the objections, the claimant and his counsel appeared, but no testimony was taken. The claim was, however, disallowed, on motion of the trustee, upon the ground that the proof of claim did not contain a sufficient statement of the claim and the consideration therefor. It is this action of the referee which claimant seeks to have reversed. Opportunity was afforded the claimant to furnish the items or particulars upon which the claim was based, and to correct the deficiencies; but he refused to do so, contending that the proof of claim as filed made out a prima facie case, and entitled the claim to allowance, in the absence of evidence disproving it.

Counsel for the claimant seems to have assumed and to contend here (but without argument to support his contention), that under the rule laid down in Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584, a proof of claim is prima facie evidence of its allegations, and entitles the claim to allowance, in the absence of evidence impeaching it, irrespective of whether the proof of claim complies with the requirements of the statute as to the statement of the claim and its consideration (sections 57a and 57b of the Bankruptcy Act). The questions presented for decision are, therefore: First, that raised by this contention; and, second, whether the allegations of the proof of claim in question are sufficient in the before-mentioned respects.

[1] I think that the mere statement of the first question refutes the soundness of the claimant's contention. I fail to perceive how any probative force can be given to a proof of claim which does not comply with the requirements of the law from which it receives whatever effect it has. It proves nothing more than incompetent evidence does. In addition, the statute (section 57d) provides that "claims

which have been *duly proved* shall be allowed," unless objections are interposed, etc. Claims which do not comply with the requirements of the statute are not "duly proved." They are not, therefore, entitled to allowance, and, if they are not entitled to allowance, it is difficult to understand upon what theory the proofs can be considered as proving anything. My attention has not been called to, nor have I been able to find, any reported case in which a contrary view is expressed. On the other hand, it has been considered in several cases that the proof of claim must comply with the statutory requirements before it is accorded any probative force. Castle Braid Co. (D. C. S. D. N. Y.) 145 Fed. 224, 228; In re Coventry Evans Furniture Co. (D. C. N. D. N. Y.) 166 Fed. 516; Orr v. Park, 183 Fed. 683, 686, 106 C. C. A. 33 (5th Cir.); In re Goble Boat Co. (D. C. N. D. N. Y.) 190 Fed. 92; In re Creasinger, 17 Am. Bankr. Rep. 538 (referee, S. D. Cal., affirmed by District Judge); In re United Wireless Telegraph Co. (D. C. Me.) 201 Fed. 445. See, also, opinion of Judge McPherson in Re Greenfield (D. C.) 193 Fed. 100, where he suggests, but does not decide, the question whether a proof of claim, based partly on checks and notes, to which neither the original instruments nor copies were attached, nor their absence accounted for, as required by the statute, "is entitled to the presumption of validity referred to in Whitney v. Dresser." I must conclude, therefore, both upon reason and authority, that, if the proof of claim in question did not comply with the necessary statutory requirements, it had no probative force whatever.

[2] It becomes necessary to consider, then, whether the proof of claim did so comply. It has been uniformly held under the present Bankruptcy Law that the statement of the claim and its consideration must be sufficiently specific and full to enable the trustee and the creditors to make proper investigation as to its fairness and legality, without undue trouble or inconvenience. In re Scott (D. C. N. D. Tex.) 93 Fed. 418; In re Stevens (D. C. Vt.) 104 Fed. 325; Orr v. Park, supra; In re Blue Ridge Packing Co. (D. C. N. D. Pa.) 125 Fed. 619; In re Coventry Evans Furniture Co., supra; In re United Wireless Telegraph Co., supra; In re Creasinger, supra; In re Griffin (D. C. Mass.) 188 Fed. 389. See, also, In re Elder, Fed. Cas. No. 4,326. The sufficiency of the claim in question must be tested in accordance with this rule. It sets forth that the bankrupt is indebted to the claimant in a certain sum, the consideration of which is stated as follows:

"For legal services rendered during the last week of August, 1913, and for services rendered said corporation since that time, to wit, during the months of September, October, November, and December, 1913, and during the months of January and February, 1914. I was duly retained by the corporation, on or about August 23d and appeared for the corporation a number of times at Trenton, N. J., during the months above mentioned, and as its counsel I prepared the schedules filed in this court during the later part of February or early in March."

This is but a general statement that the consideration of the debt is for legal services rendered during a certain period of time, without specifying the nature of the matters in which they were rendered,

whether in litigation or what, except in the one particular of the preparation of the schedules to be filed in this bankruptcy proceeding. It does not specify the dates or the number of times the claimant appeared for the corporation at Trenton, or the purpose thereof. It is silent as to the amount of time given by the claimant to the affairs of the corporation. It fails to state whether the amount claimed was agreed upon between the claimant and the corporation, or whether the amount which he claims is what he considers the services reasonably worth. In short, it affords the trustee and the creditors no means of making a proper investigation to ascertain whether the amount claimed is fair and reasonable or what services were actually rendered. During the period mentioned in the claim the claimant might well have performed services which would not be reasonably worth anything like the amount claimed, and he might, on the other hand, have performed services which would be well worth it. I am therefore entirely clear that the statement of the claim and the consideration does not measure up to the standard of the rule before stated.

Reference to the cases before cited will demonstrate, I think, the correctness of this conclusion. A statement in a claim "that the consideration for said debt is for legal services performed for said Scott (the bankrupt) during the year 1898" was held insufficient in the case of In re Scott, supra. The statement of that claim in no essential respect differed from that of the claim in question. A claim based on legal services, in which the statement of the consideration was more definite than in the claim in question, was held insufficient in the matter of Creasinger, supra. It was held in Re Morris (D. C. N. D. Pa.) 154 Fed. 211, that proofs of debt which simply stated the consideration to be "for services, mdse., &c."; "val. of wages"; "val. of professional services"; "for goods sold and delivered"—were insufficient; and in Blue Ridge Packing Co., supra, that a statement "for printing done for said bankrupt at its request, heretofore, to wit, in September, 1903, as per bill rendered," as well as a statement for "goods, wares, and merchandise sold and delivered by claimant to bankrupt at his request, consisting of green truck and vegetables, amounting to said sum of $140, with interest," etc., were insufficient; Judge Archbald holding that the claim must set forth the particulars and items.

It follows, therefore, that the referee's order disallowing the claim must be approved and affirmed.

In re SHOEMAKER.

(District Court, E. D. Pennsylvania. July 20, 1915.)

No. 5137.

BANKRUPTCY ⊂=143—PROPERTY OF BANKRUPT—INSURANCE POLICIES.

Policies upon the life of a bankrupt, providing that the insured might at any time, by written notice to the company, change the beneficiary, upon the indorsement of the same upon the policy by the company, named the bankrupt's daughter as beneficiary. Act Pa. April 15, 1868 (P. L. 103), declares that all policies of life insurance which shall be taken out for the benefit of, or bona fide assigned to, the wife or children of, or any relative dependent upon, the insured, shall be vested in the wife or children, or other relative, free from all claims of the creditors of the insured. Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 (Comp. St. 1913, § 9654), declares that the trustee of the estate of a bankrupt shall be vested with the title of the bankrupt to all property, which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold. *Held*, there was a mere designation of the bankrupt's daughter as beneficiary of the policies, and hence, as the bankrupt could have changed the beneficiary, his trustee, and not the daughter, was entitled to the surrender value of such policy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⊂=143.]

In Bankruptcy. In the matter of Samuel Shoemaker, bankrupt. Upon certificate for review of an order dismissing a petition of the trustee for an order upon the bankrupt to execute papers necessary to enable the trustee to obtain the surrender value of life policies. Order revoked, and an order entered allowing the bankrupt to pay or secure to the trustee the sum ascertained as the cash surrender value, or otherwise that the bankrupt execute the necessary papers.

Clinton O. Mayer, of Philadelphia, Pa., for claimant.
Alfred Aarons, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. In this case the referee has certified for review an order dismissing a petition of the trustee for an order upon the bankrupt to execute papers necessary for the purpose of vesting in the trustee the power to obtain the surrender value of four certain policies of life insurance issued by the Prudential Life Insurance Company of America on the life of the bankrupt. It was agreed at the hearing before the referee that the insurance policies provided that Florence M. Shoemaker, daughter of the bankrupt, should be the beneficiary, with the right to change the beneficiary; that Florence M. Sheomaker is a minor of 18 years of age, dependent upon her father, Samuel Shoemaker; and that she was made the beneficiary not in contemplation of bankruptcy. Florence M. Shoemaker claims the policies, and the benefits derived therefrom, as exempt from creditors, by virtue of the act of assembly of April 15, 1868 (Pamphlet Laws, page 103).

It appears from the opinion of the referee that the policies in question are four in number and the surrender value amounts to $3,074.52. The precise terms of the clause as to the change of beneficiary contained in the policies are as follows:

"The insured may at any time while this policy is in force, by written notice to the company at its home office, change the beneficiary or beneficiaries, such change to take effect only upon indorsement of the same on the policy by the company, whereupon all rights of the former beneficiary or beneficiaries shall cease: Provided, however, that no such change of beneficiary shall be valid if the policy or any interest therein be assigned at the time of such change."

The act of assembly of the state of Pennsylvania, approved April 15, 1868 (P. L. 103), provides that:

"All policies of life insurance or annuities on the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to, the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full and clear from all claims of the creditors of such person."

The trustee claims that he is entitled to the cash surrender value of these policies under section 70a (5) of the Bankruptcy Act.

In the case of In re Jamison Bros. & Co. (D. C.) 222 Fed. 92, on page 96, decided April 1, 1915, by Judge Dickinson, but not reported until after the decision of the referee and the filing of the certificate of review in this case, my learned colleague says:

"We are of opinion that, whatever may be the case in other jurisdictions, the rulings by which we are bound do not leave open to discussion these propositions:

"1. Where there has been merely a designation of a beneficiary to receive the moneys payable on the death of the insured, and this designation is open to recall or change by the insured, to whom also belongs the right to cancel or surrender the policy, there, if the insured be bankrupt, the surrender value of the policy passes to his trustee.

"2. Where, however, the wife, children, or a dependent relative of the insured has been made the owner of the policy, within the meaning of the Pennsylvania statutes, by it having been taken out for or bona fide assigned to them, then nothing passes to the trustee.

"These propositions are supported by In re Booss (D. C.) 154 Fed. 494, 18 Am. Bankr. Rep. 658; In re Herr [D. C.] 182 Fed. 716, 25 Am. Bankr. Rep. 142; In re Dolan (D. C.) 182 Fed. 949, 25 Am. Bankr. Rep. 145; Allen v. Trust Co., 143 Wis. 381, 127 N. W. 1003, 139 Am. St. Rep. 1107, 25 Am. Bankr. Rep. 126."

I am entirely in accord with the foregoing propositions so tersely and clearly stated by Judge Dickinson, and they rule the case at bar. There has been here merely a designation of the beneficiary, which is open to recall or change by the insured, and to him also belongs the right to cancel or surrender the policy. The policy was not, within the meaning of the Pennsylvania act of 1868, "taken out for the benefit or bona fide assigned to" the daughter of the insured, Florence M. Shoemaker, for by the terms of the policy the insured may at any time take away her interest by changing the beneficiary without her consent. As the policy was not "taken out for the benefit of" the daughter, the referee's construction of the word "dependent" in the act of 1868 as applying to the wife and children, and not alone to "relatives," is immaterial.

In the case of South Side Trust Company v. Wilmarth, 29 Am. Bankr. Rep. 29, 199 Fed. 418, 117 C. C. A. 650, the discussion of the question as to whether or not the beneficiary was dependent related to a sister of the insured, who came within the term "relative," and it was

therefore necessary to determine whether or not she was a "relative dependent."

It is ordered that the order of the referee certified for review be revoked, and that an order be entered allowing the bankrupt to pay or secure to the trustee the sum ascertained as the cash surrender value, and that otherwise the policies shall pass to the trustee as assets in accordance with the provisions of section 70a (5) of the Bankruptcy Act, and, in default of his so paying or securing such sum to the trustee, that he be ordered to execute such papers as shall be necessary to transfer his interest in the policies to the trustee.

In re MILLER.

(District Court, D. Massachusetts. March 15, 1915.)

No. 18910.

1. BANKRUPTCY ⟸318, 340—PROVABLE DEBT—ALLOWANCE—ANNUITY.
A bankrupt, for full consideration, received by him before bankruptcy, entered into an absolute promise to pay to the claimant $3 per day during the remainder of the claimant's life. Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 (Comp. St. 1913, § 9647) declares that debts of the bankrupt, which are a fixed liability and absolutely owing at the time of the filing of the petition and are founded upon a contract, absolute or implied, may be proved. *Held*, that the claim might be proven against the bankrupt's estate, and that the only uncertainty, which was the duration of the claimant's life, might be determined as in other cases by reference to mortality tables.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482, 527; Dec. Dig. ⟸318, 340.]

2. BANKRUPTCY ⟸342½—FINDINGS OF REFEREE—EVIDENCE.
Where the evidence in a proceeding to review allowance of claims was not reported, the referee's findings of fact must stand, unless they appear erroneous on the face of the certificate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. ⟸342½.]

In Bankruptcy. In the matter of Charles W. Miller, bankrupt. Petitions to review claims allowed by the referee. Petitions denied.

Alfred W. Putnam, of Boston, Mass., for trustee.
Fred L. Norton, of Boston, Mass., for creditor.

MORTON, District Judge. The bankrupt made, upon good consideration, a contract obligating him absolutely to pay to the creditor $3 per day during the creditor's life. No default existed at the time of the voluntary petition in bankruptcy and the adjudication. No payments under the contract have been made since the bankruptcy. The creditor seeks to prove an amount which is the present worth of $3 per day during his expectation of life, as shown by the mortality tables. Mr. Referee Gibbs allowed the claim, and the case is here on review.

[1] The bankrupt's undertaking is absolute; he had received the full consideration for his promise before the bankruptcy, and nothing re-

mained but for him to make the payments as agreed. His liability was "fixed," and it was "founded upon a contract." Section 63a. The only uncertainty about it is the amount which he will be called upon to pay. There are many cases in which the amount of damages recoverable, or the value of an estate, depends upon the length of time which a person killed would have lived, or which a living person will live. Nobody knows what that length of time would have been, or will be. But the damages are not on that account treated as unassessable, nor the value as unascertainable. The expected duration of the life in question, arrived at by the use of mortality tables in connection with such facts as the particular case develops, is used as the basis for computing damages or value.

I see no reason why that method should not be followed in bankruptcy proceedings. Cases in which the bankrupt's obligation is other than contractual, or may be changed by subsequent events, e. g., alimony, or where the duration of it is limited upon contingencies other than death, which cannot be estimated upon data now existing, e. g., the chance of a woman's remarriage (Dunbar v. Dunbar, 190 U. S. 340, at 345, 23 Sup. Ct. 757, 47 L. Ed. 1084), and cases in which the bankrupt's obligation to pay rests, not upon a past and executed consideration received by him, but upon future consideration to be received by him from time to time, e. g., rent under lease (Roth v. Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. [N. S.] 270 [C. C. A. 2d Circuit]; Slocum v. Soliday, 183 Fed. 410, 106 C. C. A. 56 [C. C. A. 1st Circuit]), are, I think, plainly distinguishable. The essential grounds upon which proof is rejected in such cases do not exist here. Upon the questions of law involved, this case is undistinguishable from Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223 (C. C. A. 4th Circuit); and the referee has followed the procedure there approved. That decision was referred to, certainly without disapproval, in Dunbar v. Dunbar, 190 U. S. 340, at 351, 23 Sup. Ct. 757, 47 L. Ed. 1084. Notwithstanding the criticism of Cobb v. Overman in In re Pettingill (D. C.) 137 Fed. 143, at page 147, it seems to me to be correct. The creditor had the right to treat the bankruptcy and the cessation of payment thereafter as a breach of the entire contract. In re Swift, 112 Fed. 315, 50 C. C. A. 264 (C. C. A. 1st Circuit). The referee was right in allowing the claim, and his decision is affirmed.

[2] The other petition for review brings up the referee's action in allowing a second claim by the same creditor for rent of a stable (owned by the creditor) which accrued before the bankruptcy, and a third claim for money had and received by the bankrupt to the creditor's use before the bankruptcy, amounting to $2700. The referee has found that the rent was due, and that the money was had and received by the bankrupt, as claimed by the creditor, and has allowed both these claims in full. As the evidence is not reported, his findings of fact must stand, unless they appear to be erroneous on the face of his certificate. Nothing appears therein which leads me to doubt the correctness of the referee's findings of fact or his rulings of law. His decision is affirmed.

Both petitions for review are denied.

HALL v. WILLCOX.

(Circuit Court, S. D. New York. September 26, 1906.)

1. POST OFFICE ⟸26—FRAUD ORDERS—PRESUMPTION.
Where the Postmaster General, pursuant to acts of Congress, satisfies himself that a person is improperly using the mails and issues a fraud order accordingly, there is a rebuttable presumption that his conclusion is right.
[Ed. Note.—For other cases, see Post Office, Dec. Dig. ⟸26.]

2. INJUNCTION ⟸126—RESTRAINING FRAUD ORDER—BURDEN OF PROOF.
One seeking to enjoin the enforcement of a fraud order issued by postal authorities has the burden of proving that the order was improperly issued.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 276; Dec. Dig. ⟸126.]

3. POST OFFICE ⟸26—FRAUD ORDERS—GROUNDS.
Where complainant admitted prior quackery in his electric belt business, the fact that he had recently employed a physician does not warrant an injunction against the enforcement of a fraud order issued by the postal authorities; past fraud being ground for a fraud order.
[Ed. Note.—For other cases, see Post Office, Dec. Dig. ⟸26.]

In Equity. Bill by S. S. Hall against William R. Willcox. On motion for injunction pendente lite to prevent the postmaster at New York City, under orders from the Postmaster General, from detaining mail from the complainant, who was selling "Electric Belts," which were advertised as curing or aiding many ailments and increasing and preserving the sexual powers of men. Motion denied.

J. J. Vanse, of Brooklyn, N. Y., for complainant.
C. D. Baker, of New York City, Asst. U. S. Atty., opposed.

HOUGH, District Judge. The case of Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, has simplified considerably professional ideas regarding the rights of citizens in respect of the postal transmission of letters.

[1] When the Postmaster General, pursuant to the acts of Congress now in force, satisfies himself that any given person is obnoxious to the statutes in question, issues a "fraud order" accordingly, and on being called to account in the courts certifies that he has reached his conclusion on evidence satisfactory to himself, the presumption is that his conclusion is right. It may not have been reached by the ordinary methods of courts, the rules of evidence may have been disregarded, the investigation may have been secret and ex parte; but these are details for which relief must be sought from Congress and not from the judiciary—the presumption still exists.

I do not think that presumption, however, incontrovertible. If it were, every such bill as this (which admits the issuance of a fraud order) would be open to demurrer.

It may be that the Postmaster General has exceeded the statutory grant of power, or exercised it wantonly, or maliciously.

[2] The presumption, however, is ample to put upon a complainant a burden of proof which it is difficult to imagine him meeting on a motion for preliminary injunction.

[3] Certainly this complainant has not met it. He admits one recent instance of business to be indefensible; he scarcely denies that such instances may have been the rule. If they were even rare, he admits that some fraudulent quackery existed until recently. To assert that the course of business indicated by the past has been mended by the sudden employment of a licensed physician, concerning whose professional qualifications (including pecuniary independence of the complainant and the electric belt business) nothing is shown, is asking too much of credulity.

The complainant's argument is based upon the proposition that his misdoing must be proved to be in the present tense, to justify a "fraud order."

I know of no more persuasive evidence of present conduct than past performance.

Motion for injunction denied.

In re VALLOZZA et al.

(District Court, D. New Jersey. May, 1915.)

BANKRUPTCY ⟸224—REFEREE—PLENARY JURISDICTION.

Where a creditor of a bankrupt received goods in payment of his debt, the referee in bankruptcy is without jurisdiction to hear and determine in a summary manner the question of preference, where the creditor asserted his right and refused consent to the proceeding, under Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (Comp. St. 1913, § 9607), the referee should stay such proceedings and remit the trustee to a plenary suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. ⟸224.]

In Bankruptcy. In the matter of the bankruptcy of Michele Vallozza and Nicola Di Giandomenico, individually and trading as the New York Clothing Company. On petition to review the referee's order directing that Antonio Siracusa pay to the trustee the sum of $848.50, the value of goods, wares, and merchandise delivered by the bankrupts within four months preceding the filing of the petition in bankruptcy. Order reversed, and cause remanded.

W. Frank Sooy, of Atlantic City, N. J., for the trustee.

Louis Stern, of Atlantic City, N. J., for Antonio Siracusa.

RELLSTAB, District Judge. The order under review was made in summary proceedings founded on a rule to show cause. Upon the return of the rule, Antonio Siracusa, the person against whom it was issued, excepted to the jurisdiction of the referee, insisting that he was an adverse claimant. He was a creditor of the bankrupts, and accepted goods, wares, and merchandise belonging to them in discharge

of some of their indebtedness to him. His claim of right to such goods is of substance, and not a mere fictitious or colorable one.

The questions whether he obtained a preference in such transaction or whether it was tainted with fraud are not pertinent upon the issue whether such creditor is an adverse claimant. The referee had jurisdiction to issue the rule to show cause, there being sufficient in the affidavits upon which such rule was based to justify the inquiry; but as soon as it developed that a transfer of property from the bankrupts to one of their creditors had been made, to discharge some of their indebtedness to him, and that such creditor refused his consent to the referee's inquiring into the legality of such transaction in a summary way, it was the duty of the referee to stay such proceedings and remit the trustee to a plenary suit under section 23b of the Bankruptcy Act. In re Walsh Bros. (D. C., Iowa) 21 Am. Bankr. Rep. 14, 163 Fed. 352; In re Franklin Suit & Skirt Co. (D. C., Pa.) 28 Am. Bankr. Rep. 278, 197 Fed. 591; In re Lummus (D. C., Ga.) 32 Am. Bankr. Rep. 740, 214 Fed. 891. For additional authorities, see Collier on Bankruptcy (10th Ed.) pp. 489–498a; Loveland on Bankruptcy (4th Ed.) §§ 37, 540; Black on Bankruptcy, §§ 403, 404, 465; Remington on Bankruptcy (2d Ed.) §§ 1652, 1654½, 1677, 1796, 1863–1865.

As such creditor never consented to such summary jurisdiction, but always protested against it, the order under review is reversed, and the cause remanded, that proceedings plenary in their nature may be instituted, if the same be deemed advisable.

Ex parte LEE YING et al.

(District Court, W. D. New York. June 22, 1915.)

1. ALIENS ⇐32—DEPORTATION OF CHINESE—IMMIGRATION ACT.
Immigration Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 (Comp. St. 1913, § 4270), relating to deportation of aliens found in the United States in violation of law, applies to Chinese laborers illegally entering the United States, notwithstanding special acts relating to the Chinese; hence, under a warrant charging that the Chinese persons were in the United States, and had entered in violation of Chinese Exclusion Act, May 5, 1892, c. 60, §§ 6, 7, 27 Stat. 25, 26 (Comp. St. 1913, §§ 4320, 4321), such persons may be deported under the Immigration Act.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⇐32.]

2. ALIENS ⇐32—DEPORTATION OF CHINESE—PRESUMPTIONS.
In a proceeding to deport a Chinese person, there is a natural presumption of alienage, and an unsupported claim that he was born in the United States will not establish citizenship.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⇐32.]

In the matter of the petition of Lee Ying and Lee Quon for a writ of habeas corpus. Writ dismissed, and petitioners remanded.

Dilworth M. Silver, of Buffalo, N. Y., for petitioners.
Donald Bain, Asst. U. S. Atty., of Buffalo, N. Y., for respondent.

HAZEL, District Judge. [1] The record shows that the petitioners, who are Chinese laborers, were given a fair hearing by the immigration inspector after their arrest for having unlawfully entered the United States, and I discover no irregularity in the warrant of deportation. It was contended that the warrant was defective, in that it accused the petitioners with being unlawfully in the United States in violation of the Chinese Exclusion Act, and not the Immigration Act, and that the proceedings should have been conducted exclusively under the latter act; but I think the mere statement in the warrant that the petitioners were found within the United States in violation of section 6 of the Chinese Exclusion Act, and that they had entered the United States in violation of section 7 thereof, does not invalidate the warrant, nor deprive the Acting Secretary of Labor of his power and authority under section 21 of the Immigration Act to determine the right of the petitioners to remain in this country. Ex parte Lam Pui (D. C.) 217 Fed. 456. That such act applies to Chinese laborers illegally entering the United States, notwithstanding the special acts relating to the exclusion of Chinese, has been definitely decided by the Supreme Court of the United States in United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354.

[2] The claim of counsel, unsupported by any evidence, that petitioners were born in the United States, was totally insufficient to establish citizenship, or overcome the presumption that they were aliens, and the inspector had the right to ignore such claim. Lee Sim v. United States, 218 Fed. 432, — C. C. A. —.

The writ is dismissed, and the petitioners remanded.

FINDLAY et al. v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

No. 2511.

1. EVIDENCE ⊂⊃460—PAROL EVIDENCE—AID IN INTERPRETATION OF INSTRUMENTS.

A bond, reciting that a collector of customs had notified the master of a British steamship that he had incurred penalties for violations of the Passenger Act of 1882 (Aug. 2, 1882, c. 374, 22 Stat. 186), and that the collector had been authorized by the Department of Commerce and Labor to grant clearance to the steamship on a bond for payment of such penalties and conditioned for payment to the United States of the amount for which the department should determine that the principal was liable for penalties incurred, was open to interpretation, and the court, to decide on its meaning, could look not only to the language employed, but to the subject-matter and surrounding circumstances, authorizing the admission of evidence of the negotiations and proceedings leading up to the giving of the bond.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115–2128; Dec. Dig. ⊂⊃460.]

2. SHIPPING ⊂⊃168—CARRIAGE OF PASSENGERS—PENALTIES FOR FORFEITURE—BONDS—EVIDENCE—ADMISSIBILITY.

In an action on a bond conditioned for payment of such penalties as should be determined by the Department of Commerce and Labor to have been incurred by a master of a steamship after presentation, within a reasonable time, by him or his agents or attorneys and the officers of the United States, of the facts, evidence of the subsequent proceedings in presenting the facts to the department was admissible.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⊂⊃168.]

3. SHIPPING ⊂⊃168—REGULATIONS—VIOLATIONS—PROCEEDINGS BEFORE DEPARTMENT OF COMMERCE AND LABOR.

The court, in an action on a bond conditioned for the payment of such penalties as should be determined by the Department of Commerce and Labor to have been incurred by the master of a vessel violating the Passenger Act of 1882, has no authority to revise the proceedings before the department and determine what evidence it should have received, and the court is limited to the question whether the facts had been submitted to the department and a determination made by it on the facts.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⊂⊃168.]

4. SHIPPING ⊂⊃168—VIOLATION OF REGULATIONS—BOND TO SECURE PAYMENT OF PENALTIES—DURESS—CONSIDERATION.

In a suit on a bond to secure the payment of such penalties as should be determined, by the Department of Commerce and Labor, to have been incurred by the master of a vessel for violations of the Passenger Act of 1882, evidence *held* to show that the bond was given voluntarily and supported by a sufficient consideration.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⊂⊃168.]

5. SHIPPING ⊂⊃168—REGULATIONS—VIOLATIONS—BOND TO SECURE PAYMENT OF PENALTIES—VALIDITY.

A bond to secure the payment of such penalties as should be determined by the Department of Commerce and Labor to have been incurred by the master of a vessel for violations of the Passenger Act of 1882, after presentation of the facts to the department, is not a statutory bond, because not authorized by statute, but is valid as a common-law obligation, vol-

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied November 1, 1915.

untarily given by the obligors and accepted by the officers of the department as incident to their duties in the administration of the affairs of the department; for the determination of the amount of the penalty by the department is within its legal authority.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⊂⊃168.]

6. PENALTIES ⊂⊃11—REMISSION—APPLICATION.

An application under Rev. St. § 5294 (Comp. St. 1913, § 10135), for remission of fines and penalties, is based on an admission that the fine or penalty has been incurred.

[Ed. Note.—For other cases, see Penalties, Cent. Dig. § 9; Dec. Dig. ⊂⊃11.]

7. SHIPPING ⊂⊃168—CARRIAGE OF PASSENGERS—PENALTIES—APPLICATION.

A collector of a port notified the master of a vessel of his liability to penalty for violations of the Passenger Act of 1882, and he was informed that prior to proceedings for the enforcement of the penalty, the master would be given an opportunity to present any statement he might desire to make. Attorneys for the master in writing letters to the collector referred to the violations as "alleged violations." The collector, at the request of the master for clearance of the vessel, sent a cablegram to the Secretary of Commerce and Labor and used the term "alleged penalties." The master to obtain a clearance executed a bond, reciting the facts, and conditioned on the payment of the amount which the Department of Commerce and Labor should determine that the master was liable for penalties, alleged to have been incurred. *Held*, that neither the bond nor the proceedings leading up to it disclosed an admission of liability for penalties or an application for remission or mitigation of penalties under Rev. St. § 5294.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⊂⊃168.]

8. SHIPPING ⊂⊃168 — CARRIAGE OF PASSENGERS — PENALTIES — REMISSION — STATUTORY PROVISIONS—CONSTRUCTION.

Rev. St. § 5294, authorizing the Secretary of the Treasury, on application therefor, to remit or mitigate any fine, penalty, or forfeiture provided in laws relating to vessels, was originally Act Feb. 28, 1871, c. 100, § 64, 16 Stat. 458 (Comp. St. 1913, § 10135), authorizing the Secretary of the Treasury, on application therefor, to remit or mitigate any fine or penalty, provided for in this act. The act contained 71 sections, and related to the supervision and inspection of hulls, boilers, etc., of vessels navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States and 66 of the sections were carried into the Revised Statutes, without substantial change, as title 52, sections 4399–4500, entitled "Regulation of Steam Vessels." Other sections were transferred to other titles of the Revised Statutes. Various Attorney Generals, in response to request for opinions, advised that section 5294 applied only to fines, penalties, and forfeitures incurred under the laws embraced in title 52. *Held*, that the court would follow the practice advised by the Attorney Generals, and there was no authority for the remission of penalties for violations of the Passenger Act of 1882.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⊂⊃168.]

9. SHIPPING ⊂⊃168—CARRIAGE OF PASSENGERS — PENALTIES — REMISSION — STATUTORY PROVISIONS—CONSTRUCTION.

Act Feb. 14, 1903, c. 552, 32 Stat. 825, establishing the Department of Commerce and Labor, and transferring to the department jurisdiction conferred on the Secretary of the Treasury as to the remission of fines and penalties for violating any provision of law relating to vessel or seamen, or to informers' shares of such fines, or by acts of Congress relating to the commissioner and bureau of navigation shipping commissioners, does not give the Secretary of Commerce and Labor any greater power

with respect to the subject mentioned than those previously conferred on the Secretary of the Treasury, and the Department of Commerce and Labor has no authority to remit and mitigate fines, penalties, and forfeitures except as limited in practice, under Rev. St. § 5294, to fines, penalties, and forfeitures prescribed in title 52.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⟸168.]

10. STATUTES ⟸219—CONSTRUCTION—DEPARTMENTAL CONSTRUCTION.

Where a construction placed on a statute by the executive department charged with its administration is clearly erroneous, the court must so adjudge it, but where the construction has been followed for many years, it should not be overruled, except for cogent reasons, and a mere doubt is insufficient.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ⟸219.]

11. STATUTES ⟸231—CONSTRUCTION—REVISED STATUTES.

It is not permissible to resort to the original act in the construction of a section of the Revised Statutes, where the meaning of the section is plain, but where there is an ambiguity therein, resort may be had to the original section to ascertain what, if any, change of phraseology has been made, and whether the change should be construed as changing the law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 312; Dec. Dig. ⟸231.]

12. SHIPPING ⟸168—CARRIAGE OF PASSENGERS — PENALTIES — REMISSION — STATUTORY PROVISIONS.

Though the Secretary of Commerce and Labor has no authority to remit or mitigate any of the penalties incurred under the Passenger Act of 1882, he has revisory and supervisory authority to determine whether the statute has been violated, and the extent of such violation, and in accordance with his determination direct the prosecution for a violation or its abandonment in whole or in part.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 556–562; Dec. Dig. ⟸168.]

In Error to the District Court of the United States for the District of Hawaii; Charles F. Clemons, Judge.

Action at law by the United States against James F. Findlay and others, on a bond to insure the payment of penalties alleged to have been incurred by defendant James F. Findlay, as master of the British steamship Orteric, for violation of the Passenger Act of 1882. There was a judgment for plaintiff, and defendants bring error. Affirmed.

On April 13, 1911, the British steamer Orteric having on board about 1,500 Spanish and Portugese immigrants, arrived at the port of Honolulu, Hawaiian Islands, from Oporto and Lisbon, Portugal, and Gibralter, the British port in the South of Spain. Upon the arrival of the vessel at Honolulu an inspection thereof was made by the customs officers under the direction of the Collector of the Port, who thereafter rendered a report to the Collector of the Port, wherein they found that the master of the vessel, James F. Findlay, had violated the following sections of Passenger Act of Aug. 2, 1882, c. 374, 22 Stat. 186, as amended by Act Feb. 14, 1903, c. 552, 32 Stat. 829, Act Feb. 9, 1905, c. 564, 33 Stat. 711 (Comp. St. 1913, § 8010), and Act Dec. 19, 1908, c. 6, 35 Stat. 583 (Comp. St. 1913, §§ 7997, 7998): Section 2 thereof relating to berths, section 3 thereof, relating to light and ventilation, section 4 thereof, relating to food, section 5 thereof, relating to hospitals, section 6 thereof, relating to discipline and cleanliness, and section 7 thereof, relating to the posting of notices. Comp. St. 1913, §§ 7999–8004. On April 17, 1911, the Collector of the Port notified the master of the vessel, by letter, that he

was "liable to penalties for alleged violation" of the sections of the act above set forth, and in addition section 9 thereof (section 8006), relating to passenger manifests. In this letter of notification to the master of the vessel the Collector called attention to section 13 of the act (section 8014), providing for a lien on the vessel for the penalties, and stated that "prior to instituting proceedings for the enforcement of this penalty you will be given an opportunity to present any statements you may desire to make. I would suggest that whatever statements you may desire to make, be made in the form of an affidavit." On April 22, 1911, the agents of the Orteric at Honolulu made application to the Collector of the Port for clearance of their vessel. In the application it was stated that "in view of the alleged violations of the Passenger Act of 1882, aggregating penalties in the sum of $10,000, we will furnish to you an adequate bond in the sum of $20,000 covering the same, provided the facts concerning such alleged violations be submitted to the Secretary of Commerce and Labor for determination." In another letter to the Collector of the same date, the agents of the steamer requested permission to clear their vessel "upon a satisfactory bond being furnished for the payment of any penalties which may be imposed in respect of the alleged violations of the Passenger Act by that steamer, and full particulars regarding the matter to be furnished to the Department of Commerce and Labor for their determination of what shall be done in connection therewith." On the same date (April 22, 1911), the attorneys for the vessel at Washington, D. C., wrote to the Secretary of Commerce and Labor requesting that the Orteric be permitted to proceed on her voyage upon her master or Honolulu agent entering into bond for the making good of any penalty found to be due either by the vessel or the master, and that upon the coming in of a formal report of the matter the questions involved be then adjudicated after a hearing.

Pursuant to the requests of the agents of the vessel at Honolulu, the Collector of the Port cabled to the Secretary of Commerce and Labor as follows: "Agents British steamer Orteric make application clear under bond covering alleged penalties amounting approximately ten thousand dollars Passenger Act 1882. Recommend favorable consideration." To the above cablegram the Secretary of Commerce and Labor replied as follows: "With approval United States Attorney clear Orteric fifteen thousand dollar bond." Pursuant to the above reply, and on the date of the receipt thereof (April 22, 1911), the following bond was entered into by the master, and thereafter the vessel was permitted to leave and did leave the Port of Honolulu: "Whereas, the Collector of Customs of the Port of Honolulu, territory of Hawaii, has given notice to J. F. Findlay, master of the British steamship Orteric that the said master has incurred certain penalties on account of alleged violations of 'The Passenger Act, 1882' as amended; and whereas the said Collector has been authorized by the Department of Commerce and Labor of the United States to grant immediate clearance to said steamship upon a bond being furnished in the penal sum of fifteen thousand dollars ($15,000) approved by the United States District Attorney for the Territory of Hawaii, to insure the payment of such penalties for such violations aforesaid as shall be determined by the Department of Commerce and Labor of the United States to have been incurred by the said master, after the presentation, within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts, to said department; and whereas a bond in the form of these presents and with the sureties therein named, has been approved by said United States Attorney: Now, therefore, know all men by these presents, that the said J. F. Findlay, as principal, and T. Clive Davies and W. H. Baird, both of said Honolulu, as sureties, are held and firmly bound unto the United States of America in the penal sum of fifteen thousand dollars ($15,000) for the payment of which well and truly to be made, the said principal and sureties do bind themselves, their heirs, executors and administrators firmly by these presents: The condition of the within and foregoing obligation is such that if the said principal, J. F. Findlay, shall pay to the United States of America through the Collector of Customs at the Port of Honolulu in the territory of Hawaii, the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account

of such penalties so alleged to have been incurred, then this obligation shall be null and void, otherwise of full force and effect."

On April 27, 1911, the attorneys for the Orteric at Honolulu wrote to the Collector of the Port as follows: "On the 22d day of April, 1911, in accordance with authority cabled to you by the Acting Secretary of Commerce and Labor of the United States, clearance was granted the said Orteric upon the filing with you of a bond in the penal sum of $15,000, conditioned upon the payment by Captain Findlay of such amount as might be determined by the Department of Commerce and Labor to be the amount of liability of said Captain Findlay on account of such penalties. In order to preserve the rights of Captain Findlay in the premises, we now formally enter protest against the imposition of the penalties aforesaid and all penalties whatever that may be imposed on account of alleged violations of the Passenger Act of 1882, as amended, during or in the course of the said trip of the Orteric. We also beg to state that we shall file with you as soon as possible a full statement of the facts concerning the said alleged violations, to be submitted to the Department of Commerce and Labor in order that it may arrive at a proper determination of the matter."

On June 8, 1911, the Honolulu attorneys for the vessel addressed to the Collector of the Port at that place a letter in part as follows: "We regret exceedingly the fact that we have been unable to submit the facts and case on behalf of Captain Findlay before this time. * * * Section 3 of the Passenger Act contains a proviso that in case the ventilating apparatus is approved by the immigration officers at the port of clearance, such approval shall suffice to show a compliance with the requirements of the act in this respect. We believe that we shall be able to establish that such inspection and approval were had by the testimony of Mr. Campbell. We therefore request the indulgence of your department for such further time as will enable us to secure Mr. Campbell's testimony, when we will immediately submit to you our case."

On June 13, 1911, the Honolulu attorneys submitted to the Collector of the Port for presentation to the Department of Commerce and Labor an affidavit of Findlay, the master of the Orteric, together with confirmatory affidavits of the chief officer, the ship's doctor, and the nurse of the steamer. In the affidavits various facts were set forth tending to show that the provisions of the Passenger Act had, in all respects, been complied with, with the exception of section 2 thereof, relating to berths; that the alleged violation of that section was caused by a riot during the voyage between the Spanish and Portugese passengers, resulting in a pitched battle; that after the riot the Portugese passengers refused to be berthed with the Spanish passengers, being in fear of their lives, and to prevent bloodshed and to maintain discipline the Portugese passengers were moved aft. In the letter submitting these affidavits the attorneys requested that they be permitted to submit a written argument as to the applicability of the evidence presented. The record does not show whether such written argument was ever presented, and it does not appear that the testimony of Mr. Campbell was ever taken. On June 17, 1911, the Collector of the Port at Honolulu forwarded the affidavits above referred to, together with his report and all of the correspondence exchanged between the parties, to the Secretary of Commerce and Labor at Washington. The report in part was as follows:

"We have ascertained through the assistance of the Immigration service that there were 1,242 statute passengers carried on the Br. S. S. Orteric.

"Penalties.

Section 2.	$5 fine for each statute passenger carried or brought,—1,242 at $5	$6,210
Section 3.	Penalty of	250
Section 4.	Misdemeanor reported to U. S. Attorney.	
Section 5.	Penalty of	250
Section 6.	Penalty of	250
Section 7.	Misdemeanor reported to U. S. Attorney.	
Section 9.	Penalty of	1,000
	Total	**$7,960**

"I deem it proper to make the following suggestions, viz.:

Section 2.	That the fine be mitigated to	$1,000
Section 3.	That in view of the filthy condition of the ship, the	
Section 5.	total amount of the fines imposed under each sec-	
Section 6.	tion be collected	750
Section 9.	That the fine be mitigated to	250
	Total	$2,000"

On December 4, 1911, the Acting Secretary of Commerce and Labor in a letter to the Collector of Customs at Honolulu passed upon the application to determine the master's liability for the penalties charged to have been incurred by him. In this letter the correspondence in the case, together with the evidence adduced by the master of the vessel, are referred to as "the application of James Findlay, master, for relief from the following penalties incurred in the case of the steamer Orteric for violation of the Passenger Act of August 2, 1882." The letter deals with each alleged violation of the act separately, and after setting forth the penalties prescribed for violation of the respective sections thereof, concludes as follows: "In the opinion of the department, penalties aggregating $7,960 were incurred in this case for violation of the sections enumerated and it declines to intervene in behalf of the offenders."

The master of the vessel and the sureties refusing to pay the amount assessed as penalties, suit was instituted by the United States upon the bond above set forth. The matter came on for hearing before the court on April 22, 1912 (a jury having been waived by stipulation of the parties). Evidence was introduced by the United States tending to prove the execution and delivery of the bond; the determination of the controversy by the Secretary of Commerce and Labor, notice in writing to the plaintiffs in error demanding payment of the amount assessed against them, and the breach of the bond's condition. The government then rested its case. The plaintiffs in error introduced no testimony. The matter was taken under advisement by the court, and thereafter, at the suggestion of the court, the United States Attorney moved to reopen the case for the introduction of further evidence. The motion was granted, and, over the objection of the plaintiffs in error there were introduced in evidence the various letters and cablegrams above set forth, together with various other letters, reports, etc., exchanged between the United States officers at Honolulu, and the Territorial Governor, officials, grand jury, etc., at that place, all relating to the matter now at issue. A judgment was thereupon entered in favor of the United States and against the plaintiffs in error for the full amount of the alleged penalties ($7,960.00), together with interest, amounting in the aggregate to the sum of $8,962.30. Thereafter the plaintiffs in error moved the court that the judgment be arrested on the ground that the complaint did not state facts sufficient to constitute a cause of action. The motion was denied.

The assignments of error relate to the alleged error of the court below in permitting the introduction in evidence, over the objections of the plaintiffs in error, of the letters and cablegrams above set forth, together with the other letters, reports, etc., exchanged between the officials at that place, above referred to. There are also assigned as error the action of the court in denying the motion in arrest of judgment, findings of the court that there was a submission to the Secretary of Commerce and Labor for the purpose of obtaining a remission of penalties, and that there was an admission on the part of the master of violations of the law.

Henry Holmes, William L. Stanley, and Clarence H. Olson, all of Honolulu, T. H., and E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for plaintiffs in error.

Jeff McCarn, U. S. Atty., of Honolulu, T. H., and John W. Preston, U. S. Atty., of San Francisco, Cal.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. When this case on the bond was first heard by the court below the evidence consisted of the bond in suit; its execution and delivery; the determination by the Acting Secretary of Commerce and Labor that the principal on the bond had incurred penalties amounting to $7,960; the notice of such determination; demand for payment of the sum found due; and the failure to pay. After the case had been submitted the court reached the conclusion that the bond could not, on its face, be sustained as a common-law obligation. The court thereupon upon its own motion opened the case and received evidence over the objection of the plaintiff in error of the negotiations and proceedings leading up to the giving of the bond for the purpose of interpreting the sense in which the parties understood the terms of the bond. In other words, the court was of opinion that the condition of the bond was open to interpretation, and that it was its duty, in order to decide upon its meaning, to look not only to the language employed, but to the subject-matter and surrounding circumstances. This was in accordance with the rule declared by the Supreme Court in Barreda v. Silsbee, 21 How. 146, 161, 16 L. Ed. 86; Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 592, 4 Sup. Ct. 566, 28 L. Ed. 527. We are of opinion that this evidence was properly admitted.

[2, 3] The court also admitted evidence of the subsequent proceedings in presenting the facts to the Department of Commerce and Labor. This evidence was also objected to by the plaintiffs in error. The bond recited that it was given to insure the payment of such penalties as should be determined by the Department of Commerce and Labor to have been incurred by the master—

"after the presentation within a reasonable time by the said master or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts to said department."

It was manifestly proper for the court to receive evidence concerning the presentation of the facts to the Department of Commerce and Labor for determination. It was a condition of the bond that such facts should be presented, and it was a question for the court to decide whether the facts had been presented to the Department as provided in the bond. In the letter of the Acting Secretary of the Department of Commerce and Labor, determining the master's liability to penalties, there were recitals referring to this evidence; but it was also competent for the court to receive evidence showing that the facts had been submitted. Whether all the letters, telegrams, and reports, including the report of the grand jury, were admissible in the proceedings before the department we do not decide. That was not a question for the lower court, and it is not a question for this court. We have no authority to revise the proceedings before the department and determine what evidence it should have received or what evidence it should not have received. The jurisdiction of the court is limited to the question whether the facts had been submitted to the department and a

determination by the department had been had upon such facts. We find no error in the admission of this evidence.

[4] It is contended by the plaintiffs in error that the bond in suit was given involuntarily, under duress, and without consideration, and is therefore void. This contention is without merit. The British steamship Orteric arrived at the port of Honolulu on April 13, 1911, on a voyage from the foreign ports of Oporto and Lisbon, Portugal, and Gibralter, the well-known British port on the southern coast of Spain, with about 1,500 steerage passengers. An examination of the vessel was made by two inspectors of the customs under the direction of the Collector of the Customs of that district in accordance with the provisions of section 11 of the act of August 2, 1882 (22 Stat. 186, 190). The inspectors, under date of April 17, 1911, reported to the Collector that the act of Congress had been violated by the master of the vessel in a number of particulars set forth in the report, and thereupon and on the same day the Collector notified the master of the vessel that he was liable to certain penalties for alleged violation of the Passenger Act of 1882, as amended, specifying wherein the act had been violated and the maximum penalties that had been incurred by such violations. The notice called the attention of the master to section 13 of the act relative to the collection of these penalties. The section provides that the penalties imposed by the act should be liens upon the vessel, and such vessel might be libeled therefor in any Circuit or District Court of the United States where such vessel should arrive or depart. The notice further informed the master that prior to instituting proceedings for the enforcement of the penalties, he would be given an opportunity to present any statement he might desire to make, and suggested that whatever statement he desired to make should be made in the form of an affidavit. On April 22, 1911, the agents of the steamship addressed a letter to the Collector of Customs, requesting the Collector to cable to the Secretary of Commerce and Labor at Washington for permission to grant clearance to the steamship upon a satisfactory bond being furnished for the payment of any penalties which might be imposed with respect to the alleged violations of the Passenger Act by the captain, and full particulars regarding the matter to be furnished to the Department of Commerce and Labor for determination of what should be done in connection therewith. On the same day the agents addressed a letter to the Collector of Customs stating that in view of alleged violation of the Passenger Act of 1882, aggregating penalties in the sum of $10,000, they would furnish to the Collector an adequate bond in the sum of $20,000 covering the same, providing that the facts concerning such alleged violations should be submitted to the Secretary of Commerce and Labor for determination. In answering the cable sent by the Collector at the request of the agents of the vessel to the Secretary of Commerce and Labor, the latter replied: "With approval of United States Attorney, clear Orteric fifteen thousand dollar bond." The bond in suit was thereupon given and approved by the United States Attorney as to form and sureties. There is not the slightest evidence of compulsion on the part of the Collector of Customs, the Secretary of Commerce and Labor, or any

other officer of the government, in these proceedings. The offer to give the bond was voluntarily made by the agents of the vessel and the acceptance of the offer by the Secretary of Commerce and Labor was at their request, and was manifestly a matter of favor to the agents and to the master of the vessel. The Collector notified the master that he was about to comply with the law and report the case for proceedings to enforce the payment of the penalties. The application of the agents of the vessel to give a bond was their own proposition. Its purpose was to obtain an immediate clearance of the vessel and secure a stay of the legal proceedings until the evidence could be considered and the liability of the master for the penalties determined by the Department of Commerce and Labor. It was not proposed by the officers of the government, who were pursuing the method pointed out by the statute to secure the payment of the penalties. We are of opinion that the proceedings show conclusively that the bond was voluntarily given and for a valuable and sufficient consideration.

[5] It is further contended by the plaintiffs in error that the bond in suit is void for the reason that it was not authorized by law. The bond is not a statutory bond, and in that respect was not authorized. But it may be equally valid as a common-law obligation when voluntarily given by the obligors and accepted by the officers of the department as incident to their duties in the administration of the affairs of the department. The objection is that the condition of the bond provided that the liability of the principals for the penalties charged to have been incurred under the act of August 2, 1882, was to be submitted for determination to the Department of Commerce and Labor as a judicial question—a jurisdiction which it is conceded the Secretary of Commerce and Labor had no authority to exercise with respect to these penalties. Presumably the determination was to be made by the department in the exercise of its legal authority, and as that authority was executive with respect to these penalties, the presumption is that the determination was to be made in pursuance of its executive authority, and not by the assumption of judicial authority which it did not possess. The first observation to be made with respect to the proceedings is that they do not purport to be an application on the part of the master of the vessel for a judicial determination of his liability by the officers of the department. Proceedings in court were threatened to determine the master's liability judicially. The Department of Commerce and Labor was charged with the executive duty of prosecuting the offender if it found the evidence sufficient. The penalties were a lien upon the vessel, and upon a libel being filed the vessel would be seized and held as security for their payment. This would involve delay. It was within the executive authority of the Department of Commerce and Labor to suspend these proceedings for the purpose of making a thorough investigation, and to dismiss them altogether if the evidence was found insufficient to sustain the prosecution. This is a well-known practice of the departments having duties of this character. It was at this point that the bond was given to abide by the determination of the department.

[6, 7] The court below was of opinion that the parties had in view the submission of the facts to the Secretary of Commerce and Labor with the object of securing a remission of the penalties under section 5294 of the Revised Statutes, and as that is the contention of the government in this court, it becomes necessary to notice the terms of the submission and the scope of the section under which it is claimed the application was made.

An application for remission of fines and penalties is obviously based upon an admission that the fine or penalty has been incurred. There is no such admission in this case. In the notification of April 17, 1911, sent by the Collector of the Port to the master of the vessel, the latter is notified of "liability to penalty for alleged violations," and he is informed that "prior to instituting proceedings for the enforcement of this penalty, you will be given an opportunity to present any statement you may desire to make." In each of the letters of April 22, 1911, from the Honolulu attorneys for the master of the vessel to the Collector of the Port the violations are referred to as "alleged violations." In the cablegram of the Collector of the Port to the Secretary of Commerce and Labor pursuant to the request on behalf of the master for clearance of the vessel, the term employed is "alleged penalties." Coming to the bond itself, the recitals are that notice had been given to the master by the Collector of the Port at Honolulu that the master had incurred certain penalties on account of "alleged violations" of the act, and that such Collector had been authorized to grant clearance to the vessel upon the giving of a bond—

"to secure the payment of such penalties for such violations aforesaid as shall be determined by the Department of Commerce and Labor of the United States to have been incurred by the said master, after presentation, within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at Honolulu, of the facts to said department."

The condition of the bond is:

"That if the said principal, J. F. Findlay, shall pay to the United States of America through the Collector of Customs at the Port of Honolulu in the territory of Hawaii the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred, then this obligation shall be null and void."

The language of the bond appears to be clear. It cannot be construed to be either an admission of liability for penalties or an application for remission or mitigation of penalties.

But without dwelling upon this feature of the proceedings we pass to a consideration of the more important question as to the scope of section 5294 of the Revised Statutes providing for the remission of fines, penalties, and forfeitures, for the purpose of determining whether the Secretary of Commerce and Labor had any authority to entertain the application under this section.

[8] Section 5294 of the Revised Statutes had its origin as section 64 of the act of February 28, 1871, entitled,

"An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes." 16 Stat. 440, 458.

This section provides that:

"The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine or penalty provided for in this act, or discontinue any prosecution to recover penalties denounced in this act excepting the penalty of imprisonment, or of removal from office, upon such terms as he, in his discretion, shall think proper; and that all rights granted to informers by this act shall be held subject to the said Secretary's power of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of said penalty; and that the said Secretary shall have authority to ascertain the facts upon all such applications, in such manner and under such regulations as he may deem proper."

The limitation here placed upon the authority of the Secretary of the Treasury to remit or mitigate only the fines and penalties provided in that act and to discontinue only the prosecutions to recover penalties denounced in that act is so plainly stated that further inquiry seems out of place, but, in view of the method adopted by the Revision Commission in incorporating the provisions of this act into the Revised Statutes in 1874, it will be well to notice that every provision of the section, including the exception relating to imprisonment and removal from office, and the rights of informers, had direct and apt relation to other sections of that act. The act contains 71 sections, and relates to the supervision and inspection of hulls, boilers, etc., of vessels navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce or open to general or competitive navigation, including coastwise seagoing vessels, and vessels navigating the Great Lakes when navigating within the jurisdiction of the United States. It is provided that the act shall not apply to public vessels of the United States or vessels of other countries, nor to boats propelled in whole or in part by steam for navigating canals. Sixty-six of these sections were carried into the Revised Statutes without substantial change as sections 4399 to 4500, under title 52, entitled "Regulation of Steam Vessels." Section 71, the last section of the act of 1871, was a repealing section of previous acts, and necessarily disappeared in the revision. The remaining four sections were transferred to other titles of the Revised Statutes; section 64, the section now under consideration, becoming section 5294 of the Revised Statutes, and incorporated under title 68 with other sections of the same general character under the title "Remission of Fines, Penalties, and Forfeitures." But the section as revised was not enlarged in its scope and did not lose its identity or relation to the other sections of the Revised Statutes to which it had previously been related in the original act before the revision. This identity and relation was indicated and preserved by striking out the words "this act" in the original statute and inserting in lieu thereof in the Revised Statutes the words "provided for in laws relating to steam vessels," pointing directly to title 52, entitled "Regulation of Steam Vessels," where the remainder of the act of February 28, 1871, had been transferred. The identity and relation was further indicated and preserved in the Revised Statutes by retaining the exceptions relating to imprisonment and removal from office and the rights

of informers, precisely as they appeared in the original section, where they had apt relation to other sections of the original act, and when transferred had apt relation to other sections of title 52.

It thus appears that the authority of the Secretary of the Treasury under section 5294 of the Revised Statutes was limited to the remission or mitigation of the fines and penalties provided for in the laws relating to steam vessels navigating the navigable waters of the United States, and to the discontinuance of prosecutions to recover penalties denounced in such laws as contained in title 52 of the Revised Statutes. This construction of the statute has had the support of two Attorney Generals of the United States. In 1894 Attorney General Olney was requested by the Secretary of the Treasury to be advised whether the latter had the power, under title 68 of the Revised Statutes, to remit or mitigate the penalties incurred under section 10, Act March 3, 1891, c. 551 (26 Stat. 1084, 1086), providing for the return of aliens who might unlawfully come to the United States by vessel. The Attorney General, under date of February 3, 1894 (20 Op. Atty. Gen. 705, 709), advised the Secretary that he had no such authority under any of the provisions of that title, and that section 5294 of the Revised Statutes related to the "remission by the Secretary of fines, etc., provided for in laws relating to steamboats," etc., and did not apply to a fine or penalty incurred for violation of the alien immigration laws. Congress thereupon amended section 5294, Act Dec. 15, 1894, c. 7 (28 Stat. 595 [Comp. St. 1913, § 10135]) by substituting the word "vessels" for the words "steam vessels." In 1896 (Act March 2, 1896, c. 37, 29 Stat. 39 [Comp. St. 1913, § 10135]), Congress again amended the section by adding, after the word "penalty" in the third line, the words "or forfeiture," so that the act was made to read as it now stands:

"The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty or forfeiture provided for in laws relating to vessels," etc.

In 1900 the Secretary of the Treasury submitted to Attorney General Griggs the identical question submitted to the Attorney General in 1894 for the purpose of being advised whether he had authority, under section 5294, as amended, to remit certain penalties incurred under section 10, Act March 3, 1891, c. 551 (26 Stat. 1084, 1086). The Attorney General, in answering the question (23 Op. Atty. Gen. 271, 273), reviews the opinions of his predecessor upon this section, and says:

"It cannot well be doubted that section 5294 contemplates the steamboat laws alone, or the laws relating to steam vessels as the phrase now is" [that is to say, vessels engaged in navigating the waters of the United States].

The Attorney General continues:

"I am not of opinion that the act of 1891 relates to vessels within the meaning of section 5294 as amended. The act of 1891 is an act amending the various acts relating to immigration and inspection of aliens under contract or agreement to perform labor. Section 5294 in its origin, its form in the Revised Statues, and under the amendments, belongs to the navigation laws rather than the immigration laws, and the phrase 'relating to vessels,' to my

apprehension, does not mean to include all laws which may affect vessels however remotely or indirectly, but rather the laws which relate to and regulate on the side of commerce and navigation as their original and direct purpose. It therefore seems to me that the case of a remission of a fine under the immigration laws is unprovided for. It is a casus omissus, and I concur in the views upon the subject expressed by Mr. Olney in 20 Op. Atty. Gen. 705."

The Attorney General gives a further reason why the scope of the statute has not been extended by the amendments:

"It should be observed that the above amendments to section 5294 have both been enacted since the recent immigration laws were passed, and if Congress meant to give the Secretary this additional power of remission, they would have done so by express language, or in such general terms as clearly to show this intent."

It follows that, as advised by the Attorney General, the Secretary of the Treasury during the time this subject was within the jurisdiction of the Treasury Department, applied the provisions of section 5294 of the Revised Statutes to only such fines, penalties, and forfeitures as had been incurred under the laws embraced in title 52 of the Revised Statutes, regulating vessels engaged in navigating the waters of the United States, and has not applied them to vessels incurring fines, penalties, and forfeitures under other acts of Congress.

[9] By Act Feb. 14, 1903, c. 552 (32 Stat. 825), Congress established the Department of Commerce and Labor. In section 10 (Comp. St. 1913, § 859), it was provided, among other things, that:

"All duties performed and all power and authority now possessed or exercised by the head of any executive department in and over any bureau, office, officer, board, branch, or division of the public service by this act transferred to the Department of Commerce and Labor, or any business arising therefrom or pertaining thereto, or in relation to the duties performed by and authority conferred by law upon such bureau, officer, office, board, branch or division of the public service, whether of an appellate or revisory character or otherwise, shall hereafter be vested in and exercised by the head of the said Department of Commerce and Labor. All duties, power, authority and jurisdiction, whether supervisory, appellate or otherwise now imposed or conferred upon the Secretary of the Treasury by acts of Congress relating to" various enumerated subjects, including "the remission or refund of fines, penalties, forfeitures, exactions or charges incurred for violating any provision of law relating to vessels or seamen, or to informer's shares of such fines, and by acts of Congress relating to the Commissioner and Bureau of Navigation, shipping commissioners, their officers and employés, steamboat-inspection service and any officer thereof, shall be and hereby are transferred to and imposed and conferred upon the Secretary of Commerce and Labor."

The transfer does not in and of itself give to the Secretary of Commerce and Labor any greater power or authority with respect to the subjects mentioned than that previously conferred upon the Secretary of the Treasury, and we do not find elsewhere any additional authority to remit fines, penalties, and forfeitures under section 5294 of the Revised Statutes. We conclude, therefore, that the practice in the department with respect to that jurisdiction is the same as that previously exercised by the Secretary of the Treasury under the advice of the Attorney General, and that the authority of the Secretary of Commerce and Labor to remit and mitigate fines, penalties, and forfeitures un-

der section 5294 is limited in practice to fines, penalties, and forfeitures prescribed in title 52 of the Revised Statutes relating to vessels engaged in navigating the waters of the United States, that is to say, vessels of the United States, and that such authority has not been extended to the remission or mitigation of fines, penalties, and forfeitures incurred by foreign vessels coming from foreign ports to ports of the United States and incurring penalties under the acts of Congress.

[10] Should the court follow the construction placed upon the statute by the Attorney General, and the practice of the Treasury Department and the Department of Commerce and Labor, in pursuance of such construction?

If the construction placed upon the statute by the department charged with its administration is obviously or clearly erroneous, it is the duty of the court to so adjudge, but if the departmental construction has been followed for many years, it should be respected and not overruled except for cogent reasons. A mere doubt should not be sufficient to reverse such construction. Edwards v. Darby, 12 Wheat. 206, 210, 6 L. Ed. 603; United States v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588; Hahn v. United States, 107 U. S. 402, 406, 2 Sup. Ct. 494, 27 L. Ed. 527; United States v. Philbrick, 120 U. S. 52, 59, 7 Sup. Ct. 413, 30 L. Ed. 559; United States v. Johnston, 124 U. S. 236, 253, 8 Sup. Ct. 446, 31 L. Ed. 389; United States v. Alabama G. S. R. Co., 142 U. S. 615, 621, 12 Sup. Ct. 306, 35 L. Ed. 1134; United States v. Finnell, 185 U. S. 236, 244, 22 Sup. Ct. 633, 46 L. Ed. 890.

[11] But it is said that the construction placed upon section 5294 of the Revised Statutes by the Attorney General was reached by resort to the act of Congress in which this section had its origin; that such method of construction is not permissible. The rule upon this subject as laid down by the Supreme Court of the United States is that it is not permissible to resort to the original act in the construction of a section of the Revised Statutes where the meaning of the section is perfectly plain; but the court has also held that where there is an ambiguity in the section of the Revised Statutes, resort may be had to the original act from which the section was taken to ascertain what, if any, change of phraseology there has been, and whether such change should be construed as changing the law. United States v. Hirsch, 100 U. S. 33, 35, 25 L. Ed. 539; United States v. Lacher, 134 U. S. 624, 626, 10 Sup. Ct. 625, 33 L. Ed. 1080; The Conqueror, 166 U. S. 110, 122, 17 Sup. Ct. 510, 41 L. Ed. 937; Barrett v. United States, 169 U. S. 218, 227, 18 Sup. Ct. 327, 42 L. Ed. 723.

The phraseology of section 5294 was slightly changed in revision, and was not perfectly plain to the Secretary of the Treasury as revised. He accordingly requested and received the opinion of the Attorney General as to its proper construction. He was advised that the section did not apply to a certain other subsequent act of Congress. The inquiry was repeated by a succeeding Secretary of the Treasury with respect to the section after it had been amended, and he was advised by the Attorney General that the section as amended did not apply to the act of Congress in question. This construction of the section, in our opinion, is not only in accordance with the rule prescribed by the

Supreme Court, but it is also a fair and reasonable construction of the statute, and should be followed in this case.

[12] We come now to the act of August 2, 1882, entitled "An act to regulate the carriage of passengers by sea" (22 Stat. 186), some of the pecuniary penalties of which are involved in this case. It is nowhere provided in this act that the authority of the Secretary of the Treasury to remit or mitigate fines and penalties under section 5294 of the Revised Statutes should be extended to the penalties provided in the act, and if the section is extended in this respect, it must be presumably capable of being extended in other respects. But the provisions of section 5294 of the Revised Statutes, relating to exceptions where there are claims for informers' shares, and the removal from office of certain officers of the customs for neglect of duty, have no application whatever to the act of August 2, 1882. There are no informers' shares provided for in that act, and no provision for the removal from office of an officer for neglect of duty. In other words, there is nothing in the act to show that Congress intended that its penalties should be subject to the authority of the Secretary of the Treasury to remit or mitigate, under section 5294 of the Revised Statutes; but, on the contrary, the character of the act itself indicates that such authority might well have been intentionally omitted, and that, a violation of the act being clearly established, its penalties should be enforced without remission or mitigation.

The act relates to vessels bringing steerage passengers from foreign ports, except ports in foreign contiguous territory, and the penalties are related to such matters as the construction of the vessel for the accommodation of steerage passengers so that male passengers who do not occupy berths with their wives should be berthed in compartments by themselves in another part of the vessel; to adequate means and appliances for ventilating the compartments of the vessel; the location and construction of water-closets and privies and their maintenance in a cleanly and sanitary condition; suitable location of compartments for hospitals; causing compartments and spaces occupied by passengers to be kept at all times clean and in healthy condition; and the delivery to officers of the customs of an accurate list, signed and verified on oath by the master, of all passengers taken on board the vessel at any foreign port, specifying, among other things, the location of compartments or places occupied by each passenger during the voyage if the passenger be other than a cabin passenger.

Whether this statute has been violated in a particular case must be ascertained preliminarily by inspection, and that is peculiarly the duty of an executive officer charged with the execution of the law under the supervisory and revisory authority of the head of the department. It was therefore within the jurisdiction of the Secretary of Commerce and Labor, in the exercise of his supervisory and revisory authority over the action of his subordinates (section 10, Act Feb. 14, 1903, 32 Stat. 825, 829), to inquire and determine preliminarily whether in his opinion the penalties of the statute had been incurred by the master of the vessel in this case, and if they had been incurred to direct that proceedings in court be taken for their recovery, providing of course,

in the case of fixed or maximum pecuniary penalties, the amount had not been deposited or their payment secured by a suitable bond given for that purpose. In the event the secretary should determine that some or all of the reported penalties had not been incurred, he would direct that action be taken in accordance with such determination. It must be remembered that prosecutions for violations of the federal statutes are in charge of the department having jurisdiction of the case, and it may determine whether it will prosecute a reported case or not; that is to say, whether the evidence is sufficient to justify a prosecution and the extent of such prosecution if undertaken. In the opinion of the Attorney General heretofore referred to (23 Op. Atty. Gen. 271, 276), he advised the Secretary of the Treasury that, while the latter had no power under section 5294 of the Revised Statutes to remit or mitigate the fines imposed by the act of March 3, 1891 (26 Stat. 1086), he did have authority to inquire whether the fines had been in fact incurred; and if he found that the fines had not been incurred under the circumstances stated, he had authority to return the deposit made to secure their payment.

5. Applying these constructions of the statute and the practice of the department to the present case, we are of opinion that while the Secretary of Commerce and Labor had no authority to remit or mitigate any of the penalties incurred under the act of August 2, 1882, he had revisory and supervisory authority to inquire and determine whether the statute had been violated, and the extent of such violation, if any, and in accordance with such determination to direct the prosecution of the case or its abandonment in whole or in part as the facts found upon examination might justify. That this was the view which the Acting Secretary entertained respecting his authority is shown by the concluding paragraph of his letter to the Collector of Customs at Honolulu, disposing of the application of the master of the vessel to determine his liability. The Acting Secretary says:

"In the opinion of the department, penalties aggregating $7,960 were incurred in this case for violations of the sections enumerated, and it declines to interfere in behalf of the offenders."

That the Acting Secretary exercised discretion appropriate to his executive authority is shown by the proceedings in this case. He determined that the full amount of the penalties reported by the officers of the Customs had not been incurred. The number of immigrants reported by the inspectors in the Orteric was over 1,500. The Acting Secretary determined that the number of steerage passengers with respect to whom penalties should be imposed was 1,242. In the application made on behalf of the master to give a bond to secure payment of the penalties it was stated that the penalties aggregated $10,000, doubtless based upon the report of the inspectors. The Acting Secretary determined that the penalties did not exceed the sum of $7,960. He determined that the reported violations of sections 2, 3, 4, 5, 6, 7, and 9 of the act should be reduced to violations of sections 2, 3, 5, 6, and 9, omitting section 4, the violation of which is classed as a misdemeanor, and a fine of $500 is imposed, with imprisonment for a term not exceeding six months, and section 7, the violation of which is also

classed as a misdemeanor with a fine of not more than $100. This submission of a question by the accused to the determination of executive officers of the departments is a practice well known, and has many advantages. It avoids delay and saves expense, and generally permits the exercise of a reasonable discretion, which may not be available when the whole case is submitted to judicial determination. We are of opinion that the master was seeking the benefit of such discretion when he submitted his case to the Department of Commerce and Labor, and that the submission was in accordance with the terms of his bond.

The judgment of the lower court is therefore affirmed, but for the reasons stated in this opinion.

NEW YORK & CUBA MAIL S. S. CO. v. MALDONADO & CO.

(Circuit Court of Appeals, Second Circuit. May 13, 1915.)

No. 235.

1. MARITIME LIENS ⟸60—JURISDICTION—LIEN FOR FREIGHT.

A through bill of lading provided for the transportation of a shipment by rail and water from a point in Mexico to New York. The last carrier, a steamship company, paid all prior charges and delivered the goods to the consignee in New York. *Held*, that it had a maritime lien for the freight and all charges upon the goods, notwithstanding the delivery of the goods upon the consignee's credit or his bond, and its action to recover for freight and advance charges was one on a maritime cause of action, within the jurisdiction of the United States District Court.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 98; Dec. Dig. ⟸60.]

2. LIMITATION OF ACTIONS ⟸2—LAW GOVERNING.

Where a bill of lading for the transportation of a shipment from a point in Mexico to New York, though signed in Mexico, was a single contract, by which, upon delivery of the shipment to the consignee in New York, he was obligated to pay the specified freight charges, the time within which a suit for such charges might be brought was to be determined by the law of New York, and not by that of Mexico.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4–8; Dec. Dig. ⟸2.]

Rogers, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree in favor of libelant. The action was brought to recover for freight and advance charges on 2,507 bags of peas from a point in Mexico to New York City.

James J. Franc and D. P. Hays, both of New York City, for appellant.

Burlingham, Montgomery & Beecher, of New York City (Norman B. Beecher and Roscoe H. Hupper, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] A through bill of lading was signed by the first carrier, which specified carriage by water to the west coast terminal of the Tehuantepec National Railway, thence by rail (about 190 miles) to Puerto, Mexico, thence by connecting lines to New York. The last carrier, libelant, paid all prior charges and delivered the goods to defendant in New York. The contract was a single one for the entire service, for a lump sum payable in New York. Defendant contends that the District Court had no jurisdiction of the controversy, on the ground that it was not a maritime cause of action. We do not assent to the proposition. Libelant had a maritime lien for the freight and all charges upon the goods; that it chose to let defendant take them, relying upon his credit or his bond, does not change the situation. We are satisfied that the District Court had jurisdiction of the action. Monteith v. Kirkpatrick, 3 Blatchf. 279, Fed. Cas. No. 9,721; British & F. M. Co. v. So. Pacific R. R., 72 Fed. 285, 18 C. C. A. 561.

[2] Defendant further contends that the contract is governed by the law of Mexico, and that certain provisions of that law as to the time within which actions to recover for freight shall be brought operate to defeat the action. A majority of the court are of the opinion that, although the bill of lading is in the Spanish language and was signed in Mexico, the contract was a single one, by which, upon delivery of the peas to defendant in New York, he was obligated there to pay a specified sum. The contract was to be completed in New York by tender of the goods and payment therefor; if payment be delayed, the time within which suit may be brought to recover it is to be determined by the law of New York.

Decree affirmed, with costs.

ROGERS, Circuit Judge (dissenting). This suit is for the recovery of freight alleged to be due for the transportation of merchandise from Guaymas, in the republic of Mexico, to the port of New York. The shipment was under a bill of lading entered into on September 25, 1912, in the city of Guaymas, Mexico. The bill of lading provided that the freight and charges should be paid at New York immediately after the arrival of the vessel. The merchandise was delivered at New York on November 7, 1912, but the freight and charges remain unpaid.

The respondent's answer avers that it was the mutual intention of the parties, at the time the bill of lading was entered into, executed, and delivered, "that the said bill of lading and the nature, obligation, and interpretation thereof were to be governed by the laws of the republic of Mexico." It is also averred that contracts for the transportation of property by land or sea made in Mexico are governed by the Commercial Code of the Republic of Mexico and that as to any points not covered by that Code the Civil Code of Mexico applies, if the carrier is regularly and permanently engaged in the business of transportation, and that under the Civil Code obligations and rights of action based on contracts of carriers for the transportation of property are extinguished and absolutely void without recourse after the lapse of six months from the conclusion of the voyage or car-

riage. It is also averred that under the Commercial Code of Mexico all obligations and rights of action based on contracts for the transportation of property by land or sea are extinguished and absolutely void without recourse after the lapse of one year from the conclusion of the voyage or carriage. It is also averred that the cause of action set forth in the libel did not accrue within either the aforesaid period of six months or the aforesaid period of one year prior to the commencement of the action, and that the action was not commenced within either the six months or the one year period. The cause was heard and decided on exceptions filed by libelant to the respondent's answer on the ground that the answer is insufficient to constitute a defense to the libel.

As a general rule statutes of limitation are regarded as municipal regulations founded on local policy, which are without effect outside the jurisdiction of the country enacting them. Since statutes of limitation usually affect the remedy only, the time within which an action on a contract can be brought is governed by the lex fori, and not by the lex loci contractus or the lex domicilii. And so the rule is that it is immaterial that the statutory bar has fully run against the contract in the jurisdiction where it was made, provided it has not run in the jurisdiction where the suit is brought. But a different question arises when the statute of the foreign state in which the contract was made, and by which the parties agreed the contract was to be governed, not merely bars the right of action, but extinguishes the obligation of the contract itself. And in the case at bar and under the averments of the answer the Mexican law not simply barred the remedy, but it extinguished the right of action. And under such circumstances no action can be maintained in the courts of the United States upon the contract.

The rule is stated in Dicey's Conflict of Laws (2d Ed., London, 1908) pp. 709, 710, as follows:

"Secondly. Any rule of law which solely affects, not the enforcement of a right, but the nature of the right itself, does not come under the head of procedure. Thus, if the law which governs, e. g., the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it affects the rights of the parties to the contract, and not the remedy for the enforcement of such rights. Hence any rule limiting the time within which the action may be brought, any limitation in the strict sense of that word, is a matter of procedure governed wholly by the lex fori. But a rule which after the lapse of a certain time extinguishes a right of action—a rule of prescription in the strict sense of that word—is not a matter of procedure, but a matter which touches a person's substantive rights, and therefore is governed, not by the lex fori, but by the law, whatever it may be, which governs the right in question. Thus if, in an action incurred for debt in France, the defense is raised that the action is barred under French law by lapse of time, or that for want of some formality an action could not be brought for the debt in a French court, the validity of the defense depends upon the real nature of the French law relied upon. If that law merely takes away the plaintiff's remedy, it has no effect in England. If, on the other hand, the French law extinguishes the plaintiff's right to be paid the debt, it affords a complete defense to an action in England."

And in John Bassett Moore's American Edition of the same work the learned commentator, at page 178, citing numerous cases in support of his proposition, says:

"But if the statute in force in the jurisdiction in which the cause of action arose extinguishes the debt or obligation, and does not merely bar the remedy, it governs, and if it has taken effect no action can be maintained in another jurisdiction."

In Beal's work on Conflict of Laws, vol. 3, p. 520, it is said, in speaking of where suit is brought in a foreign court:

"If it is claimed that remedy is barred by the statute of limitations, it is the statute of the forum which decides, unless, indeed, some statute which has power to do so has actually extinguished the right. That may happen where it was a condition of the right at the time of its creation that it should be exercised within a certain time, or where (as often in the civil law) the lapse of time extinguishes the right itself (prescription liberatoire)."

The provision in the Mexican law which extinguished the right of action discharged the obligation of the contract. If it affected the remedy only, it would be a matter of procedure simply, and without effect in our jurisdiction. But as it does not relate to procedure, and affects the contract itself, this court must recognize and give effect to it. Thus in Gibbs & Sons v. Société Industrielle et Commerciale des Metaux, 25 Q. B. Div. 309, 405 (1890), Lord Esher, in speaking of a contract made in one country and sued upon in another, said:

"Therefore, if there be a bankruptcy law, or any other law, of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country, where the action is brought. That, at any rate, is the law of England on the subject. So where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country."

In Baker v. Stonebraker's Adm'rs, 36 Mo. 338, 349 (1865), the court said:

"The doctrine is well established that, where an act of this kind operated to extinguish the contract or debt itself, the case no longer falls within the law of limitations on the remedy merely. In such case, when the debt or judgment is sued on in another state, the lex loci contractus, and not the lex fori, is to govern. Sto. Confl. of Laws, § 582; Huber v. Steiner, 2 Bing. N. C. 202. These authorities admit a qualification, that 'the parties are within the jurisdiction during all the period of the statute, so that it has actually operated on the case.' This qualification is to be understood of cases where the statute itself expressly makes exceptions of the absence of the parties beyond the jurisdiction, in which case it would not operate on them. But where, as in this case, the statute makes no exception of the absent party, but is absolute in its terms, this qualification is inapplicable. 1 Smith's Lead. Cas. 368."

In Pritchard v. Norton, 106 U. S. 124, 129, 1 Sup. Ct. 102, 106, 27 L. Ed. 104 (1882), the Supreme Court, speaking through Mr. Justice Matthews said:

"The principle is that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract."

That which discharges a contract "goes to the substance of the obligation," and is therefore governed by the law of the contract, and that in this case is the law of Mexico.

In Wayman v. Southard, 10 Wheat. 1, 48, 6 L. Ed. 253 (1825), Chief Justice Marshall declared that:

"The principle that in every forum a contract is governed by the law with a view to which it was made" is a principle of universal law.

And in Lloyd v. Guibert, Law Rep. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that:

"It is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter."

It may be argued that as under the contract payment was to be made in New York City, and it was there that default was made, the right of action accrued in New York and is on that account to be governed by the New York law; but in Dicey on the Conflict of Laws, that distinguished authority says:

"There is a great uncertainty as to what is the law governing a contract for through carriage of person or goods, which may often be partly by land and partly by water, from a place (e. g., London) in one country to a place (e. g., Paris) in another. Here, as elsewhere, the only ultimate test for determining the law by which a contract is governed is the presumed intention of the parties." 2d Ed., p. 580.

In the case at bar the intention of the parties is not left to inference, as the answer expressly alleges that the parties mutually intended that the contract should be governed by the Mexican law. That allegation must be accepted as true, as the case is heard on the bill and answer.

I have emphasized the fact that the answer of the respondent alleges that the intention of the parties to the contract was that it should be governed by the Mexican law, and that their intention is controlling. If, however, there had been no allegation that such was the intention of the parties, and this court had been left to apply the law applicable to a case in which there was no evidence outside the bill of lading itself as to the intention of the parties, the same result would be arrived at, and it would be necessary to hold that the law of Mexico governed the contract. The contract was made in Mexico, is in the Spanish language—the language of Mexico—and contains nothing to indicate that the owners of either the ship or the goods are not Mexicans, or that it was intended that the contract was to be governed in any respect by the law of New York. It contains a stipulation that:

"The freight and charges on said goods shall be paid at New York (ship lost or not lost) as in the margin, including primage and average, if any, according to the York-Antwerp rules, immediately after the arrival of the vessel, without rebate or discount."

To the extent specified the contract was not subject to the Mexican law, but in other respects it was. The York-Antwerp rules were rules drawn up in 1864 at York in England, and adopted in 1877 at Antwerp in Belgium, at international conferences of the more im-

portant mercantile associations of the United States, as well as of the maritime countries of Europe. The bill of lading also provides that the goods were to be carried by vessel from Guaymas, Mexico, to Salina Cruz, Mexico, where they were to be delivered to the Tehuantepec National Railway, to be carried by such railway or other system of transportation to Puerto, Mexico, and there delivered to any vessel of the connecting lines to be carried from said Puerto, Mexico, to New York. The transportation was thus in part on land and in part on the sea.

In Liverpool & Great Western Steam Company v. Phenix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788 (1889), the Supreme Court reviewed at length the authorities relating to contracts of affreightment which involved carriage on the high seas, where the contract was entered into in one country and delivery was to be made in another. In that case the bill of lading was made at New York, and the goods were to be carried from that port to Liverpool. The thing contracted for was to be chiefly performed on the high seas, and was to end at the port of Liverpool. The court held that the fact that the goods were to be delivered at Liverpool, and the freight and primage were payable there in sterling currency, did not make the contract an English contract. Mr. Justice Gray, speaking for the court, said:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

In my view of the case the law of Mexico controls: (1) As to the primary obligation of the contract. (2) As to the secondary obligation of the contract. (3) And as to the discharge of the secondary obligation.

For the reasons above stated, I think the answer constituted a defense to the libel, and that the decree of the District Court dismissing the libel should be reversed.

COURTNEY v. SHEA et al.

SAME v. WHALLEN.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

Nos. 2630, 2665.

1. BANKRUPTCY ⊂⊃440—RECOVERY OF PROPERTY—SUMMARY PROCEEDINGS.

Petitions by a trustee in bankruptcy, praying for a rule against the bankrupt and his wife, requiring them to pay money deposited in a bank in the wife's name and stock in a building association issued in the wife's name, and praying for a rule against a third person individually and as executor, requiring him to show cause why he should not pay to the

trustee a sum the bankrupt had paid for stock in a building association and had transferred to such third person, initiate proceedings summary in character, and decisions thereon are reviewable under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), and are not appealable under section 24a (section 9608) as a controversy arising in bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂=440.]

2. BANKRUPTCY ⊂=440—RECOVERY OF PROPERTY—ADVERSE CLAIM—SUMMARY PROCEEDINGS—APPEAL—PETITIONS TO REVISE.

The remedy to revise in a matter of law given by Bankr. Act, § 24b, and the remedy of appeal under section 24a, are mutually exclusive; and where the proper remedy is to revise, an appeal also taken will be dismissed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂=440.]

3. BANKRUPTCY ⊂=288—RECOVERY OF PROPERTY—ADVERSE CLAIMS—SUMMARY PROCEEDINGS.

Where the adverse claim of a third person existing at the time of the filing of the petition in bankruptcy will sustain a judgment in favor of the third person if supported by uncontradicted testimony, the trustee must resort to a plenary suit to recover the property adversely claimed; but where the adverse claim is merely frivolous, such as that of an agent or bailee holding in the interest of the bankrupt, the trustee may maintain summary proceeding for the recovery of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288.]

4. BANKRUPTCY ⊂=288—RECOVERY OF PROPERTY—ADVERSE CLAIMS—SUMMARY PROCEEDINGS.

Between April, 1913, and November following, the bankrupt gave to his wife $3,970.38, which she deposited to her own credit. She checked against the account, so that only $684.47 remained on November 10th. The husband was adjudged a bankrupt on November 11th. The wife thereafter withdrew for necessary household and personal expenses $449.93, and so reduced her credit to $234.54. Shortly after the marriage of the parties, in 1906, the bankrupt began to deliver most of his earnings to his wife, on the understanding that she should pay the family expenses, and the savings, if any, should belong to her. She invested the savings in building association stock in her own name. *Held* that the wife, as to the stock and the money deposited in the bank, except $234.54, had a bona fide adverse claim, which she was entitled to have tried in a plenary action as against the trustee in bankruptcy, notwithstanding Ky. St. 1909, § 1907, providing that every gift by a debtor shall be void as to existing creditors, which section can be relied on only in a plenary action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288.]

5. BANKRUPTCY ⊂=288—RECOVERY OF PROPERTY—ADVERSE CLAIMS—SUMMARY PROCEEDINGS.

Where one, over a year before he was adjudged a bankrupt, transferred stock in a building association in alleged fraud of his creditors, the trustee can only maintain a plenary action against the transferee for relief.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂=288.]

Appeals from, and Petitions to Revise Orders of, the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Petitions by R. H. Courtney, trustee in bankruptcy of John H. Shea, against John H. Shea and Irene Shea, and against James P. Whallen, individually and as executor of John H. Whallen, deceased. From orders (211 Fed. 365) granting insufficient relief, the trustee appeals, and also brings petitions to revise. Orders affirmed, and appeals dismissed.

On November 11, 1913, John H. Shea was adjudicated a bankrupt on his petition of that date, and later R. H. Courtney was appointed trustee of the bankrupt's estate. Upon examination into the condition of the estate, it appeared that certain moneys had been deposited in bank, and certain other moneys invested in shares of stock in two building associations, the Avery Building Association and the Portland Building & Loan Association, in the name of the bankrupt's wife, Irene Shea. On January 2, 1914, the trustee filed a petition in the court below, alleging that these moneys and stocks belonged to the bankrupt, and that Irene Shea claimed to be the owner of the moneys and securities. The prayer was for a rule against the bankrupt and Irene Shea, requiring them to pay to the petitioner the money and to turn over to him the shares of stock. On the same date a rule was issued against the bankrupt and his wife to show cause why the prayer of the petition should not be allowed. Response was filed by Shea and his wife, setting out many details which need not be repeated. Upon the hearing the referee adjudged the response to be insufficient and made the rule absolute.

On January 16, 1914, the trustee also filed a petition in the court below against James P. Whallen, individually and as executor of John H. Whallen, claiming that the bankrupt had placed in the possession of the Whallens certificate 484 for 50 shares of stock in the Avery Building Association; that Shea had paid $1,470 to the building association on account of such shares of stock; and that Shea, without receiving any consideration therefor, had, on August 31, 1912, transferred the certificate to James P. and John H. Whallen for the purpose of defrauding the creditors of the bankrupt; that John H. Whallen had since died testate, and James P. had qualified as his executor. The petition contained a prayer for a rule against James P. Whallen, individually and as such executor, requiring him to show cause why he should not pay to the trustee the sum of $1,470, and to turn over to him the certificate representing the stock. Response was filed by James P. Whallen, individually and as such executor, stating that on August 31, 1912, he with John H. Whallen purchased from Shea this certificate of stock and paid therefor the sum of $1,125, part in cash and part through discharge of Shea's obligations to them for loans of money theretofore made to him; that after the date of such purchase the Whallens paid to the building association on account of the shares $370, making the total value of the certificate $1,494; and that the Whallens were the absolute owners of the stock. The referee, adjudging the response to be sufficient, discharged the rule, without costs.

In the first proceeding Shea and his wife filed a petition for review, and in the second the trustee filed a like petition, in the District Court. In that court the order in the first proceeding was affirmed only to the extent of requiring respondents to pay to the trustee $234.54 out of the moneys then on deposit to the credit of Irene Shea, or under her control, in the First National Bank of Louisville, but in all other respects the order was reversed and set aside; and the order in the second proceeding was affirmed. So far as the order in the first proceeding was affirmed, it seems to have been acquiesced in by the respondents; at least they have taken no steps to have it reviewed. The trustee adopted two remedies for bringing the modified order in the first proceeding and the entire order in the second under review in this court; one was by appeal, and the other by petition to revise in matter of law. Each proceeding was docketed here as a separate case, though both cases are included in one record and were argued and submitted as one cause.

B. K. Marshall, of Louisville, Ky., for appellant and petitioner.

J. B. Baskin, of Louisville, Ky., for appellees and respondents.

Before WARRINGTON and DENISON, Circuit Judges, and SESSIONS, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). [1, 2] Counsel do not concern themselves about the remedies adopted by the trustee to bring these cases into this court. Since each proceeding is summary in character and object, we think each is a proceeding in bankruptcy, reviewable under section 24b, and not appealable as a controversy arising in bankruptcy proceedings under section 24a. First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 288, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Goldstein, 216 Fed. 887, 888, 133 C. C. A. 91 (C. C. A. 7th Cir.); In re Farrell, 176 Fed. 505, 507–509, 100 C. C. A. 63 and citations (C. C. A. 6th Cir.); In re Rose Shoe Mfg. Co., 168 Fed. 39, 40, 93 C. C. A. 461 (C. C. A. 2d Cir.); In re Rathman, 183 Fed. 913, 929, 106 C. C. A. 253 (C. C. A. 8th Cir.). The two remedies adopted, the one to revise in matter of law and the other to appeal, are mutually exclusive (Barnes v. Pampel, 192 Fed. 525, 527, 113 C. C. A. 81 [C. C. A. 6th Cir.]; In re Martin, 201 Fed. 31, 37, 119 C. C. A. 363 [C. C. A. 6th Cir.]); and the appeals will be dismissed.

[3] The controlling question in each case is whether the trustee was entitled to summary processes, or, stated in another way, whether he was required to proceed by plenary suits to recover the moneys and stocks in dispute. Every legitimate object of summary proceedings such as these is accomplished, and they should be dismissed, when it appears that the property sought to be recovered is in possession of a third person and held under an adverse claim, which existed at the time the petition in bankruptcy was filed, and which, if supported by uncontradicted testimony, would sustain a judgment in favor of the claimant, even though the claim might in the end prove to be fraudulent and voidable; but of course a merely frivolous claim, such as that of an agent or bailee holding in the interest of the bankrupt, should not be allowed to defeat summary process. In re Yorkville Coal Co., 211 Fed. 619, 621, 128 C. C. A. 570 (C. C. A. 2d Cir.); In re Bacon, 210 Fed. 129, 134, 126 C. C. A. 643 (C. C. A. 2d Cir.); In re Goldstein, supra, at page 888 of 216 Fed., 133 C. C. A. 91; In re Blum, 202 Fed. 883, 884, 121 C. C. A. 241 (C. C. A. 7th Cir.); Shea v. Lewis, 206 Fed. 877, 880, 881, 124 C. C. A. 537 (C. C. A. 8th Cir.); In re Rathman, supra, 183 Fed. at page 918 et seq., 106 C. C. A. 253; In re Cohn (D. C.) 98 Fed. 75, opinion by Judge Addison Brown; In re Green (D. C.) 108 Fed. 616, opinion by Judge McPherson. It results that, where the adverse claim is of the character first pointed out, the trustee must resort to plenary suit, but that, where the adverse claim is of the character secondly pointed out, a summary proceeding may be maintained. Babbitt v. Dutcher, 216 U. S. 102, 113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969.

[4] 1. In her response to the petition of the trustee, Irene Shea in terms alleges that the court below and the referee had no jurisdiction of the proceeding brought against her; and we find nothing looking to a waiver of her rights in this behalf. The most that she did was to yield to compulsory process to appear and testify. Further, one of the defenses set up by the respondents is that within a few weeks after their marriage, January, 1906, they entered into an agreement, concerning which the learned trial judge found:

"It seems not to be disputed, and we therefore find it to be true, that shortly after the marriage of the respondents early in 1906, the bankrupt arranged with his wife to put most of his earnings in her hands, she to pay all bills, expenses, etc., of the family, and if she, by judicious and economical management, saved anything out of the money, the amount thus saved was to become her property."

Mrs. Shea testified in substance that the agreement had ever since been observed and carried out. The referee made no allusion to this agreement or the testimony supporting it, either in his opinion or certificate. Between April, 1913, and the following November, though prior to the bankruptcy, it appears that the bankrupt gave to his wife $3,970.38, which was deposited to her credit in the First National Bank of Louisville, and within the same period she checked out of this account $3,285.91, leaving a balance to her credit of $684.47 at the time the proceeding in bankruptcy was begun. After the bankruptcy, and in November and December of that year, Mrs. Shea, according to her uncontradicted response, checked against this balance for necessary household and personal expenses to the amount of $449.93. This sum was withdrawn in part by checks running in favor of third persons in payment of rent, supplies, etc., and the rest by checks for cash to herself, reducing the balance in bank to $234.54. This is the sum as to which the court affirmed the order of the referee. In other words, this was the only money found to be in possession of the wife at the commencement of the present proceeding—January 2, 1914. We are not concerned with this sum, for the reason, pointed out in the statement, that no steps have been taken to review the partial affirmance. The trustee claims, however, both in his petition and in argument, that the wife should be required to pay over the entire balance of $684.47. This ignores the rights of the persons who received Mrs. Shea's checks before the trustee began his summary proceeding. It is not suggested that those persons did not receive the checks, or the sums for which they were drawn; and Mrs. Shea could no more be compelled by summary process to pay over money she had so disposed of than the rights of the persons who were in possession of it could be adjudicated in their absence. And as to the portion withdrawn by Mrs. Shea in her own favor for the purposes stated, she further says in her response that the money was used before she knew any part of it would be claimed by the trustee, and this is not disputed. True, she made a deposit of money during this period; but it cannot be presumed to be the same money she had checked out.

The money paid to the building associations, it is true, was given to Mrs. Shea by the bankrupt; but as early as August 30, 1911, she purchased from one Hite a passbook, No. 2604, representing 20 shares of stock in the Avery Building Association, and paid therefor $162; she paid further sums to the association on account of these shares in 1911 and 1912, amounting to $38. On February 17, 1912, Mrs. Shea purchased from one Ray a passbook, No. 1208, for 30 additional shares of the association before named, for $162, and subsequently during that year, and also between January 4 and November 1, 1913, she continued to make payments on account of such shares to the amount of $473, aggregating a total investment in the shares of that association

of $837. Between January 25, 1911, and November 1, 1913, Mrs. Shea purchased shares of stock in the Portland Building & Loan Association, and made payments thereon in the ordinary way from time to time to the amount of $1,958. The passbooks were all purchased and kept in her name. When the dates of these purchases of the passbooks in the two associations and of the payments made on account of the shares therein are considered, it is perfectly plain that the claims made by Mrs. Shea to the moneys used to pay for the shares, and to the shares themselves, are substantial; it is therefore vain to insist that her claims are but colorable.

Reliance is placed upon the nature of a suit which was brought in the name of a taxpayer on behalf of Jefferson county, Ky., against the bankrupt, and which resulted in a judgment against him and in the voluntary proceeding in bankruptcy; also upon section 1907 of the Kentucky Statutes, which provides in substance that every gift made by a debtor "shall be void as to all of his then existing liabilities"; but the enactment further provides that such gifts shall not be "void as to creditors whose debts or demands are thereafter contracted," etc. It is enough to say of the contentions made in respect of these matters that they may be of weight in a plenary suit; but we hold that they cannot be employed in support of a summary proceeding such as this.

[5] 2. It is not necessary to dwell upon the proceeding brought against Whallen. His response, which is in substance set out in the statement, is fairly sustained by his own testimony; and we do not discover anything in the record opposed to his version of the transaction. Both the referee and the District Judge held the response and the testimony in its support to be sufficient. The referee discharged the rule, and the court affirmed his order.

The orders as made by the District Judge in both proceedings are affirmed, and the appeals therein are dismissed, with costs.

THE NEW HAMPSHIRE.

THE PORTCHESTER.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

Nos. 308, 309.

COLLISION ⊂⊃95—STEAMER AND MEETING TOW—FAULT.

A steamer passing up East River against an ebb tide, and which agreed by signal to pass port to port a tug coming down with a tow on a hawser through the eastern channel of Hell Gate, *held* solely in fault for a collision with the tow, on the ground that she was moving at too great speed and should have waited for the tow to clear Hallett's Point.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⊂⊃95.

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Southern District of New York.

Haight, Sandford & Smith, of New York City (John W. Griffin, of New York City, of counsel), for appellant New England S. S. Co.

Carpenter & Park, of New York City (Samuel Park, of New York City, of counsel), for appellees the Portchester and others.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. October 15, 1912, at about 5:30 p. m., the steam tug Portchester was approaching Hell Gate on an ebb tide of four knots an hour bound for New York. When about off Negro Point she gave the usual bend whistle, and as usual on an ebb tide headed over to Hallett's Point, so that her tow might swing out behind her in going down the East River. The steamer New Hampshire, going up the East River bound for New Haven, as she approached Hallett's Point in the east channel close to the Astoria shore, saw the towing lights and red light of the tug. Thereupon she blew a signal of one blast, which the tug answered with one blast. This constituted an agreement that the vessels were to pass each other in the east channel port to port. After blowing the one blast the steamer slowed down, but in passing Hallett's Point ran right across the hawser between the tug and the tow, as the result of which there was a mixup, in which the scow S. & R. No. 47 sustained damage.

The owners of the scow filed a libel to recover their damages against the steamer, and the claimant of the steamer brought in the tug under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi). The master of the steamer testified that when he discovered the tow it was impossible for him to pass port to port, because it was coming up so close to the Astoria shore. Therefore he blew two whistles, reversed full speed astern, which threw his bow to port, his propeller being left-handed, and put his wheel hard aport to correct this effect, notwithstanding which he ran into the tow. On the other hand, the witnesses for the tug explained the steamer's sheer as a result of the ebb tide striking her starboard bow as she came out of the eddy current running along the Astoria shore. Judge Learned Hand held the steamer solely at fault on the ground that she was going too fast to control her movements when she made out the location of the tow. He also found that the proofs showed it to be the custom for steamers in the situation of the New Hampshire on an ebb tide to wait until a down-coming tow has cleared Hallett's Point. We think he was right on both points.

Counsel for the steamer contended that the tug should have approached Hallett's Point at a greater angle, so that the ebb tide would have swung her tow further off, leaving room for the steamer to pass port to port. It may be that the navigation of the tug might have been better in this respect. Still the steamer could easily have prevented the collision, had she slowed down or stopped to ascertain just where the tow was and let it pass; whereas the tug with a long hawser tow on the ebb tide was quite unable to manœuvre. Two barges lying in the east channel east of Mill Rock reduced the waterway considerably, and were a reason for the tug's passing closer to the point than usual. It was pointed out in addition that Judge Addi-

son Brown severely criticized a contention that an upward-bound vessel should have waited off Hallett's Point on an ebb tide in The City of Springfield (D. C.) 26 Fed. 158. But this was written when there were three channels in Hell Gate, viz., the east, the middle and the west. Since that time Flood Rock has been removed, and there are two, one on the east and the other on the west side of Mill Rock. The rationale of his decision was that the whistles exchanged in that case did not indicate to the steamer going up which of the three channels the tug was going to take, and the steamer had no reason to expect her to take, as she did, the most dangerous one. If there had been but one channel, the judge admitted that it would have been the duty of the steamer going against the tide to wait for the tug coming with it. Exactly the same rule applies when the vessels have come to an understanding that they are to pass port to port in the same channel, The Galatea, 92 U. S. 439, 445–446, 23 L. Ed. 727. Judge Brown recognized this difference in The Dasori (D. C.) 47 Fed. 330. These latter cases are applicable to the present situation, in which the vessels had agreed to pass port to port in the east channel. Under analogous circumstances we have held it to be the duty of steamers going down the Harlem River on a flood tide to wait above Horn's Hook until the navigation with an approaching steamer has been agreed upon. The Arrow, 214 Fed. 743, 131 C. C. A. 49; Transfer No. 12, 221 Fed. 409, — C. C. A. —.

The decree is affirmed.

COLLINS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 16, 1915.)

No. 4387.

INDIANS ⊂⊃38—INTRODUCING LIQUOR INTO INDIAN COUNTRY—POSSESSION AS EVIDENCE.

The mere possession by a defendant of liquor within that part of the state of Oklahoma which was formerly a part of Indian Territory is not sufficient to warrant his conviction for introducing the liquor into the state.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⊂⊃38.

Introducing intoxicating liquors into Indian country, see note to Joplin Mercantile Co. v. United States, 131 C. C. A. 171.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Jack Collins. Judgment of conviction, and defendant brings error. Reversed.

See, also, 219 Fed. 670, — C. C. A. —.

R. Emmett Stewart, of Muskogee, Okl. (G. W. P. Brown, of Muskogee, Okl., on the brief), for plaintiff in error.

W. P. McGinnis, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

PER CURIAM. Collins was tried, convicted, and sentenced for introducing intoxicating liquor into the county of Muskogee, state of Oklahoma, from without the said state of Oklahoma, the portion of said county into which the liquor was introduced having been within the limits of the former Indian country. In its charge to the jury the trial court used the following language:

"I think, however, you will have little trouble in concluding from the evidence in this case that these officers did discover out there a spring wagon, loaded with a large quantity of whisky. I think you will have little trouble in arriving at the conclusion that the liquor was marked Hill & Hill, and that it was also marked with the name of some man Gilley of Ft. Smith. I think you will have little trouble in arriving at the conclusion that the people in possession of that liquor, or somebody, had introduced it from a point outside the state, and probably from Ft. Smith, into this the Eastern District of Oklahoma, into Muskogee county, which was formerly part of the Indian Territory, and that therefore somebody was in the act of violating the law. If you arrive at those conclusions, after a consideration of the evidence, then there remains but the one question: Was this defendant in possession of that liquor? Was he one of the men that was out there, and, if he was, does the evidence, that being true, establish his connection with it in such way as that he aided, abetted, assisted, or procured in its introduction?"

This portion of the charge was excepted to by counsel for defendant, and the giving of said instruction is assigned as error. We have carefully examined the evidence in the record, and we do not think the court was justified in telling the jury that they would have little trouble in finding that the liquor had been introduced from a point outside the state and probably from Ft. Smith into the Eastern District of Oklahoma. The evidence was not clear upon this point. We also think the remaining portion of the language excepted to was in effect a charge that if the jury found the defendant was in possession of the liquor then a conviction should follow. Under the decisions of this court, mere possession of the intoxicating liquor would not be sufficient to authorize a conviction of the crime charged. Chambliss v. United States, 132 C. C. A. 112, 218 Fed. 154; Lewellen v. United States, 223 Fed. 18, — C. C. A. —; Moore v. United States, 224 Fed. 95, — C. C. A. —; Sellers v. United States, 222 Fed. 1023, — C. C. A. —; Crites v. United States, 222 Fed. 1022, — C. C. A. —; Cecil v. United States, 225 Fed. 368, — C. C. A. —; Parks v. United States, 225 Fed. 369, — C. C. A. —; Talkington & Bastine v. United States, 225 Fed. 367, — C. C. A. —. The sufficiency of the evidence was not questioned at the trial.

The judgment below is reversed, and a new trial ordered.

TALKINGTON et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 16, 1915.)

No. 4357.

INDIANS ⊂=38—INTRODUCTION OF LIQUOR INTO INDIAN COUNTRY—PROSECUTION.

Failure to prove that the introduction was by accused is fatal to a prosecution for introducing liquor into a part of the state of Oklahoma which was formerly part of the Indian Territory.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⊂=38.

Introducing intoxicating liquors into Indian country, see note to Joplin Mercantile Co. v. United States, 131 C. C. A. 171.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Steve Talkington and Joe Bastine. Judgment of conviction, and defendants bring error. Reversed.

Guy H. Sigler, of Ardmore, Okl. (William Pfeiffer, of Ardmore, Okl., on the brief), for plaintiffs in error.

W. P. McGinnis, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty, of Muskogee, Okl., and C. W. Miller, Sp. Asst. U. S. Atty., of Holdenville, Okl., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

PER CURIAM. Talkington and Bastine were tried, convicted, and sentenced for introducing into the county of Carter, state of Oklahoma, from without the state of Oklahoma intoxicating liquor. At the close of all the evidence counsel for defendants demurred to the evidence offered by the government for the reason that the same was insufficient to convict them of the offense charged in the indictment. The demurrers were overruled and an exception taken.

We have carefully read the testimony, and are of the opinion that the demurrers should have been sustained. There was a failure of evidence to show that the defendants introduced the liquor as charged. Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112; Lewellen v. United States, 223 Fed. 18, —— C. C. A. ——; Moore v. United States, 224 Fed. 95, —— C. C. A. ——; Sellers v. United States, 222 Fed. 1023, —— C. C. A. ——; Crites v. United States, 222 Fed. 1022, —— C. C. A. ——; Cecil v. United States, 225 Fed. 368, —— C. C. A. ——; Parks v. United States, 225 Fed. 369, —— C. C. A. ——.

The judgment of the lower court is reversed, and a new trial ordered.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

KEY v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1915.)

No. 4435.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Robert Key was convicted of crime, and he brings error. Reversed.

Guy H. Sigler, of Ardmore, Okl. (William Pfeiffer, of Ardmore, Okl., on the brief), for plaintiff in error.

W. P. McGinnis, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

PER CURIAM. The indictment in this case is like that in Talkington and Bastine against the United States, 225 Fed. 367, — C. C. A. —, decided at this term. As in that case there is a total failure of evidence to show that the defendant introduced the liquor as charged, and for that reason the demurrer to the evidence should have been sustained. The judgment is reversed.

CECIL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1915.)

No. 4338.

INDIANS ⊂⊃38—INTRODUCTION OF LIQUOR INTO INDIAN COUNTRY—CRIMINAL PROSECUTION.

Possession by a defendant, within that part of Oklahoma which constituted Indian country at the time of the passage of Act July 23, 1892, c. 234, 27 Stat. 260, of intoxicating liquors which had been brought into the state from without, is not sufficient to warrant his conviction under such statute for introducing liquors into the Indian country.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⊂⊃38.

Introducing intoxicating liquors into Indian country, see note to Joplin Mercantile Co. v. United States, 131 C. C. A. 171.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against Henry Cecil. Judgment of conviction, and defendant brings error. Reversed.

A. A. Davidson, of Tulsa, Okl., for plaintiff in error.

D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

PER CURIAM. Cecil was tried, convicted, and sentenced in the District Court of the United States for the Eastern District of Oklahoma for introducing and carrying into the Indian country, to wit, the county of Muskogee, in the state of Oklahoma, from without said Indian country, and from without said district, spirituous and intoxi-

cating liquor. At the close of all the evidence offered at the trial, counsel for the defendant demurred to the evidence introduced, for the reason that it failed to show the defendant guilty as charged. The demurrer was overruled, and an exception taken.

We are of the opinion that the demurrer ought to have been sustained, as there was not sufficient evidence that the defendant introduced intoxicating liquor into Muskogee county from without the district or state of Oklahoma. Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112; Lewellen v. United States, 223 Fed. 18, — C. C. A. —; Moore v. United States, 224 Fed. 95, — C. C. A. —; Sellers v. United States, 222 Fed. 1023, — C. C. A. —; Crites v. United States, 222 Fed. 1022, — C. C. A. —.

The judgment below is reversed, and a new trial ordered.

PARKS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1915.)

No. 4319.

INDIANS ⊂=38—INTRODUCTION OF LIQUOR INTO INDIAN COUNTRY—CRIMINAL PROSECUTION.

Possession by a defendant, within that part of Oklahoma which constituted Indian country at the time of the passage of Act July 23, 1892, c. 234, 27 Stat. 260, of intoxicating liquor which had been brought into the state from without, is not sufficient to warrant his conviction under such statute for introducing liquor into the Indian country.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⊂=38.

[Introducing intoxicating liquors into Indian country, see note to Joplin Mercantile Co. v. United States, 131 C. C. A. 171.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Criminal prosecution by the United States against W. F. Parks. Judgment of conviction, and defendant brings error. Reversed.

W. J. Crump, of Muskogee, Okl., for plaintiff in error.

W. P. McGinnis, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., and C. W. Miller, Sp. Asst. U. S. Atty., of Holdenville, Okl., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

PER CURIAM. Parks was indicted, tried, and convicted for introducing into the county of Muskogee, state of Oklahoma, intoxicating liquor from without said state. At the close of all the evidence offered at the trial, counsel for Parks moved the court to instruct the jury to return a verdict of not guilty, for the reason that the testimony was not sufficient to warrant the conviction of the defendant. This motion was overruled, and an exception taken.

We are of the opinion that the motion should have been granted. In accordance with the previous decisions of this court, there was not sufficient evidence that the defendant introduced the liquor as charged. Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112; Lewellen v. United States, 223 Fed. 18, — C. C. A. —; Moore v. United States, 224 Fed. 95, — C. C. A. —; Sellers v. United States, 222 Fed. 1023, — C. C. A. —; Crites v. United States, 222 Fed. 1022, — C. C. A. —; Cecil v. United States, 225 Fed. 368, — C. C. A. —.

The judgment of the court below is reversed, and a new trial ordered.

BURKE v. SOUTHERN PAC. R. CO. et al.

LAMPRECHT et al. v. SAME.

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

Appeal from the Circuit Court of the United States for the Southern Division of the Southern District of California; Erskine M. Ross, Judge.

Suit by Edmund Burke against the Southern Pacific Railroad Company and others. Decree for defendants, and complainant appeals. Affirmed.

Appeal from the Circuit Court of the United States for the Northern Division of the Southern District of California; Erskine M. Ross, Judge.

Suit by J. I. Lamprecht and others against the Southern Pacific Railroad Company and others. Decree for defendants, and complainants appeal. Affirmed.

See, also, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527.

In Burke v. Southern Pac. R. Co.:

Edmund Burke, of Los Angeles, Cal., in pro. per.

Guy V. Shoup, D. V. Cowden, and Wm. Singer, Jr., all of San Francisco, Cal., for appellees.

In Lamprecht et al. v. Southern Pac. R. Co. et al.:

E. J. Blandin, of Cleveland, Ohio, and D. J. Hinkley, of Detroit, Mich., for appellants.

Charles R. Lewers and Guy V. Shoup, both of San Francisco, Cal., for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

PER CURIAM. The appeals from the decree of the court below dismissing the bill and the cross-bill in this case presented to this court questions of law which were thereupon certified to the Supreme Court. The answers of that court to all the questions were adverse to the contentions of the appellants. Burke v. Southern Pacific Railroad Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527. Thereafter the appellant Lamprecht filed a petition in this court, praying that the further question be certified to the Supreme Court, namely: Does the provision, "Provided further that all mineral lands be, and the same are hereby, excluded from the operations of this act," as the same is contained in the special act of Congress approved July 27, 1866 (14 Stat. 295, c. 278, § 3), expressly withhold from the officers of the Interior Department who administer it and the joint resolution approved June 28, 1870 (16 Stat. 382, No. 87), and the grant made thereby, all power and authority to determine conclusively and adjudicate in any proceeding under said act and joint resolution, what lands are and what lands are not mineral lands?

It is alleged in the petition that this question was not included in the questions which were certified to the Supreme Court, and was not answered

by that court, and a brief and argument is filed in support of the petition. We are of the opinion that the question so formulated is necessarily involved in the questions which were certified, and is fully met by the answers thereto. The second question which was certified directed attention to the grant as one which excluded mineral lands, and a portion of the opinion of the Supreme Court is devoted to the discussion of the appellant's contention that mineral lands are excluded from the operation of the grant. Referring to the language of the statute, "that mineral lands be, and the same are hereby, excluded from the operation of this act," the court said: "Words hardly could make it plainer that mineral lands were not included, but expressly excluded." To certify the question which is now proposed would be a request upon the part of this court that the Supreme Court revise its decision and answer differently the questions which have already been answered.

The petition must be denied, and, as there are no other questions to be disposed of, the decree of the court below is affirmed.

DAVID E. KENNEDY, Inc., v. UNITED CORK COS.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 286.

PATENTS ⊂=328—VALIDITY—PRIOR USE—TILE FLOORING.

The Kennedy patent, No. 1,054,424, for a tile flooring, *held* void for prior public use, upon evidence showing that the flooring was made by the patentee, sold for profit, and used in various cities, in both private and public buildings, more than two years prior to application for the patent.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from the final decree of the District Court of the United States for the Southern District of New York dismissing the bill in an infringement suit founded upon letters patent No. 1,054,424 granted February 25, 1913, to David E. Kennedy for a tile flooring.

Hillary C. Messimer, of New York City, for appellant.

Stephen J. Cox, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patent contains two claims both of which are involved but, in the view we take of the defense of prior public use, the alleged invention is sufficiently described in the first claim which is as follows:

"1. A permanent flooring comprising a plurality of non-homogeneous superimposed layers forming an integral structure comprising a hard non-pierceable base, a yielding non-metallic wear or tread layer comprising a plurality of independent units or tiles and an interposed layer between the base and tread layers, said intermediate layer being relatively softer than the base layer and adapted to be pierced by metallic securing means when in a dry condition."

One of the defenses is that the tile flooring of the patent was used generally by complainant's customers more than two years prior to his application, on December 16, 1911. The complainant insists that this use was experimental within the case of Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000. Nicholson, the inventor,

constructed, at his own expense, a pavement about 75 feet in length which was laid in front of the toll house on a road belonging to the Boston & Roxbury Mill corporation, of which he was a stockholder and treasurer. This was done in order that he might ascertain its durability, liability to decay and the effect which heavy loaded wagons would have upon it. Nicholson was there almost daily, walking over the pavement, making minute and careful examination of its condition and asking questions regarding it. He chose this particular locality because the road was a great thoroughfare out of Boston, traveled by heavy teams and presenting a severe test of the wearing quality of the pavement. If it succeeded there, its general success was assured. The court held that this was not a public use, but a proper and necessary experiment undertaken by Nicholson at his own expense and not to be sold. But the court took particular pains to say, in order that the decision might not be misunderstood, that:

"So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent."

The converse of this proposition is also clearly stated by the court as follows:

"But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale, within the meaning of the law."

Nicholson's use was held experimental because he did not sell or lease the section actually laid. He kept full control over it and during all the time necessary to test its wearing qualities which was, of course, a number of years, he was constantly watching it to see what, if any, changes were necessary. There can be no question, we think, that if Nicholson had sold his pavement to a large number of cities, received pay therefor and lost all control of the pavements, the court would have reached the conclusion that he had renounced all right to a patent. See also Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 249, 266, 8 Sup. Ct. 122, 31 L. Ed. 141; Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160; Eastman v. Mayor, etc., 134 Fed. 844, 69 C. C. A. 628.

Applying the doctrine of these authorities to the facts in the present case, we have no doubt that the patented flooring was sold for profit and publicly used in various cities from New York to California for more than two years prior to December 16, 1911, the date of Kennedy's application. These prior uses were in private residences, clubs, universities, banks, public libraries, and department stores and were bought and paid for. Those in the large stores, public libraries and banks were certainly in public use and disclose all the features of the claims. None of the features of the pavement case is present. If Nicholson had sold his pavement to the city of Boston and received his pay he would have lost all dominion and control over it just as this complainant did when he sold his flooring to any one who was willing to pay for it.

We think the decree of the District Court should be affirmed with costs.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. DE FOREST RADIO TELEPHONE & TELEGRAPH CO. et al.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

Nos. 273–275.

Appeals from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, granting an injunction pendente lite restraining defendants from infringing claims 1, 2, and 5 of the Lodge patent, No. 609,154, granted August 16, 1898, and claims 1, 2, 3, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 19, and 20, of the Marconi patent, No. 763,772, granted June 28, 1904. At the same time appeals were argued from an order denying a motion to vacate or modify the injunction and from an order denying a motion to suspend the injunction.

Samuel E. Darby, of New York City, for appellants.

L. F. H. Betts, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Both patents and an extended presentation of the prior art were considered and the claims construed by Judge Veeder, whose very full and careful opinion will be found in Marconi Wireless v. National Signalling Co. (D. C.) 213 Fed. 815. Judge Hough's opinion in the case at bar is reported in 225 Fed. 65. We do not think it necessary to add anything to the discussion at this stage of the case; with the facts before him Judge Hough quite properly granted the preliminary injunction.

Orders affirmed, with costs.

FORD MOTOR CO. v. UNION MOTOR SALES CO. et al.

(District Court, S. D. Ohio, W. D. December 4, 1914.)

No. 2147.

1. PATENTS ⊂=216—RIGHTS OF PATENTEE—PRICE RESTRICTION ON RESALE OF PATENTED ARTICLE.

Where the owner of a patent sells a machine made by him thereunder, and receives therefor the full price asked, and all that he expects to receive, he has fully exercised the exclusive right to sell given him by the patent laws, so far as relates to the particular machine sold, and cannot legally fix the price at which it may be resold by the purchaser.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. ⊂=216.]

2. PATENTS ⊂=216—SALE OF PATENTED ARTICLE—CONTRACTS RESTRICTING PRICE ON RESALE—VALIDITY.

Complainant manufactures automobiles under its own patents and sells the same to dealers, receiving therefor the prices it has fixed; but by contracts with such dealers it is provided that the machines will be

resold by them at complainant's full advertised list prices only, and that a violation of such provision shall constitute an infringement of the patents, subject the dealer to the payment of a fixed sum as damages, and authorize a cancellation of the contract; also that title to the particular machine or machines so sold shall revert to complainant. There is a further provision reserving title in complainant until full payment of the purchase price. *Held*, that such a contract is one of sale of the machines, and not of the right to sell, that on full payment of the purchase price of a machine it passes beyond the patent monopoly, and that in so far as the contract attempts to fix the price at which only it may be sold thereafter it is illegal, as in restraint of trade and unenforceable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 329; Dec. Dig. ⊂=216.]

In Equity. Suit by the Ford Motor Company against the Union Motor Sales Company, Lucien A. Soward, J. Carl Horton, Earl Saunby, and William T. S. Yocum. Decree for defendants.

Lucking, Helfman, Lucking & Hanlon, of Detroit, Mich., and Alfred M. Allen, of Cincinnati, Ohio, for complainant.

Judson Harmon, of Cincinnati, Ohio, for defendants.

HOLLISTER, District Judge. The complainant, Ford Motor Company, a manufacturer of automobiles under its own patents, seeks by this suit to restrain the defendants from representing that they can, or will, procure for sale Ford automobiles at a price less than the regular price list of the complainant; from conducting, or attempting to conduct, any business in Ford automobiles; from infringing directly, or indirectly, the complainant's patents or "license restrictions and price restrictions"; from combining among themselves, or with others, to infringe complainant's patents by breaking its price restrictions; from conspiring with any of complainant's "dealers-licensees or subdealers-licensees or salesmen"; from procuring or obtaining any Ford automobiles at less than the complainant's list prices; and from interfering with the complainant's business, or with the business of any of its "dealers-licensees or subdealers-licensees."

It was proved that defendants obtained Ford machines from a dealer or dealers, and sold them and advertised them for sale at less than complainant's regular price list. The rights of the parties depend upon the construction to be given the written contracts entered into between the complainant and its so-called "dealers-licensees." No case involving a contract precisely like the agreement between the complainant and the dealers who sell the cars made by it, and covered by its patents, has been presented to the Supreme Court. An agreement by a patentee giving to another a license to manufacture under the patent and to sell at a fixed price on a small royalty has been held not to come within the condemnation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209). Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. It is conceded that contracts, such as made by the complainant in this case with its dealers, would, were it not for the fact that the article sold was made by the complainant under its patents, be contrary to public policy

under the decision in Dr. Miles Medical Co. v. Park, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. It is claimed, however, that since the complainant manufactures its cars under its own patents it has the right to maintain its monopoly of the exclusive right to sell, granted by the patent laws, by a contract of sale with its dealers fixing the price on resale at which the dealers may sell to the user, although by so doing the competition between its dealers is thereby effectually prevented.

The contract in this case and the license contract to which the Supreme Court have given their approval are not in terms the same. If they involved the same principles, the conclusion must necessarily be that the contract involved here is neither contrary to public policy nor in contravention of the Anti-Trust Act, because the patentee, having the exclusive right or monopoly to sell, has by this contract only exercised the right given him by the patent laws of the United States. There is, however, a marked difference in the facts, for in this case the patentee is the maker, and does not receive a royalty, but actually sells each machine for a price fixed by itself, and is paid by the dealer all that the maker asks for the article sold. There is no question of use, or restricted use, in this case, as in Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, for the contract is either a complete sale of the exclusive right to sell, given the complainant by the patent laws, or a license to sell, which involves a reservation of some part of the exclusive right to sell, or, as contradistinguished from these, amounts to a sale by the patentee itself.

[1] For the purposes of this case it may be assumed that if the contract partakes of the quality of a sale of the exclusive right to sell, or of a license to sell, it is a good contract, which the complainant may legally enter into with its dealers, and, under the facts proved in this case, an injunction must issue against the defendants. But if, under the terms of the contract, the complainant has sold the automobiles made by it and delivered the same to its dealers, passing the title upon receipt of the contract price, then, under the decisions of the Supreme Court and on principle, the conclusion, in my judgment, must be that by such sale the complainant has exercised its exclusive right to sell, so far as the particular commodity sold is concerned, and cannot legally fix the price at which the dealer shall resell. The contract does not deal with the use of the automobile sold. Hence to call it a contract for "restricted use" is a misnomer, and the adoption of such a definition is, as said by Mr. Justice Day, "a mere play upon words." Bauer v. O'Donnell, 229 U. S. 1, 16, 33 Sup. Ct. 616, 619, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150.

Counsel for the complainant say that the sale is conditional; that it is a restricted sale, and that it is a license to sell on condition. It is immaterial what the contract may be called, but its purpose and effect must be ascertained. Before proceeding to that end it may be well to consider what it is a patentee gets by the statutes which embody every right acquired by him. It was said in Adams v. Burks, 17 Wall. 453, 456, 21 L. Ed. 700:

"The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee."

Perhaps as strong an illustration of the right of the patentee to qualify or restrict the use to which, upon sale, the patented article may be put, is shown in the case of Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. This went so far as to hold that the patentee of a machine, which in its operation involved other articles, could limit its use to such other articles furnished by himself, though they themselves were not patented, and that he could do this by a mere notice upon the machine itself, which was binding upon a third person, who, with knowledge of the notice, sold such other articles to the vendee for use upon the machine, and who, by so doing, became a contributory infringer. The patentee, having the exclusive right to use, which contemplates the entire use, may sell the entire use, or sell a part of it only, or sell on condition of use in a particular way. It necessarily follows from these decisions that he may restrict, or qualify, his exclusive right to make or sell.

The question in this case is whether or not the patentee, having the exclusive right to sell, has, by these contracts, conferred that right, either wholly or in part, or has done something else which is of such character as to involve other rights vested by the common law or statute in the public; for, while the patentee has the "*exclusive* right to make, use, and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee" (Bauer v. O'Donnell, 229 U. S. 1, 10, 33 Sup. Ct. 616, 617, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150, citing Bloomer v. McQuewan, 14 How. 539, 549, 14 L. Ed. 532, and Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 425, 28 Sup. Ct. 748, 52 L. Ed. 1122), yet, if what the complainant has done, or attempted to do, by these contracts with its dealers, amounts to something more than the exercise of the exclusive right to sell, it has, by such act, added to and extended its exclusive right to sell, and has thereby brought itself within the condemnation of rules and laws established and enacted for the protection of the public against monopolies and contracts in restraint of trade. This a patentee cannot do, because, while the purposes in granting these rights to the inventor should, as said by Mr. Justice Day in the Sanatogen Case, 229 U. S. 1, 10, 33 Sup. Ct. 616, 617, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, "be fairly or even liberally construed; yet, while this principle is generally recognized, care should be taken not to extend by judicial construction the rights and privileges which it was the purpose of Congress to bestow." And he says further (229 U. S. 11, 33 Sup. Ct. 617, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the letters patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use and vend, fairly construed, with a view to making the purpose of Congress effectual, reside the tent of the patent monopoly under the statutes of the United States."

Regard must be had to the nature of the article dealt with in the contract. It was settled long ago that when a patentee sells the patented article, which is valuable only for the use to which it may be put, he receives the consideration for its use and parts with the right to restrict the use. An automobile has value only in its use, and if the inventor, who is also the manufacturer, sells it for such price as pleases him, without restrictions on the use, he will have exercised his exclusive right to sell. It was said by Mr. Justice Miller in Adams v. Burke, 17 Wall. 453, 456, 21 L. Ed. 700:

"But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

But if it is urged that in Henry v. Dick the patentee really received upon the sale of the patented article the price he asked, the title passing, and was therefore no longer concerned with the use to which the article might be put, upon the principle of the case just cited, it will be sufficient to call attention to a part of the language of Mr. Justice Day in the Sanatogen Case, when stating what the decision in the case of Henry v. Dick was (229 U. S. 14, 15, 33 Sup. Ct. 619 [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]):

"It is expressly stated in the opinion that the machine was sold at cost or less and that the patentee depended upon the profit realized from the sale of the non-patented articles to be used with the machine for the profit which he expected to realize from his invention." And "While the title was transferred, it was a qualified title, giving a right to use the machine only with certain specified supplies."

It would seem that the decision in Henry v. Dick should be regarded as applying to the particular facts involved in the case, and not as the declaration of a principle. Indeed (as Mr. Justice Day shows), in the opinion in that case Mr. Justice Lurton distinguishes the case from Bobbs-Merrill v. Straus, hereinafter referred to, by saying (224 U. S. 47, 32 Sup. Ct. 379 [56 L. Ed. 645, Ann. Cas. 1913D, 880]):

"There is no collision whatever between the decision in the Bobbs-Merrill Case and the present opinion. Each rests upon a construction of the applicable statute, and the special facts of the cases."

One cannot fail to notice also Mr. Justice Day's remarks about the Bement Case, which complainant cites as conclusive authority for the propriety of its contract. Among other things, he says (229 U. S. 14, 33 Sup. Ct. 618 [57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150]):

"The case was one arising upon license agreements, originating in a state court, and did not involve the construction of the patent act in the circumstances now disclosed"

—language which would seem to indicate that no principle was intended to be announced in that case different from the long-established

rule that, when the patentee of the article had received upon sale his price, the article being valuable to the purchaser because of its use, it passed beyond the limits of the patentee's monopoly.

The facts here show no license, no sale of the exclusive right to sell, no sale in which the patentee looks to his profits in future sales, or in any use to which the article sold may be put by its purchaser. There seems to me no doubt about this. Therefore, there being no restrictions in the contract of sale upon the use, as there were in the case of Henry v. Dick, has the complainant, by selling the article to the dealer, receiving all for it that he ever will receive, and the price being satisfactory to him, exercised, with respect to the machine sold, the exclusive right to sell granted to him, bearing in mind what the article is and the usual attributes of a sale of a chattel?

[2] In the contract in question, the so-called "dealer-licensee" is given a restricted right to use and vend, within certain described territory, automobiles made by the patentee, is required to estimate the number of cars "that he will purchase" from the patentee in each of the various months covered by the agreement, and upon failure to purchase the agreed upon number the patentee had the right to cancel the agreement. Each machine is sold by the patentee at a discount of 15 per cent. of its current advertised list price, "and will be resold by the Dealer-Licensee in the above-described territory only, at the Manufacturer-Licensor's full advertised list prices only, current at date of sale. * * *" The Dealer-Licensee agrees not to—

"do or permit any act whatsoever either directly or indirectly or through another party, as would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, * * * and in the event of a breach, violation or infringement of the provisions of this clause the Manufacturer-Licensor shall have the right at its option to immediately terminate this agreement, but in any event, the Dealer-Licensee shall pay to the Manufacturer-Licensor the sum of two hundred fifty dollars ($250.00) for every such breach, violation or infringement, such sum being the agreed damage the Manufacturer-Licensor will sustain."

Provision is made for a rebate of certain percentages on the net amount of resales made. It was agreed that the dealer-licensee should be restricted, not only to the territory specified in the agreement, but, on resale, to the price—

"made at the current advertised Ford list prices, * * * and that any violation of such territorial or price restrictions shall be and constitute an infringement of such Ford patents and each of them; and in addition thereto it is also agreed that in case of any such infringement or breach of such restrictions, or any of them, the title to the particular car or cars sold in violation of such restrictions, or any of them, shall at once revert to the Ford Motor Company. The foregoing provisions are in addition to all other remedies and damages and penalties herein provided for."

This provision is also found:

"It is expressly agreed that the legal title to all automobiles sold or delivered by the Manufacturer-Licensor to the Dealer-Licensee hereunder shall be and remain in the Manufacturer-Licensor until the full purchase price thereof * * * shall be paid in money to the credit of the Manufacturer-Licensor, * * * with full and complete power and authority hereby vested in said Manufacturer-Licensor, in case of default in payment of money by the Dealer-Licensee, regardless of how the amount thereof may be evidenced, to retake,

with or without process of law, into its custody and possession said automobiles and the same permanently retain, and all liability from said Manufacturer-Licensor to said Dealer-Licensee on the contract for the sale and delivery of such automobiles, shall in such case cease and terminate."

The contract is of great length, with many provisions; but these seem to be sufficient to present the question with which we are concerned. This reservation of title is a familiar method of securing the purchase money, but when the purchase money is paid the title passes. This is recognized by the contract itself, in providing that, upon a resale by the dealer at less than the complainant's list price, the title shall revert to the complainant. It is quite clear that this is not an agreement to pay royalties, for the patentee actually sells the automobile manufactured by it at a price satisfactory to it. No matter how many machines the dealer-purchaser sells to users, the manufacturer-patentee receives on each machine the entire sum for which he is willing to part with it and to transfer title.

If a patentee sells a machine made by him under his patents, and obtains for it all he asks, what further rights has he under the patent laws? Having the exclusive right to sell, he sells and gets his price. With respect to the machine sold he has exercised his right to sell. It was said in Chaffee v. Belting Co., 22 How. 217, 223, 16 L. Ed. 240:

"When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated."

There is a difference between an agreement conveying the exclusive right given by the patent laws to sell the patented article and a sale by the patentee of the article itself. In the one case, the patentee grants the right to sell. In the other, he himself sells. If he grants to another the right to sell, then he has parted with the exclusive right he had under the patent laws. No doubt he could make such a grant for a lump sum, large or small, as he chose, or take his pay on a fixed royalty or percentage on sale; and, under the Bement Case, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, he might fix the price at which his vendee of the right could sell. But, having the exclusive right to sell, these methods of payment for the right and the restrictions as to price of sale would be but qualifications and conditions upon which the right to sell was granted. If the patentee's right to sell was transferred on condition that the transferee of the right could sell the article itself only at a price fixed by the patentee, it might be said the right conveyed was not complete, but was qualified and conditional, and this would be coming very close to the Bement Case.

It seems to me that there is confusion in the minds of many between this exclusive right to sell the patented article granted by the manufacturer-patentee, and a sale of the article itself by the manufacturer-patentee. If the patentee himself makes a sale of the article made by

him under the patent, and gets his price, the transaction partakes of all of the characteristics of a sale of a chattel. If he sells only the right to sell the article, he may retain something of the complete right he has by restricting the terms under which sales may be made. If he makes no such restrictions, then, of course, the grantee of the right may himself fix the price at which sales shall be made by him.

This contract does not give the vendee the right to sell. It sells to him the article, and attempts to give him the right to resell. He buys. The manufacturer-patentee sells the product to him, and then seeks to control the price at which he shall resell. If, upon payment by the dealer of the purchase price, the title of the machine passes to him, how can it be taken away because the user, to whom the dealer has sold, has paid a less price than the list price? See opinion of Judge Ray in Waltham Watch Co. v. Keene (D. C.) 202 Fed. 225, 234, et seq.

There are cases sustaining such contracts as these, all of which were decided prior to the Sanatogen Case. In National Phonograph Co. v. Schlegel (C. C. A. 8th) 128 Fed. 733, 64 C. C. A. 594, the decision is squarely to the point, and was written by Judge Van Devanter, who now, as Justice of the Supreme Court, dissents from the decision of the majority in the Sanatogen Case. And it is quite significant that Judge Denison, then of the District Court, in Edison v. Smith Mercantile Co. (C. C.) 188 Fed. 925, while upholding such a contract under the authorities as they existed at that time, said (page 926):

"Several courts have recognized a tendency to go too far in sanctioning such conditions, and some recent decisions in the Second Circuit, as well as the opinions of the Supreme Court in the Bobbs-Merrill Case, 210 U. S. 339 [28 Sup. Ct. 722, 52 L. Ed. 1086], * * * and the Dr. Miles Case, 220 U. S. 373 [31 Sup. Ct. 376, 55 L. Ed. 502], * * * and the granting of the pending certiorari in the Dick Case, 224 U. S. 1 [32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880], * * * have tended to indicate that some limits will be placed upon the now customary practice."

What that learned judge would have done, if the Sanatogen Case had been decided, cannot, of course, be said; but it is evident he felt constrained to the conclusion he reached by the decisions theretofore rendered.

Judge Hazel in Ford Motor Co. v. International Automobile League et al. (D. C.) 209 Fed. 235, draws the conclusion that the principle enunciated in the Sanatogen Case and in Bobbs-Merrill v. Straus was applicable to these very contracts, assuming that the dealers, who sold to the defendants in that case, "were the full owners thereof, having paid for the same in accordance with the terms of the license, and therefore were not merely in possession under the ordinary conditional contract of sale."

So far as appears in the case under consideration here, the dealers, from whom the defendants purchased, had paid the complainant for the cars; but whether they had or not seems to me of no consequence, because, when the purchase price was paid to the complainant, the title passed to the dealer, as said hereinbefore. That such contracts as these would not now be sanctioned seems quite clear from the views of the

majority of the Supreme Court expressed in the Sanatogen Case, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150. In that case the Bauer Chemical Company was the sole agent and licensee for the sale of an albuminoid known as "Sanatogen," covered by letters patent of the United States. The agreement provided that the agent and licensee should have power to fix the price of sale to wholesalers, distributors, retailers, and the public, the product to be furnished the Chemical Company at manufacturer's cost, and the net profits to be divided equally by the parties. On each package was the following:

"Notice to the Retailer.

"This size package of Sanatogen is licensed by us for sale and use at a price not less than one dollar ($1.00). Any sale in violation of this condition, or use when so sold, will constitute an infringement of our patent No. 601,995, under which Sanatogen is manufactured, and all persons so selling or using packages or contents will be liable to injunction and damages.

"A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation. The Bauer Chemical Co."

The proprietor of a drug store purchased for his retail trade from the Bauer Company original packages of Sanatogen bearing that notice. He sold them at retail at less than $1, and, without the license or consent of the Bauer Company, purchased from jobbers, who had theretofore purchased from the Bauer Company, original packages of Sanatogen with the notice affixed, and sold them at retail at less than the price fixed in the notice, and expressed the intention of continuing such sale. The question for decision by the Supreme Court was: May a patentee by notice limit the price at which future retail sales of patented articles may be made; such articles being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold?

I have already referred to some of the remarks of Mr. Justice Day in that case. He discussed the decision in Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. There the owner of a copyright of a book undertook to limit the price of the book for sale at retail by a notice on each book fixing the price at $1, stating that no dealer was licensed to sell for less, and that a sale at a less price would be treated as an infringement of the copyright. The Supreme Court decided that the copyright statute, in securing to the holder of the copyright the sole right to vend copies of the book, conferred a privilege which, when the book was sold, was exercised by the holder, that the right secured by the statute was thereby exhausted, and that the owner of the copyright could not, by a mere notice, fix such a limitation of price on resale, as was attempted in that case. Mr. Justice Day applied the principle of that case to a notice on a patented article, interpreting the right to vend in the copyright statute and in the patent statute as the same.

While in each of these cases the court limited its decision to the facts in each, and denied the right by a holder of a copyright and the patentee of a patented article, after receiving the price at which he was willing to sell the book in the one case and the patented article in the

other, and did sell, to fix, by a mere notice on the book or patented article, the price for future sales of the same, and expressly withheld an expression of opinion upon the effect of fixing the price for resales by the vendee in case of license or contract covering copyrighted articles in the one case and patented articles in the other, yet the language in each of these cases points directly to the view that when the patentee of a patented article sells the article made by him under the patent for a price at which he is willing to sell, and receives the price, he has, as to that article, received all to which he is entitled under the patent laws. That principle underlies these decisions.

The conclusions in the Bobbs-Merrill Case and the Sanatogen Case were the result of a construction by the court of the copyright and the patent statutes; that is to say, involved a determination of what rights are conferred by those laws. As I read those decisions, the court say (quite irrespective of the difference, if there is any, between fixing the price for future sales by the vendee by notice on the article, or by contract of which third persons have knowledge) the right in a patentee to sell the patented article itself is, in either case, exhausted when he sells the article and has received his price.

But is there any difference between an attempt to fix the price of future sales by notice, and an attempt to fix the price by contract? A notice is effectual to bind the one who receives it, when he takes the article to which it is attached with knowledge of the condition. Railroad v. Fraloff, 100 U. S. 24, 27, 25 L. Ed. 531; The Majestic, 166 U. S. 375, 384, 17 Sup. Ct. 597, 41 L. Ed. 1039; Gaines v. Transportation Co., 28 Ohio St. 418.

The license in the Dick Case, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, read:

"This machine is sold by the A. B. Dick Co. with the license restriction that it may be used only with the stencil paper, ink and other supplies made by A. B. Dick Company, Chicago, U. S. A."

The defendant, and the purchaser who sold to her a can of ink made by some other than the A. B. Dick Co., both had knowledge of the restriction attached to the machine. It was there said by Mr. Justice Lurton (224 U. S. 12, 32 Sup. Ct. 365 [56 L. Ed. 645, Ann. Cas. 1913D, 880]):

"It is not denied that she accepted the machine with notice of the conditions under which the patentee consented to its use. Nor is it denied that thereby she agreed not to use the machine otherwise."

And in the Sanatogen Case, in the notice fixing the price was printed:

"A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation."

There can be no doubt that the defendant in that case knew of the condition and attempt to impose the restriction upon him; for, in the certified facts, it appears he sold the Sanatogen at less than the price fixed in the notice, and averred that he would continue such sales.

If the patentee's exclusive right to sell is exhausted by a sale, the Supreme Court say he cannot, by a mere notice attached to the patented

article, though brought home to the purchaser, add to or extend his right by fixing the price at which his vendee shall sell the same article. It must therefore be true that if the patentee had, by a sale of the article and the receipt of his price for it, passed the title to another, he cannot enlarge or extend that right by contract, or in any other way, for he has parted with what he had. And when he seeks to fix the price at which his vendee shall sell, he brings into operation other laws and policies which conflict with such attempt—rules against restraints on alienation; the common law against restraints of trade and monopolies, and the Sherman Anti-Trust Law against contracts, conspiracies, and combinations to restrain trade, and to monopolize or attempt to monopolize the same. When the complainant sold an automobile under one of these contracts, and received the price, the title passed to the purchaser, and no sale by the purchaser to another could cause a reverter of the title to the complainant; for, in the complete exercise of his right to sell, he sold, and the subject of sale passed without the limits of the monopoly.

The Supreme Court in Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, held that a trade agreement involving the right of the parties to it to use a certain patent, which transcends what is necessary to protect the use of the patent or the monopoly conferred by law, and which controlled the output and price of goods manufactured by all who use the patents, was illegal under the Anti-Trust Act of 1890. It was said in that case by Mr. Justice McKenna (226 U. S. 49, 33 Sup. Ct. 15 [57 L. Ed. 107]):

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences, and therefore restrained."

The purpose of complainant's contracts with its dealers is to prevent competition between its dealers, each of whom has paid it all it asked. The vice in them is that the patent law does not confer power on the patentee to prevent competition among those who have purchased the patented article from him. I am therefore of opinion that these contracts (the opinion being restrained to the facts in this case) are invalid, and that the defendants in causing them, or attempting to cause them, to be broken, have done the complainant no wrong cognizable by the law.

An order may be taken dismissing complainant's bill, at its costs.

UNITED STATES EXPANSION BOLT CO. v. H. G. KRONCKE HARDWARE CO. et al.

(District Court, W. D. Wisconsin. July 24, 1915.)

No. 18–E.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—EXPANSION BOLT.
The McCreery & McCreery patent, No. 623,809, for a one-part expansion bolt, *held* valid as a limited advance in the art, as showing an improved form over those of the prior art, but not infringed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—SHIELD FOR EXPANSION BOLTS.

The Pleister patent, No. 973,559, for a shield for expansion bolts, *held* to disclose invention, and valid within narrow limits, but not infringed.

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—LEAD ANCHOR FOR EXPANSION BOLTS.

The Cook patent, No. 685,820, for a one-piece lead anchor or shield for expansion bolts, *held* valid, but not infringed.

4. TRADE-MARKS AND TRADE-NAMES ⟸70—UNFAIR COMPETITION—IMITATING FORM OF ARTICLE.

The copying by complainant, so closely as to deceive purchasers, of shields and anchors for expansion bolts, which had been made and sold by defendants for many years, and were well known to the trade, *held* to constitute unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70.]

In Equity. Suit by the United States Expansion Bolt Company against the H. G. Kroncke Hardware Company and the Diamond Expansion Bolt Company. On final hearing. Bill dismissed as to Hardware Company, and decree in favor of Diamond Company against complainant on counterclaim.

See, also, 216 Fed. 186.

Banning & Banning, of Chicago, Ill., for complainant.

Alan M. Johnson, of New York City, for defendants.

SANBORN, District Judge. Infringement suit on the patent to King McCreery and Vance McCreery, dated April 25, 1899, No. 623,809, on a one-part expansion bolt designed for securing structures like signs, ladders, wiring, or pipes to walls of buildings, ceilings, roofs, etc. The defendant Diamond Company filed three counterclaims, one for infringement by complainant of the patent to Henry W. Pleister, No. 973,559, dated October 25, 1910, another for infringement of the patent to John H. Cook, No. 685,820, issued November 5, 1901, and the third for unfair trade or competition, in that the complainant has closely copied the forms of devices sold by the Diamond Company. In addition to these four issues, complainant in the replication pleads a claim of unfair trade against the Diamond Company, alleging that it has resorted to slander and defamation of complainant's financial standing, reputation, and reliability, and in bad faith has threatened to involve complainant's customers in litigation, if they trade with it. These issues are involved in prior suits in the United States District Court of the Southern District of New York and in the Supreme Court of the state of New York, but have been brought in this case under the liberal provisions of the equity rules, in order to have them all disposed of in one suit.

The patents relate generally to expansion bolts, called two-part iron shields and one-part lead anchors. The principle of the expansion bolt is quite simple. The iron shield is like a section of a gun barrel split in two lengthwise, with the bore tapered so that by the insertion of a screw the barrel may be expanded and made to firmly and unshakably grip a socket in a wall. Lead anchors act on the

same principle, and are used for lighter work. The holding power of the devices is greatly increased by having ribs or corrugations on their outer surfaces, circumferential on their inner, and longitudinal on their outer, ends, to prevent both withdrawal and turning of the shield when being fastened. The controversy turns mainly around the question of corrugations, although the Cook patent, while showing external spurs or gripping points, claims only interior features.

After the litigation in New York was commenced, complainant acquired the McCreery patent and brought this suit in Wisconsin, and by the pleadings referred to the whole controversy between the parties has been thus transferred to this district. The Diamond Company has done a large business in expansion bolts for many years, while the United States Company has only recently come into the field. The former, while not covering the whole field, has done more than its share in introducing the expansion bolt to the trade, having spent large sums in advertising and demonstration for some 17 years. From 1908 to 1910 it sold 2,250,000 of its lag shields, and from 1911 to 1913 1,500,000 a year. From 1908 to 1911 it sold 8,000,000 lead anchors, and in 1912 and 1913 some 7,000,000. The selling returns of both forms in 1913 were $168,000. They were known to the trade as "Diamond" shields and "Diamond" anchors. Complainant did not commence the making or sale of the type of expansion bolts here in dispute until late in 1913, but by energetic methods, cutting prices, and copying the form and style of the Diamond goods, has proved a very formidable competitor. The appearance of the respective forms of shields and anchors is so similar as to make it quite difficult to distinguish them, unless the lettering is noticed. As to this point of unfair competition, complainant claims that the devices have reached their final form, and cannot practically be made in any other way, with the necessary efficiency and limit of cost; and that the rule of Pope Automatic Merchandising Co. v. McCrum-Howell Co., 191 Fed. 979, 112 C. C. A. 391, 40 L. R. A. (N. S.) 463, in this circuit, is a controlling authority in favor of complainant. In recent cases in the Illinois district I have refused to apply the rule of this decision to infringing devices while the infringed patent was still in force. Automatic Recording Safe Co. v. Bankers' Registering Safe Co., 224 Fed. 506.

Complainant claims the right to make and sell its bolts and anchors under the patent to the McCreerys, which dates from May 5, 1898, and will not expire until April 25, 1916; also under a public use of an improved form of the McCreery device, which was put into a ventilating system on a building in Cleveland, Ohio, in June, 1903. If this right be conceded, or assumed to exist, two other questions arise: First, whether in so exercising its rights complainant may lawfully adopt the exact form of the devices which for a long time have been produced by the Diamond Company, under the later patents to Pleister and Cook; and, second, whether these two patents are valid, in view of McCreerys' patent, a prior Cook patent, and patents issued to J. W. Tripp in 1901, Anderson and Bebler in 1903, and others.

The questions arising on the patents are quite close and technical, because all the inventions are of quite narrow scope. The principle

of the expansion bolt was discovered as early as 1855 by Loudon and Ahlstrom, No. 13,177, followed by Bartlett in 1873, No. 137,338, Calkins in 1894, No. 519,172, and Kreinsen in Germany in 1896, No. 86,778. The three patents here in question, therefore, are simply specific developments or advances of the art, all of a limited character. The Diamond Company has built up a large business, partly on the Cook and Pleister patents, and the United States Company has developed a large and growing trade, based to a considerable extent upon unfair competition with the Diamond Company, but to quite a degree also on another form of expansion bolt, and by very energetic methods. The United States business has not been due to any extent to its patent acquired from the McCreerys, that having been purchased as a protection to its business, after it had been sued for infringement by the Diamond Company.

The great development of the expansion bolt has not been wholly the work of either of the parties. Other concerns have dealt in them very largely. They have advanced on their merits, aided by large and expensive advertising. As a matter of production the devices appear to have reached their cheapest, most efficient, and best looking form. The United States Company claims that the designs cannot be changed in any particular without increase of expense and decrease of efficiency.

[1] *The McCreery Patent, and McCreery Public Use of the Pleister Invention.* The McCreery patent, owned by complainant, issued April 25, 1899, is prior to the Cook and Pleister patents of the Diamond Company, and it is also claimed that a public use of the Pleister patent by the McCreerys is shown by the evidence. McCreerys brought out a one-part shield, with expanding jaws forced apart by the entry of a screw, and having exterior transverse corrugations to hold the expanded portion firmly against the wall socket into which it is driven. Practically all the important elements of the modern shield are found in the McCreery patent, except the longitudinal corrugations or fins designed to prevent the turning of the shield in its socket. Both kinds of corrugations appear in the later Pleister patent, as well as in the patent to J. W. Tripp, No. 688,756, which is later than McCreerys and earlier than Pleister. For better understanding, McCreerys' claim 3 and Pleister's claim are quoted:

"3. An expansion bolt having in combination a ferrule provided with an internally threaded collar at one end, expansible jaws integrally united to said collar and made wedge-shaped on their inner faces, and a threaded device engaged with said collar to project between said jaws to expand the jaws, the outer surfaces of said jaws corrugated on their exterior, the corrugated surfaces of the jaws arranged to contact with the adjacent walls of a receiving orifice, when expanded, substantially the whole length of the jaws, whereby an equal pressure will be exerted by the jaws the whole length thereof upon an outside structure with which the jaws are engaged, substantially as set forth."

"A shield for expansion bolts comprising a plurality of expansion members forming a cylinder having its exterior surface of substantially a uniform diameter throughout and provided with a tapered interior surface, transverse projections on the forward exterior surface of the expansion members and longitudinal projections upon the rear exterior surface of the expansion members, making that end of the expansion members of a diameter slightly greater than the end on which the transverse projections are formed."

It will be seen that the McCreerys describe a one-part and Pleister a device of two or more parts, and that McCreerys do not show the lengthwise ribs or corrugations found in Pleister. It is claimed that the latter were added by McCreerys, and used in a ventilator system on the Colonial Arcade and Colonial Hotel buildings in Cleveland, Ohio, installed in 1903 pursuant to a contract of April 10, 1903. The expansion bolts were used to sustain the discharge pipe or stack outside the buildings, and to fasten it to the outer wall. It appears from the testimony that McCreery bolts with the longitudinal corrugations were driven into sockets bored in the wall and screwed up to hold the pipe securely. Two of these bolts were removed from the wall during the present year, and are in evidence. They had remained in place from 1903. A number of witnesses were called on the question of the use of the bolts, and all documents and books which could be found were produced. The testimony shows that complainant exhausted all possibly available facts relating to such public use, and put in evidence all testimony, papers, and exhibits which could be discovered.

Without detailing this evidence it is enough to say that I am satisfied that it overcomes the heavy burden of proof necessary to establish a prior public use, and establishes beyond any doubt that the McCreery one-part bolt in substantially the same form shown by Pleister (except the number of parts) was designed and sold in 1902, and used in 1903 on the Cleveland ventilator. Although some books and records have disappeared or been destroyed, all facts now discoverable tend only to sustain the prior use, do not contradict each other, and are consistent and harmonious. I find no difficulty in sustaining the McCreery patent as a limited advance in the art, and as an improved form of Calkins or Kreinsen. A small number were sold, and successfully used; the bolt business being crowded out by the pressure of the other work in which the inventors were engaged.

[2] *The Pleister Patent, No. 973,559, February 2, 1910.* The claim has already been quoted. It is distinguished from McCreerys as used in the Cleveland building only in having two or more parts, and in slightly raising the fins or longitudinal corrugations, "making that end of the expansion members of a diameter slightly greater than the end on which the transverse projections are formed." The same elements are found in Tripp, No. 688,756, and in Anderson and Bebler, No. 741,994, and there are also many two-part constructions among the prior patents. At the same time Pleister made a practical advance in the art by producing a convenient bolt, adapted to modern needs, under which has been produced a form of device which is said to be the last word of combined style, cheapness, and efficiency, and which complainant has adopted without variation, except in one particular. Under such circumstances the patent should be sustained as a refined, but substantial, advance in the art. But I do not think it should be held that complainant infringes, by reason of the McCreerys patent and Cleveland use covering the main elements of Pleister, also because the United States construction does not employ fins of greater diameter than the other parts of the shell. In the

latter only one of the fins is raised above the general exterior level. Obviously all this is rather refined, but is in keeping with the whole controversy.

[3] *The Cook Patent, No. 685,820, November 5, 1901.* This invention relates to the one-piece lead anchors used in lighter work than the iron bolts, but made in the same general form. Although the anchors may be used in stone or brick, the matter of exterior corrugations or projections is not so important in this class of work as the other, because the surfaces to which they are generally attached are softer and more yielding, so that they are readily gripped by the greater expansion at the inner end, and because the shell is soft. The important feature of this patent consists in making the bore of the shield slotted lengthwise, instead of a smooth circular bore, as in Cook's expired patent, No. 575,282. In the patent in suit he claims a tubular block longitudinally slotted for the greater part of its length, so that when the screw is inserted threads will be made only in part of the interior surface. The United States Company does not use this peculiar feature, as they make the bore circular without slots. Their anchors are indeed split for the greater part of their length, but not slotted, and the screw engages the whole inner surface of the bore, not merely a part of it. Neither party should be held to infringe any patent held by the other.

[4] *The Question of Unfair Competition by Complainant against the Diamond Company.* It appears that in July, 1913, the general manager of the United States Company called on the manager of the Diamond Company and asked for reduced prices on shields and anchors, and if he could not get them threatened to copy them. About the same time he called on another company dealing in expansion bolts, and stated that he expected to manufacture shells which would be a duplicate of those produced by the Diamond Company, and at the same interview he produced sample lead anchors which were exactly like those of the latter company. Attempts were also made to hire salesmen of the Diamond Company.

When the shields and anchors of the United States Company came out, they were almost exactly like the Diamond devices, with which the trade was familiar. They can only be distinguished by close inspection. The evidence shows that the trade was deceived. The new articles were sold at a lower price, and the Diamond Company's large business, built up after years of effort, was seriously injured. The only defense attempted for thus appropriating the fruits of years of outlay and effort (aside from the patents) is that the devices can be made in no other way on a competitive basis. On this question the burden of proof is on the complainant, and I think the testimony does not support its position. I am satisfied some way can be found to avoid confusion, which will also be as practical and inexpensive as that now employed by complainant. This is most certainly true of the lead anchors.

As to unfair competition by the Diamond Company, the evidence does not support the claim made against it. There should be a decree sustaining each of the three patents in suit, also the prior use, that

none of the patents is infringed, and for an accounting and damages against complainant for unfair competition, without costs for or against any party. The bill should be dismissed as to the H. G. Kroncke Hardware Company.

SANITARY STREET FLUSHING MACH. CO. v. CITY OF AMSTERDAM.

(District Court, N. D. New York. August 11, 1915.)

1. PATENTS ⊂=327—SUIT IN EQUITY—PREVIOUS ADJUDICATIONS.
The District Court is bound, as to the validity of a patent, by decisions of the Circuit Court of Appeals holding it valid.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⊂=327.]

2. PATENTS ⊂=328 — VALIDITY AND INFRINGEMENT — STREET FLUSHING MACHINE.
The Ottofy patent, No. 795,059, for a street flushing machine designed to deliver streams at an angle of 20 degrees or less to the pavement so as to have a scouring effect, was valid, and was infringed by a machine with nozzles so attached that it might, and when in use did at times, discharge water onto the pavement within the angle of 20 degrees.

3. PATENTS ⊂=327—SUIT IN EQUITY—PREVIOUS ADJUDICATIONS.
A decision that a street flushing machine involved in a prior suit had not then been so adjusted and used as to infringe was not an adjudication that the machine of the same make used by defendant was not an infringing machine or was incapable of being so adjusted as to infringe when in use.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⊂=327.]

In Equity. Suit by the Sanitary Street Flushing Machine Company against the City of Amsterdam to restrain alleged infringement by defendant, as a user of a street flushing or washing machine, so called, of United States letters patent granted to Leopold Otto Ottofy, assignor to American Street Flushing Machine Company, and for an accounting. Decree for an injunction and an accounting.
See, also, 216 Fed. 190.

C. V. Edwards, of New York City, for complainant.
Duell, Warfield & Duell, of New York City, for defendant.

RAY, District Judge. In St. Louis Trust Company, as Trustee, v. Studebaker Corporation et al., 211 Fed. 980, 128 C. C. A. 478, the Circuit Court of Appeals in this, the Second Circuit, held the patent above referred to valid for the reason it provides for discharging the water upon the pavement through pipes and flat nozzles at an angle of 20 degrees and less and that this was the most efficient angle of discharge for flushing pavements. That court also held:

"As to the machine now alleged to infringe the testimony is conflicting, but we are inclined to think defendant's witnesses have based their statements more on careful measurements, and less on estimates. Upon the whole, we think it has been shown that defendant's machines, as made and operated, do not deliver the stream at any less angle than 25 degrees, which seems to be a satisfactory arrangement for modern streets and is not an infringement of

the patentee's device. We are also satisfied that defendant's machine has all the elements of the patent claims, except the angle less than 20 degrees, and that it is a very simple and easy job to modify it, so that it will be a complete infringement. The mere lengthening of the pipes a very few inches, and a trifling regulation of the position of the nozzle, will make any one of defendant's machines an infringing device. As at present organized, these machines would probably not commend themselves to a municipality which had streets paved with cobble or blocks with earth interstices; but the changes which would adapt it for use there are so slight that there must be a constant temptation to make them. However, until that temptation has been yielded to, we cannot find that the patent has been infringed, and therefore affirm the decree dismissing the bill, with costs of this appeal to defendants."

The bill was dismissed by Judge Hough on the ground of noninfringement and the Circuit Court of Appeals affirmed.

In American Street Flushing Co. v. D. Connolly Boiler Co., 198 Fed. 99, 117 C. C. A. 285, the same court held the same patent valid and also infringed by another device.

[1, 2] The defendant here is using one of the Studebaker machines. This court is, of course, bound, as to the validity of the patent, by these decisions. The so-called machine is very simple. It consists of a tank on wheels, which tank holds water under pressure. There are pipes for discharging the water through flat-mouthed nozzles so set near the surface of the street and near the rear wheels as to discharge the water forwardly and outwardly (not at right angles to the cart) and upon the pavement at an angle of less than 20 degrees. As the water is under pressure, it is discharged with more force than the pressure behind would otherwise be, and, as it is discharged forwardly and outwardly and strikes the pavement within the angle mentioned, the water has a scouring effect as it strikes, and together with the loose and loosened dirt is carried forwardly and outwardly, and, on a sloping street, operates to carry the dirt towards or into the gutter. The patentee had in mind the protection of the front wheels of the vehicle carrying the tank, pipes, and other apparatus from getting wet, and also the protection of the legs of the animals drawing same. The main idea seems to have been to scour the pavement without digging into it or between the blocks composing it and to direct the flowing stream of water and dirt forwardly and outwardly. As we have seen, this Studebaker machine, which did not, in the case first referred to, actually discharge the water so as to strike the pavement within the prohibited angle of discharge, was held not to infringe. In short, the Studebaker machine does not infringe unless so constructed, set, or arranged as to discharge the water on the pavement; that is, cause it to strike the pavement within the angle of less than 20 degrees, which is a most efficient angle of discharge and contact. With the numerous flexible jointed nozzles of the present day it is easy to so turn and adjust the nozzle as to discharge the water in several directions and even convert the machine into a mere sprinkler.

I assume, from the language of the opinion of the Circuit Court of Appeals above quoted, that when one of these Studebaker machines has its nozzles so attached and set that it will and does, when in use, discharge the water or a considerable part of it onto the pavement,

even a part of the time, within the prohibited degree of actual contact, that is, within the angle of 20 degrees, it becomes an infringing machine. I saw these machines, or one of them, and these attachments, in actual operation, and also heard the testimony. That defendant's machine can discharge water from the flat nozzle so as to strike the pavement within the prohibited or monopolized degree cannot be doubted. As set and operated in the streets of Amsterdam, measurements of this angle of impact were taken, and, while there is difficulty and uncertainty in fixing the exact angle of impact as is obvious to one who watches its operation, I am of the opinion, and find, that the users of this machine owned and operated by the defendant were not careful as to the angle of discharge and impact and actually did discharge the water at times, at least, when flushing the streets of Amsterdam, so it struck the pavement within the 20 degrees angle. Hence I must find that defendant in using this machine has infringed the patent in suit.

This court is bound by the decisions referred to in the Second circuit, and as the great weight of evidence is that defendant did, at the time observations were made, discharge the water from its machine upon the pavements of the streets of the city of Amsterdam within the monopolized angle, the various parts of the flushing machine itself being either duplications or equivalents of the Ottofy machine and similarly combined, I am compelled, as stated, to find infringement.

[3] The defendant contends that the decision heretofore rendered between the same parties or their privies that in a given case (the case referred to) the Studebaker machine, constructed like this Amsterdam machine in question, did not infringe—was not an infringing machine—is res adjudicata here. I do not think this contention can be maintained. There has been no adjudication that a machine like the alleged infringing machine used by this defendant is incapable of being so adjusted by slight changes as to infringe when in use. It was adjudicated that the machine like this and in question then had not been so adjusted and used as to infringe and hence there was no infringement proved.

Here this defendant has either yielded to temptation or by carelessness so adjusted the pipes and nozzles of the machine as to infringe.

There will be a decree for an injunction and an accounting, with costs.

In re MURPHY.

(District Court, D. Massachusetts. February 25, 1915.)

No. 21685.

1. BANKRUPTCY ⟸98—FINDINGS OF REFEREE—CONCLUSIVENESS.
The findings of fact of a referee, to whom a matter in bankruptcy was referred, are conclusive, where the evidence is not reported, unless they appear erroneous on the face of his report.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸98.]
2. BANKRUPTCY ⟸76—PETITIONING CREDITORS—PREFERENTIAL PAYMENT—EFFECT—RETURN THEREOF.
A creditor who has received a preferential payment, and who, in his petition for the adjudication of bankruptcy, does not disclose the payment, nor offer to return it, but who, during the hearings on the question of adjudication before the referee, and while in court, offers to return it, has standing as a petitioning creditor, provided he will deposit the payment with the clerk, to be paid over to the trustee on his appointment.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. ⟸76.]

In Bankruptcy. In the matter of John F. Murphy, alleged bankrupt. Adjudication of bankruptcy confirmed, on petitioners, Ayer & Co., depositing with the clerk a specified sum, to be paid over to the trustee when one shall be chosen.

Joseph Doyle, of Boston, Mass., for petitioning creditors.
Jasper N. Johnson, of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. [1] The only real question is whether Ayer & Co. have standing as petitioning creditors. Without that claim, the petitioning creditors have not provable claims which amount to $500. The matter was referred to Mr. Referee Gibbs, who has filed his report, stating the facts, and has ruled upon the facts found that the petition is sufficient and that the respondent should be adjudicated. As the evidence is not reported, his findings of fact are conclusive, unless they appear to be erroneous on the face of his report.

[2] The respondent was, at the filing of the petition, indebted to Ayer & Co. in the sum of $624.22. This was a provable debt, and the petition is good, unless the following facts prevent Ayer & Co. from being petitioning creditors:

The common-law assignment, which is the act of bankruptcy relied on, was made on November 2, 1914. In the preceding October Ayer & Co. had received from the respondent a check for $40.13, dated ahead to November 3, 1914. On November 9, 1914, after the common-law assignment, Ayer & Co. accepted payment of this check from the alleged bankrupt "from money earned by him subsequent to the common-law assignment." (Referee's Report, p. 2.) This petition in bankruptcy was filed on January 8, 1915, and in it Ayer & Co. allege themselves to be creditors to the amount of $665.35, which I infer is intended to be the sum of $624.22 above noted, plus the payment of $40.13, which was apparently deducted by the referee in arriving at the amount of the claim at the filing of the petition. That this is so is not entirely clear upon the referee's report, and the figures do not exactly bear out the inference; but the uncertainty as to the correct amount is not significant on the question now before the court. The referee reports "that the $40.13 was

a preference and should be paid back." At the hearing before the referee, Ayer & Co. "offered to return the sum of $40.13 if the court shall at any time find that such payment was a preference." (Referee's Report, p. 2.)

It thus appears that Ayer & Co. had a claim of between $600 and $700, on which, prior to the filing of the petition, they had received a payment, preferential in character, amounting to $40.13; that in the petition nothing was said about this payment and there was no offer to return it, but that such an offer has been made by them during the hearings on the question of adjudication before the referee, and is now before the court.

It is contended by the respondent that creditors who have received a voidable preference cannot be counted as petitioning creditors, at least not unless the petition itself states the preference and offers to surrender it; and he objects to any amendment of this petition for that purpose. This question was carefully considered and passed upon in Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 80 C. C. A. 25 (C. C. A. 8th Circuit), where it is said:

"Such a preferred creditor may present or join in a petition for an adjudication of bankruptcy. But he may not be counted for the petition unless he surrenders his preference before the adjudication."

See, too, 1 Remington on Bankruptcy (Edition of 1908) p. 182.

In this case the alleged preference is a money payment of known value; and it is apparent that Ayer & Co. have a claim of about $600 after deducting the preference. They offer to return the preference. But, no receiver having been appointed, there is at present no person to whom repayment can be made. Before accepting a preferred creditor as a petitioner, the court ought to make certain that the preference will actually be surrendered. It is undesirable to burden the estate with the expense of a receivership solely for that purpose if it can be avoided. In one such case the preferential payment was required to be deposited with the clerk, to be paid over to the trustee upon the latter's appointment. Re Gillette (D. C.) 104 Fed. 769. That seems a convenient and effective way to deal with this case. It does not seem to me necessary that the disclosure of the preference or the offer to return should be made in the petition; if I thought that necessary, I should allow the petitioners to amend.

The respondent also contends that Ayer & Co. are estopped from joining in the petition by reason of inequitable conduct on their part. This estoppel was based upon an alleged attempt on the part of Ayer & Co. to extort payment of their claim by the threat of proceedings in bankruptcy. The facts are stated in the referee's report. He has found against the respondent. Upon the facts found, this contention of the respondent cannot be supported.

Upon the petitioner's depositing with the clerk, within 10 days, the sum of $40.13, to be paid over to the trustee when one shall be chosen, a decree may be entered confirming the referee's report and adjudicating the respondent bankrupt; otherwise, the petition will be dismissed.

In re KESSLER.

(District Court, E. D. Pennsylvania. July 30, 1915.)

No. 5155.

COURTS ⟸376—PRACTICE IN FEDERAL COURT—STATE LAW—EXAMINATION OF BANKRUPT'S WIFE.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, § 21a, as amended in 1903 (Act Feb. 5, 1903, c. 487, § 7, 32 Stat. 798 [Comp. St. 1913, § 9605]), declares that a court of bankruptcy may by order require a bankrupt and his wife to appear in court or before a referee to be examined concerning the acts, conduct, or property of the bankrupt, but that the wife may be examined only touching business transacted by her or to which she is a party. Act June 29, 1906, c. 3608, 34 Stat. 618, amending Rev. St. § 858 (Comp. St. 1913, § 1464), declares that the competency of a witness to testify in any civil action shall be determined by the laws of the state or territory in which court is held. Act Pa. May 23, 1887, § 5 (P. L. 159), declares that neither husband nor wife shall be competent to testify against each other, except in proceedings for divorce. *Held* that, in a proceeding in bankruptcy in the state of Pennsylvania, the bankrupt's wife could not be examined.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 984; Dec. Dig. ⟸376.]

In Bankruptcy. In the matter of Samuel Kessler, a bankrupt. On a certificate to review an order of the referee requiring Rose Kessler to show cause why she should not be held in contempt for refusing to testify. Order to show cause vacated.

Nathaniel I. S. Goldman and J. Howard Reber, both of Philadelphia, Pa., for trustee.

Alfred Aarons, of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. Upon the certificate of the referee that Rose Kessler, wife of the bankrupt, being called before him as a witness, refused to answer questions in the course of the proceedings upon the ground that her answers might tend to incriminate her, an order was entered requiring her to show cause why she should not be held in contempt. The proceedings before the referee were based upon a petition of the trustee for an order upon the bankrupt to turn over assets alleged to be withheld from his trustee, and the wife was called under the provisions of section 21a of the Bankruptcy Act, providing as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt *and his wife* to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: *Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.*"

The underscored words were added to the section by the amendatory Act of 1903. The words "who is a competent witness under the laws of the state in which the proceedings are pending," which occurred in

the original act, immediately after the words "including the bankrupt," were stricken out in the amendatory act. Prior to the amendment of 1903, therefore, if the wife of the bankrupt was not a competent witness against her husband under the laws of the state in which the proceedings were pending, she could not testify against him in those proceedings. In re Jefferson (D. C.) 96 Fed. 826; In re Mayer (D. C.) 97 Fed. 328.

After the amendment of 1903, the wife was a competent witness, within the limitations expressed in the proviso and subject to the general provisions as to competency of witnesses prescribed by Congress by the provisions of section 858 of the Revised Statutes. Since the amendment of 1903, however, Act June 29, 1906, 34 Stat. 618, has been passed, amending section 858 of the Revised Statutes, so that the section now reads:

"The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held."

A proceeding in bankruptcy is unquestionably a civil action, suit, or proceeding, and the competency of the wife to testify in a bankruptcy proceeding against her husband in this district is therefore to be determined by the laws of the state of Pennsylvania. The Pennsylvania Act of May 23, 1887, § 5 (P. L. 159), provides:

"(c) Nor shall husband and wife be competent or permitted to testify against each other, except in those proceedings for divorce in which personal service of the subpœna or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either may testify fully against the other, and except also that in any proceeding for divorce either party may be called merely to prove the fact of marriage."

Applying the act of 1906 to the Pennsylvania act of 1887, it follows that the respondent is incompetent, and cannot be permitted to testify against her husband in a civil proceeding under the Bankruptcy Act. Judge Rellstab, in the district of New Jersey, has similarly interpreted the act of June 29, 1906, in the cases of In re Hoffman (D. C.) 28 Am. Bankr. Rep. 680, 199 Fed. 448, and In re Thompson (D. C.) 28 Am. Bankr. Rep. 794, 197 Fed. 681.

The respondent, therefore, cannot be held in contempt for refusing to testify before the referee, and the order to show cause is vacated.

PAVICK v. CHICAGO, M. & ST. P. RY. CO.

KLAWA et al. v. SAME.

(District Court, E. D. Wisconsin. September 11, 1914.)

Nos. 546, 565.

REMOVAL OF CAUSES ⇐12—"PROPER DISTRICT."

The "proper district," within Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. 1913, § 1010]) § 28, designating the suits brought in a state court subject to removal by defendant to the federal courts "for the proper district," is defined by section 29 (section 1011), providing

that a party "entitled" to remove any such suit may do so by filing a petition for the removal of such suit into the District Court to be held "in the district where such suit is pending," and is not the district in which, under section 51 (section 1033), the suit could have properly been brought originally.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. ⊂⊃12.

For other definitions, see Words and Phrases, Second Series, Proper District.]

Two actions, one by Paul Pavick, the other by Christ Klawa and others, both against the Chicago, Milwaukee & St. Paul Railway Company. Remanded to state court.

A motion has been made by the plaintiff in each of the cases for remand to the state court from which it has in form, been removed to this court. The defendant railway company is a resident of the Eastern district of Wisconsin. Pavick, a resident of Iowa, commenced suit against it in the state court of Minnesota. Klawa and others, residents of the state of Oregon, sued in the state court of Washington. The motions, which have been argued together, present the single question whether the cases are removable to the federal court of this district of the defendant's residence.

Barton & Kay, of St. Paul, Minn., for plaintiff.
H. J. Killilea, of Milwaukee, Wis., for defendant.

GEIGER, District Judge (after stating the facts as above). The motions to remand will be granted.

In section 28 of the Judicial Code (Act March 3, 1875, 18 Stat. L. 470, c. 137, § 2, and Act August 13, 1888, 25 Stat. L. 434, c. 866, § 2), the suits brought in a state court and subject to removal to the federal courts "for the proper district by the defendant or defendants therein, being nonresidents therein," are designated. Section 29 provides for filing a petition "for the removal of such suit into the District Court to be held in the district where such suit is pending." It is urged by defendant that because section 24 of the Judicial Code (Comp. St. 1913, § 991) defines the original jurisdiction of the District Court, and because section 28 grants the right of removal by nonresident defendants of all cases brought in the state court in which such original jurisdiction might have been invoked, therefore section 51 must be taken as definite of the term "proper district" as used in section 28.

Section 51 reads:

"No civil suit shall be brought in any District Court against any person by any original process * * * in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The claim is made that section 28 grants the right of removal; that from 1789 to 1875 the law corresponding to this section provided for a removal to the District (then Circuit) Court of the United States

for the district wherein the suit is pending, and in 1875 was changed by substituting, for these words italicized, the clause "for the proper district"; that by such change Congress intended to provide for the cases now here. And it is insisted that because section 29 governs only the practice or procedure, its language, the retention therein of the clause, "in the district where such suit is pending," cannot prevail against the removal to this court. Counsel's contention that the change of language effected a substantial change of right brings section 29 into clear conflict with section 28 in all cases like those at bar, for by its express terms it is made applicable to all cases "entitled" to removal under section 29. The two sections combined provide that certain suits, when instituted in a state court, may be removed to the federal court for the proper district; that a party "entitled" to remove may so remove by filing a petition for its removal into the federal court for the district wherein it is pending. It is my judgment that the two sections must be read in harmony; that the clause in section 29 defines, for removal purposes, the term "proper district" as used in section 28. If, as is claimed, this results in a restriction of the removal right, the remedy, it seems to me, is with Congress. But I do not believe that the phraseology "proper district" was adopted with the view of making any change in the then existing law. The subsequent enactment of section 53, Judicial Code (Comp. St. 1913, § 1035), for removal to the federal courts "in the division in which the county is situated from which the removal is made," is proof conclusive of the absence of any intention to permit the removal here attempted. The general description or designation of the removal right may be one thing, but mandatory provisions regulating its exercise must be given full effect when insisted upon by parties. In re Moore, 209 U. S. 501, per Brewer, J., and pages 512, 513, per Fuller, C. J., 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164. I adopt, upon the question presented, the views expressed in St. John v. U. S. F. & G. Co. (D. C.) 213 Fed. 685.

An order of remand may be entered in each case.

In re SAGE.

(District Court, S. D. Iowa, E. D. July 17, 1915.)

No. 1262.

BANKRUPTCY ⊂=482—ATTORNEYS' FEES—PROPER SERVICES.

The services for which an attorney's fee is to be allowed in involuntary bankruptcy are the investigating of legal questions involved in the situation presented, the giving of necessary legal advice to the petitioning creditors and other creditors requiring it, investigating the records, and preparing and filing the petition; but do not include conferring with other creditors to induce them to join in the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. ⊂=482.]

In Bankruptcy. In the matter of David H. Sage, bankrupt. Claim for attorney's fees allowed in part.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

John M. Dawson, of Kahoka, Mo., for claimants.
Boyd & McKinley, of Keokuk, Iowa, for trustee in bankruptcy.

WADE, District Judge. Attorneys, Joseph S. Tall and John P. Hornish, filed a claim as attorneys for petitioning creditors in the sum of $2,500. Oral testimony was taken. Mr. Tall testified that he put in four or five days in making trips to Keokuk and consulting with various creditors, and attorneys representing creditors, with a view of instituting bankruptcy proceedings. Mr. Hornish testified that he put in 18 to 20 hours during a period extending over about a week. Mr. Tall represented three creditors whose total claims amounted to $275.07. Hornish represented a creditor having a claim for $6,000. Upon a per diem basis, no one places the value of the attorneys' fees at more than $50 per day.

The law contemplates that an attorney's fee for one attorney shall be allowed for actual services rendered in behalf of the petitioning creditors. Strictly speaking, this allowance should be made to the creditors. The law contemplates that the bills shall be paid by the creditors, and that they shall be reimbursed from the estate. I apprehend that the creditors in this case would be very much surprised if counsel had presented to them a bill for $2,500 for the services rendered. No one will claim that the value of the service required in preparing a petition and filing the same, and procuring the adjudication, would be more than $100 in ordinary cases.

Much of the service rendered by Tall was in trips to Keokuk, conferring with creditors and attorneys in an effort to induce them to join in the petition. I do not consider such service in itself a proper charge. In this case, the claims of Mr. Tall for attorneys' fees exceed several times the amount of claims held by his clients. The solicitation of other creditors to join in the petition is not necessarily the work of an attorney; it is work which any business man can do. What the law contemplates is that a creditor, who feels that a bankruptcy petition should be filed, shall have the right to employ an attorney to investigate the legal questions involved in the situation presented, and to give such advice as is necessary, and to investigate records, and to prepare the petition and file it; beyond this, an attorney's services are not necessary. The creditor himself can confer with other creditors, after having had the advice of counsel, as to whether they wish to join in the proceedings. It is true that these other creditors may require legal advice with reference to duties and liabilities, and for such payment should be allowed; but, for merely traveling back and forth to confer with them in an effort to get them to join, I do not consider it as being a proper subject of allowance for attorneys' fees.

In this case, there were some peculiar circumstances, and the estate is comparatively large, and for these reasons I feel that an allowance of $350 is justified; but I feel that any more than this amount would be in excess of anything contemplated by the statute.

In the foregoing, I have tried to follow the rule announced in the following cases: In re Young (D. C.) 142 Fed. 891; In re Goldville Mfg. Co. (D. C.) 123 Fed. 579; In re Carr et al. (D. C.) 117 Fed. 572; In re J. W. Harrison Mercantile Co. (D. C.) 95 Fed. 123.

UNITED STATES v. LEHIGH VALLEY R. CO. et al.

(District Court, S. D. New York. December 21, 1914.)

No. 11—129.

MONOPOLIES ⟸16—CARRIERS OWNING COAL MINES — REGULATION — INTERSTATE COMMERCE—"DISSOCIATION OF INTEREST."

Where a railroad company has acquired about 13 per cent. of contiguous coal mining lands, the acreage of which represents less than 27 per cent. of the coal lands naturally tributary to it, and carries about 18 per cent. of all the coal transported, of which percentage four-fifths comes from mines controlled by a company in turn controlled by the carrier, but where there is an honest "dissociation of interests" between coal owner and coal carrier, which is merely the lawful conduct of honest men, and where the carrier does not own stock in any company selling coal beyond the limits of the state wherein the composite business of owning, mining, transporting, and selling coal is legal, there is no monopoly of interstate commerce.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. ⟸16.]

In Equity. Suit by the United States of America against the Lehigh Valley Railroad Company and others for a violation of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209), and the Commodities Clause of the Act of June 29, 1906, c. 3591, 34 Stat. 585 (Comp. St. 1913, § 8563). Bill dismissed.

The Attorney General, represented by Thurlow M. Gordon, of Washington, D. C., and Arthur W. Machen, Jr., of Baltimore, Md., for the United States.

John G. Johnson, of Philadelphia, Pa., and E. H. Boles, of New York City, for Lehigh Valley R. Co. and others.

Everett Warren, of Scranton, Pa., for Lehigh Valley Coal Sales Co.

John Hampton Barnes, of Philadelphia, Pa., and Silas W. Howland, of New York City, for Girard Trust Co.

E. V. B. Getty, of New York City, for G. B. Markle Co.

F. W. Wheaton, of Wilkes-Barre, Pa., for Lehigh Valley Coal Co. and Coxe Bros. & Co., Inc.

HOUGH, District Judge. This suit is but one chapter in a litigation against anthracite coal owners and carriers, which has now extended over many years, and become historic. The earliest chapter requiring notice is the "First Commodities Case" (United States v. Delaware & Hudson Co. et al. [C. C.] 164 Fed. 215, on appeal 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836); next came the "Second Commodities Case" (United States v. Lehigh Valley Railroad Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458); and finally the Lackawanna Coal Sales Case (United States v. Delaware, Lackawanna & Western Ry. [D. C.] 213 Fed. 240). At page 249 of 213 Fed., it is said:

"We understand that (a new action against the Lehigh Railroad) has recently been brought in the Second Circuit"—this is the cause referred to.

The District Court is but a parade ground wherein a review of the evidence and arguments may be taken before this action joins the

Lackawanna Coal Sales Case on the docket of the Supreme Court. Therefore the statement of facts and summary of litigated questions will be largely made merely by reference to the reports above enumerated.

In the Lackawanna Case (D. C.) 213 Fed. at 263, it is said:

"The bill of complaint also makes a formal charge * * * under the anti-trust act; * * * but the oral argument left us under the impression that this charge was not much insisted on."

This statement of McPherson, J., marks the only substantial difference that I can discover between this litigation and the one in which he wrote.

The bill herein charges violations both of the "Sherman Act" and the "Commodities Clause," but the extended arguments are addressed almost wholly to the anti-trust feature of the litigation. So far therefore as the commodities clause is concerned, I shall dismiss it with the statement that there is no great difference between what the Lackawanna Railway did and was upheld in doing by all the Circuit Judges of the Third Circuit, and what the Lehigh Valley Railroad has been doing as shown in this case.

If there be any material differences, they tend to strengthen the position of the Lehigh as compared with that of the Lackawanna, for the Lackawanna owned outright much, if not most, of the coal long transported over its own lines; whereas, the Lehigh Valley owned the stock of other corporations which under the laws of Pennsylvania had good right to own the lands and mine and sell the coal the transportation of which has given rise to so much litigation. I do not myself think that this difference is substantial. Without further discussion, it is held that nothing in the bill charged constitutes a violation of the "Commodities Clause," if the decision in the Lackawanna Coal Sales Case is right—and that I am not concerned to question.

While the tone of complainant's argument on the "Commodities Clause" is well illustrated by an italicized assertion in the brief that "the court (in the Lackawanna Case) wholly ignored the most vital provisions in the whole contract," and the decision (of three Circuit Judges) is merely that "of a court of co-ordinate jurisdiction and in a different circuit, (and) of course in no way binding upon this court," it is not overlooked that an endeavor has been made to distinguish the Lackawanna suit from this action.

It is asserted that the coal sales company has received and is receiving "discriminating favors from the" other principal defendants. This means that the sales company has an annually diminishing allowance made it by the coal company to encourage the introduction of Lehigh coal in regions where business is presently unprofitable, and has been permitted to buy coal in storage at very low rates; while the railroad company has at inadequate rentals leased to the coal sales company certain "storage plants."

From the assertion that these arrangements are undue favors is drawn the inference that there is a lack of good faith in the creation of the coal sales company which shows that that corporation is but the

alter ego of the coal company, which itself is but the creature of the railroad company; wherefore the law is still infringed.

The suggestion or argument, when examined, amounts to this: That when, by the creation of coal sales companies of which no share of stock belonged to the Lackawanna or Lehigh Railroads, those corporations sought to comply with modern law, it was their duty severally to have no relation whatever with the new companies, except to collect freight charges. But the Lehigh Valley Railroad owned certain lands useful only for storing coal, the coal company had certain coal on hand, and the plan of an independent sales company was new. What should or could be done with the lands and coal on hand, and how could the concern retiring from the selling business insure the creation of a strong and pushing successor? Certainly not by hostility. Who would or could buy the coal on hand and occupy and use the storage plants except the coal sales company? But (says complainant) the prices were ridiculously low. Answer is justified that: (1) The assertion is untrue, and (2) it was praiseworthy and lawful at first to sacrifice much in price when the object was to save from further assault the business of selling coal after interstate transportation —a business that had become precarious owing to modern economics as asserted in statutes and interpreted by the courts.

The differences suggested between this and the Lackawanna Case seem to me wholly unsubstantial.

Upon the anti-trust side of this case no extended discussion of facts is necessary. There is little conflict about facts—in the sense of visible phenomena.

But some analysis of the bill may assist in presenting the theory upon which this suit has been promoted. It is asserted that substantially all of the defendants (except the Girard Trust Company and the G. B. Markle Company)[1] have combined to restrain and monopolize, and have been monopolizing, "the production, transportation and sale in interstate commerce of anthracite coal from lands located along the lines of the Lehigh Valley Railroad."

The method of monopoly and restraint is said to have been by "acquiring control of the output of independent producers by exerting the power of the Lehigh Valley Railroad as a carrier to give undue preference and advantages to the coal producing and trading companies controlled by it and to discriminate against their competitors."

The result of this process is said to be that the "monopoly of the ownership and production of anthracite coal, exercised through subsidiary corporations under its control," has enabled the Lehigh Valley Railroad to prevent "the building of any new railroad in the portion of the anthracite regions served by it, and has kept independent pro-

[1] NOTE.—The Girard Trust Company is a defendant solely because it is the trustee of certain bonds which might be injuriously affected by granting the prayers of the bill, and the Markle Company is a party because it long ago made an agreement for a term of years by which the Lehigh Railroad exclusively transports the Markle coal, and the Lehigh Coal Company (and now the coal sales company) became the exclusive selling agent for said coal at prices fixed by Markle.

ducers under the disadvantage of having to ship over a railroad *also engaged in the coal business.*"

The italicized portion of the last sentence is most important, for what is meant by "engagement in the coal business"? The bill, the kind of evidence offered and the arguments in support, all really assume that by "coal business" is meant the operations, united in interest and centralized in control, of mining, shipping, transporting, and selling anthracite coal.

It has already appeared that, if the Lackawanna Coal Sales Case is to be followed, it must be held that the Lehigh Valley Railroad has not since the filing of this bill, or for some time before, been engaged at all in the selling of coal to the consumer. It must therefore follow that, when the government still insists upon the existence of monopoly and restraint of trade, such offensive conduct must be found in an identity of interests between a coal-carrying corporation and coal-owning and mining companies.

But it must also be remembered that the mere fact of such union in interests as manifested by a stock ownership is not unlawful, provided there is a "dissociation in good faith," between "bona fide corporations."

On this point counsel for the government have submitted the proposition that the phrases "dissociation in good faith" and "bona fide corporations," as used in the opinions of the Supreme Court, do not refer merely or chiefly to the honesty or morality of the transactions, so that when they deny "dissociation in good faith" no reflection is thereby made upon the integrity of those concerned in the transaction.

In other words, a body of men may be honest, moral, well-intentioned, and acting within the letter of the law, and yet be unable to resist conviction of monopoly and restraint of trade because they cannot, in "good faith," "dissociate" the corporations which they control. The proposition is incredible; to my mind "dissociation in good faith" requires no more than the lawful conduct of honest men.

Many hundreds of pages of the testimony herein is summed up in the "First Commodities Case" (C. C.) 164 Fed. Rep. at 222. What Gray, J., there stated is still true, and no more detailed reference will be made to the history and development of the Lehigh Valley Railroad and its controlled companies. In order to show monopoly and restraint evidence has been adduced to prove that:

(1) For many years before 1912 the coal mining and selling business of the Lehigh Valley Coal Company was either absolutely unprofitable or would not have been profitable if that corporation had not been secretly, unduly, and unlawfully favored in the matter of freight rates.

(2) Such favors took the form of the railroad company's furnishing at low rates terminal and storage facilities and making advances of money either without interest or at rates far below what was reasonable under the circumstances.

(3) Producers and shippers of coal from lands neither owned nor controlled by any defendant corporation complained of such dis-

criminatory treatment and proved before the Interstate Commerce Commission that their grievances were well founded.

(4) The Lehigh Valley Railroad was one of the defendants in United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, and has therefore been conclusively shown as a conspirator striving to prevent the construction of another railroad which might afford an outlet for anthracite in addition to the lines of the defendants in that suit.

As to all of the above contentions I decline to make any definite finding, because I regard the evidence as immaterial to existing conditions. All of the matters referred to took place before the creation and entry into business of the Lehigh Valley Coal Sales Company, and, assuming all the allegations to be true, it is thought that even in an action under the Sherman Act an opportunity might well be afforded (as in criminal proceedings) for a locus pœnitentiæ.

The following propositions of law I regard as applicable to this case and the enumerated statements of fact as material to the judgment to be pronounced:

(1) Ever since the Lehigh Valley Railroad emerged (more than half a century ago) from the throes of establishing any business at all, it has sought to acquire control (mostly through the Lehigh Valley Coal Company) of a considerable portion of that limited region in the state of Pennsylvania, which so far as is known contains substantially all the anthracite coal in the world.

(2) Either by outright purchase, or by acquisition of the stock of (especially) Coxe Bros. & Co., this process had so far succeeded that in the year 1912 (and just before the formation of the Lehigh Valley Coal Sales Company) the Lehigh Valley Coal Company owned or controlled rather less than 13 per cent. of the nearly contiguous mining regions in Pennsylvania known as the Wyoming, Lehigh, and Schuylkill. That acreage represented a little less than 27 per cent. of the coal lands naturally and conveniently tributary to the lines of the railroad company. Of all anthracite coal transported by all carriers, the Lehigh Railroad was then carrying about 18 per cent., and of that percentage approximately four-fifths came from mines owned or controlled by the Lehigh Valley Coal Company or was produced through such exclusive transportation contracts as had been made with the Markle Company.

(3) The Lehigh Valley Coal Company has from its creation done as it was ordered to do by the Lehigh Valley Railroad, and under such direction has bought, leased, or otherwise acquired control of coal lands. The purpose of this acquisition on the part of the Lehigh Valley Railroad was to get and firmly keep the business of carrying the coal extracted from those lands.

(4) The Lehigh Valley Railroad Company does not now, and has not since March 1, 1912, owned any shares in any company selling coal beyond the limits of Pennsylvania. It does own, and for many years has owned, all the shares of companies which now own and mine coal and sell it in Pennsylvania f. o. b. pit mouth. The same companies before March 1, 1912, sold the coal so mined in many

states of the Union after transportation of the same by the Lehigh Valley Railroad Company.

(5) Since March 1, 1912, the Lehigh Valley Railroad Company has transported no coal (not necessary for its own operation) wherein it had any interest direct or indirect within the meaning of existing statutes.

(6) The allegations of the bill of complaint permitted as an amendment by the Second Commodities Case were fully denied and have never been proved; but, if they were true prior to March 1, 1912, they are now immaterial.

(7) At the time this bill was filed, the regulation of freight rates (including joint rates) for interstate transportation was and still is committed to the Interstate Commerce Commission. No charge of violation of law in respect of rates existing when bill filed or arising since has been proven.

(8) The charge in the bill that freight rates for coal carried were made unreasonably high for the purpose "of injuring independent producers of anthracite," and of forcing them either to sell their mines * * * or enter into contracts for the sale of their output," is not proven; nor is there any such allegation as to existing freight rates or rates existing at the time of bill filed.

(9) The mere creation, maintenance, and extension of the composite business of owning, mining, transporting, and selling coal has long been not only legal but laudable within the state of Pennsylvania—and is so still.[2]

(10) Equitable decrees have occasionally been used as epitaphs or means of preventing the resurrection of obnoxious practices (United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007); but they normally speak in the present tense and are applied to remedy existing evils and not to characterize or condemn past wrongs.

Assuming for argument's sake the correctness of the foregoing, upon what foundation does the complainant's case rest?

The theory is compendiously shown by the following extract from the brief submitted:

"Carrier Analogous to a Judge.

"The truth is, where a common carrier, charged with the semijudicial duty of holding the scales even between various shippers who compete with one another, and of rendering impartial service to all alike, proceeds to buy up the business of some of these competing shippers, the case is as if a judge upon the bench should proceed to buy up the claims of some of the litigants in his court. The one practice restrains trade and fosters monopoly as much as the other would hinder justice and promote corruption."

This delightful argumentum ad judicem shows that what is really complained of is the bald fact that the railroad company, by owning the stock of various coal companies, controls and practically owns so much anthracite coal that it cannot be trusted to deal fairly with the rest of the world in the matter of transportation charges, which matter

[2] Note.—This proposition is rested without further discussion on the statement of Gray, J., in (C. C.) 164 Fed. 224, as quoted in 213 U. S. 402, 29 Sup. Ct. 527, 53 L. Ed. 836. It might have been made after an examination of the testimony in this case.

the judicial branch of our government is not content to leave to the regulation of another governmental agency, viz., the Interstate Commerce Commission.

It cannot be charged, and is not asserted in argument, that monopoly exists because of the control of so small a portion of anthracite acreage as has been stated above; nor yet in the mere fact of transporting a correspondingly small proportion of all the coal carried by all carriers. So there is found, in the very large proportion which the coal from the Lehigh lands bears to all the coal carried by the Lehigh Railroad, a monopoly within the "territorial unit" consisting of the lands presently reached by the Lehigh Railroad.

This doctrine of territorial unit is a novelty which I do not think bears investigating, for all that it does or can amount to is this (under existing decisions): The coal lands are lawfully owned; the coal therefrom is lawfully carried; there is an actual and honest dissociation of interests between coal owner and coal carrier. The relations which are complained of have therefore no influence upon interstate commerce; for said relations begin, exist, and end within the limits of the state of Pennsylvania, and are there entirely legal.

The foregoing discussion of the "anti-trust" portion of this bill has resulted rather from the vigorous confidence of counsel than from any perception on my part of its difficulty.

If the Lackawanna Case is to be followed, and any violation (at or since time when bill filed) of the commodities clause denied, there is no life left in this action, unless the meaning of the well-worn phrase "interstate commerce" is to receive fresh enlargement. Complainant's evidence and arguments consist largely in an iteration of alleged wrongs committed in those far-off days when the same entity could mine, transport, and sell its own coal without encountering governmental interference. So great were those wrongs, it is said, that, even though transportation and ownership be now fully divorced in "good faith," their recurrence can only be effectually prevented by finding monopoly and restraint in any ownership by a carrier of potential tonnage—which is undoubtedly the railroad way of regarding unmined coal.

But it is still true that to violate the Sherman Act there must be monopoly or restraint of a particular thing—"interstate commerce." Separated from the commodities clause, the same kind of argument would apply to wheat or timber grown on the extensive realty of one of the "land-grant" railroads of the West, and there is at bottom no difference between this argument against the Lehigh Railroad's retention of its coal stocks, and the view humorously condemned by Justice Brewer in an address well worth remembering.[3]

[3] Note.—"The Constitution gives to Congress the exclusive regulation of commerce between the states, as well as between this country and foreign nations; but who can now say, in view of legislation and judicial decision, at what period of time interstate commerce begins, and where it ends? If we listen to the contentions of some we shall be led to believe that when the farmer sows his wheat, having in view the gathering in the fall of a crop of grain which he intends to sell to a mill in some other state, the power of Congress attaches as upon a beginning of interstate commerce and continues until the wheat has been manufactured into bread and eaten by the consumer." Address before Virginia State Bar Association August, 1906.

This case may be thus summed up: No monopoly of interstate commerce is shown, nor any attempt to monopolize; for the proof of the pudding is in the eating thereof, and it is impossible to find any of the normal results of monopoly without also finding violations of the commodities clause—and none is discovered. As to restraint of interstate trade in coal transported over the Lehigh Road, there can be no restraint without control, and, since the railroad does not control the coal it carries, it has no means of restraint.

Bill dismissed.

HORTON v. TONOPAH & GOLDFIELD R. CO.

(District Court, D. Nevada. October 6, 1914.)

No. 1125.

1. CARRIERS ⟸197—CONVERSION BY CARRIER—UNCLAIMED FREIGHT.
Where the carrier has sold lumber shipped for freight and demurrage charges, after due notice and demand, and in strict compliance with the statute relating to the sale of unclaimed freight, there is no conversion.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891–900; Dec. Dig. ⟸197.]

2. CARRIERS ⟸100—CARRIAGE OF FREIGHT—DEMURRAGE.
Where the rules of a car service association, regularly filed with the Interstate Commerce Commission, prohibited agents from storing car load freight in warehouses or on ground belonging to the railroad company without adding car service charges, the same as if the freight had been left in the car, the carrier's right to collect demurrage does not end when the shipment is unloaded, so that the car may be released for service, the rule being obligatory upon the carrier, and violations thereof constituting unlawful discriminations.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427–433; Dec. Dig. ⟸100.]

3. CARRIERS ⟸197—CARRIAGE OF FREIGHT—SALE OF FREIGHT FOR CHARGES.
Under Rev. Laws Nev. § 541, providing that uncalled for freight may be sold for charges, upon notice, in an action by the shipper for conversion of a shipment of lumber which had been sold to pay freight and demurrage, the burden was on the carrier to show that the sale was regularly conducted.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891–900; Dec. Dig. ⟸197.]

4. CARRIERS ⟸197—CONVERSION BY CARRIER—SALE OF UNCLAIMED FREIGHT.
Where a carrier sold certain car load lots of lumber, title to which was in plaintiff as consignor, but which consignee had refused to accept, for freight and demurrage charges, in one parcel, together with shipments belonging to others, to a purchaser who secretly acted as agent for the carrier, which was the real purchaser, it was a conversion of the lumber.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891–900; Dec. Dig. ⟸197.]

5. CARRIERS ⟸100—CARRIAGE OF FREIGHT—CONTRACT OF SHIPMENT—DEMURRAGE—INCREASED RATES.
While changes in freight rates will not be given a retroactive effect, as to the contract of shipment, when the shipment has reached destination, and after the expiration of the free time allowed under the schedules filed with the Interstate Commerce Commission, demurrage rates may be advanced and collected after such time without being objectionable as

affecting pre-existing rights, since the shipper has no right under the contract of shipment to occupy the carrier's premises for storage purposes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427–433; Dec. Dig. ⊂⊃100.]

6. CONSTITUTIONAL LAW ⊂⊃188—RETROACTIVE EFFECT OF RULES—CARRIAGE OF FREIGHT—RATES.

A rule of the Interstate Commerce Commission regulating freight rates and charges cannot be regarded as retroactive, unless it impairs some right vested according to existing law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 530; Dec. Dig. ⊂⊃188.]

At Law. Action by C. E. Horton, surviving partner of the firm of the Horton-Hinckley Lumber Company against the Tonopah & Goldfield Railroad Company. Judgment for plaintiff.

John T. Thornton and Leo C. Lennon, both of San Francisco, Cal., for plaintiff.

Hugh H. Brown and J. H. Evans, both of Tonopah, Nev., for defendant.

FARRINGTON, District Judge. The plaintiff, C. E. Horton, surviving member of the firm of Horton-Hinckley Lumber Company, in this action seeks to recover for the alleged conversion of some 22 car loads of lumber.

The defendant company owns and operates a line of railroad, reaching from Mina to Tonopah and Goldfield, all in this state. The lumber in question was shipped in 1907 from points outside the state, received by the defendant at Mina, and transported, 18 car loads to Goldfield, and four car loads to Tonopah. In each case the consignment was to Horton-Hinckley Company itself, but with the understanding between Horton-Hinckley Company and its customers that each lot should be delivered to the party ordering it when he paid the freight, and until such payment was made legal title to the lumber would remain in the consignor. On arriving at its destination the lumber was refused by the parties ordering it. Horton-Hinckley Company was notified of this fact, but failed to take any action. In August, 1907, Hinckley went to Tonopah and Goldfield, and later the firm wrote defendant that the entire situation would be cleaned up in 10 days, but nothing was done.

[1] The company was fully and seasonably informed as to the arrival of the lumber at its destination, and the failure of the persons by whom it was ordered to take and receive it. Frequent demands were made by the railroad company for the payment of its charges, and the removal of the lumber. The four car-loads sent to Tonopah were sold at public auction December 9, 1907, for $1,435.04. This sale appears to have been entirely regular, and in strict compliance with the Nevada statute regulating the sale of unclaimed freight; consequently the lumber cannot be regarded as having been converted by the defendant.

Under the Revised Rules and Regulations of the Utah Car Service Association, in force at Tonopah during the times in question, it was

the duty of defendant to collect for car service and storage the sum of $1 per car per day after the expiration of 48 hours' free time. Under these rules the free time did not commence until the car had been properly placed for unloading and delivery. In computing the time all Sundays and holidays are excluded.

Two hundred and seven dollars, the amount claimed as demurrage on the lumber shipped to Tonopah, is not excessive, and is therefore allowed and found to be due from plaintiff; and it is conceded that $1,228.73 is due for freight.

The 18 cars sent to Goldfield contained 314,728 feet of lumber. They reached that point as their final destination at various times between April 1 and August 12, 1907. The freight charges claimed are $6,131.50. This amount is conceded to be correct, and is therefore found to be the amount due.

Six cars were unloaded in June, 1907, and the remainder in October of the same year. This was done by defendant company. Defendant's cars were then released, but the lumber remained on its right of way.

[2] Plaintiff contends that the company's right to collect demurrage ended when the cars were thus released for service. I am unable to accept his view. Rule 11 of the Car Service Association, in force at that time, prohibited agents—

"from storing any part of car load freight in warehouse or on ground belonging to the railroad company without adding thereto car service charges, the same as if the freight had been left in the car."

This rule was stated in defendant's tariff schedule, regularly filed with the Interstate Commerce Commission, and published as required by law; consequently it was so obligatory that until changed by action of the Commission itself, it was unlawful for the carrier to collect or receive any greater or less compensation for storage than that provided for in the rule. Furthermore, to permit the carrier to stop the running of demurrage charges by unloading freight cars for favored patrons would render the collection of such charges more or less discretionary, and open the door for discrimination as between shippers, the very thing which the act to regulate commerce was designed to prevent.

November 5, 1907, the lumber was offered for sale by the company at public auction, under the provisions of the Nevada act providing for the sale of unclaimed freight. There being few or no bidders, it appears to have been bid in by the company itself, and immediately thereafter the company began to sell the lumber in small lots at private sale. During the month of November three car loads were purchased by the Goldfield Lumber Company. Being advised that these proceedings were irregular, defendant company caused the remaining 15 car loads to be again advertised for sale.

[3] Section 541 of the Revised Laws of Nevada, under which these sales were attempted to be made, provides:

"If no person calls for the freight or other property received by such railroad, express company or other common carrier, commission, forwarding merchant, or warehouseman, within sixty days from the receipt thereof, the carrier, forwarding, commission merchant, or warehouseman may sell such prop-

erty, or so much thereof, at auction to the highest bidders, as will pay freight and other just and reasonable charges, first having given notice of the time and place of sale to the owner, consignee, or consignor, when known, and by advertisement in a daily paper ten days, or if a weekly paper, four weeks, published where such sale is to take place, or if there is no paper published at the place where such sale is to take place, by posting a notice of the sale conspicuously in at least three public places."

No valid sale of undelivered freight can be made by a carrier unless the statutory method is strictly pursued. 2 Moore on Carriers, p. 649.

The burden is on the carrier to show that one or the other of these sales was regularly conducted. This has not been done. Furthermore, the evidence fails to show that any notice of the time an place of sale was first given "to the owner, consignee, or consignor."

[4] At the second sale the 15 car loads of lumber in question, belonging to Horton-Hinckley Company, together with 4 car loads of coal belonging to the Goldfield Trading & Transfer Company, and 13 car loads of lumber belonging to various other persons and firms—32 car loads in all—were sold in one parcel to H. W. Brooks for $2,000. It appears that Brooks at some previous time had been an employé of the company, and was a brother of one S. W. Brooks, defendant's then agent at Goldfield. The purchase was made in pursuance of a secret understanding that Brooks was merely acting as agent for the company, that the company was the real purchaser and party in interest. Brooks paid nothing for the lumber, but proceeded to dispose of it at retail, turning the proceeds in to the company. These proceeds were credited to the Horton-Hinckley Company account. The Railroad Company itself, as the evidence shows, used a considerable quantity of the lumber, which was credited to the same account, at $25 per thousand.

It is very clear that these transactions constituted a wrongful conversion of the lumber. Gulf, C. & S. F. Ry. Co. v North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567; Van Zile on Bailments and Carriers, §§ 126, 305, 542. Martin v. McLaughlin, 9 Colo. 153, 158, 10 Pac. 806.

I find that the 18 car loads so converted contained 314,728 feet of lumber, of the value of $40 per thousand, or a total value of $12,589.12, at the time and place of conversion.

The date of the conversion is fixed as November 5, 1907, the time of the first attempted sale.

Central Ry. Co. v. Chicago, etc., Co., 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87.

[5] The amount of demurrage charge presents the most difficult question in the present case. The oldest waybill is dated January 31st, and the most recent August 24, 1907. According to the testimony, between the 1st day of February and the 19th day of July, 1907, the charge at Goldfield was $1 per car per day; between July 19th and October 19th of the same year, it was $3 per day; and between October 19, 1907, and January 17, 1908, it was $10 per day. Under the rule in force, the demurrage began to run on each car at the expiration of 48 hours after it had arrived at its destination, and had been placed in a suitable position for unloading and delivery. The time is computed

by excluding Sundays, holidays, and each Monday immediately following a Sunday which is itself a holiday. These advances in demurrage rates were provided for in schedules regularly filed from time to time with the Interstate Commerce Commission, and posted and published in conformity with the federal statute.

Defendant contends that each advance in rates must be given effect, and be enforced on each car load of lumber remaining in the custody of the company after the expiration of free time, even though the advance was not made until a date subsequent to the day when the car left its point of origin. Plaintiff contends that such a course gives the rules and rates a retroactive effect. He maintains that the demurrage rates in force when the through movement began must control throughout, and can neither be increased nor diminished pending the particular shipment, either by the carrier or the Interstate Commerce Commission. Apparently this question has never been passed on. The Interstate Commerce Commission has held a number of times that changes in freight rates will not be given a retroactive effect. For instance, if a certain lot of merchandise is shipped from New York City to Salt Lake, it must pass over a number of independent connecting lines; it is, however, a through route, for which a through rate is given in the tariff schedules in force at the time the movement begins. This through rate must control the particular shipment until it reaches its destination. It is regarded as a contract between shipper and carrier. If, while the goods are in transit, and before they reach Chicago, the local rate between Omaha and Salt Lake is raised or lowered, the change cannot affect this particular shipment. Any other rule would be disastrous. A merchant doing business in distant localities is entitled to know before he ships his goods what the freight charges will be. With this information he can decide whether to make the shipment or not. If it were permissible to change the rate on such a consignment after the shipper had parted with his possession, a serious and wholly unnecessary element of uncertainty and hazard would be introduced into business. Through Routes and Through Rates, 12 Interst. Com. Com'n R. 163, 170; Barnes on Interstate Transportation, p. 234; New Orleans Storage Rules & Regulations, 28 Interst. Com. Com'n R. 605–607.

After the lumber in question reached Goldfield and a reasonable opportunity had been afforded to remove it, defendant's duty as a carrier was fully performed. If the consignee then failed to receive or remove the lumber, the railroad was bound to exercise reasonable care for its safety and preservation until it could be legally sold in satisfaction of accrued charges. The carrier, however, is under duties other than those which it owes to the particular shipper. It owes a duty to the community, which cannot be efficiently and properly performed if its cars and terminal facilities are cluttered with uncalled for freight. This fact is important in fixing terminal rates. The rate must be large enough to yield reasonable compensation for the service rendered—for the use of cars, tracks and storage space—but to this must be added an amount sufficient to stimulate, and even coerce, the speedy removal of freight after the carriage is complete.

Hence a demurrage charge has been held to be in part compensation and in part penalty to secure the release of equipment and tracks.

In re Advances in Demurrage Charges, 25 Interst. Com. Com'n R. 315.

The reasonable demurrage charge, therefore, may be utterly unreasonable, if measured only by the value of the service to the particular shipper. However, all questions as to the reasonableness of the demurrage charges in the present case are settled by the action of the Interstate Commerce Commission, and are not subject to inquiry in this court.

Unquestionably the schedule of transportation rates filed with the Interstate Commerce Commission, posted and published in conformity with the statute, together with the waybill and the fact that the lumber was shipped, constitute a contract. It is an agreement to perform a certain amount of service for a definite compensation. Any change therein after the transportation begins, without the consent of both parties, would be unjust. With respect to such contracts the Interstate Commerce Commission has repeatedly said that changes in the schedule of rates will not be permitted to retroact on freight movements commenced before the change was made.

The contract was entire and indivisible, so much so that, if through any act of the shipper the shipment was not completed, the carrier was entitled to his full charges (6 Cyc. 493); and by issuing the bill of lading the carrier binds itself to deliver the goods at their destination. 6 Cyc. 481.

This agreement is essentially and radically different from the arrangement as to the lumber left in defendant's custody after the expiration of 48 hours' free time. True, the schedules in force when the original movement began fixed a demurrage rate at $1 per car per day, and this rate could not be withdrawn or modified except by consent of the Commission, obtained in the manner provided by law. Nevertheless, there was no agreement that the lumber, or any portion thereof, after it arrived at its destination, should remain in the custody of the railroad company for any fixed period, or, in fact, for any period whatever beyond a reasonable time for delivery. The schedule was in the nature of an offer to store goods at a certain rate. Until the offer is accepted in some way, there is no binding contract. If the fact that the 18 cars were left in the custody of the company after the expiration of the free time for unloading be construed as an acceptance of the demurrage rates set out in the schedules, still it was not an acceptance for any definite period.

In T. M. Kehoe & Co. v. Charleston & Western Ry. Co., 11 Interst. Com. Com'n R. 169, it is said that:

"A railroad company is a common carrier. Its duty is to transport freight to destination and to deliver it to the consignee. It is the duty of the consignee to receive his freight within a reasonable time, and if he neglects to do so the liability of the railroad company as a common carrier ceases, and it becomes simply a warehouseman. It is under no legal liability to continue to discharge the duty of a warehouseman, but may insist that the consignee shall receive and remove his freight. The consequences to the railway of neglect to do this are not merely, in case of car load freight, the loss of the use of a car. The uncertainty arising from the fact that cars are sometimes

unloaded promptly and sometimes not is embarrassing. The congestion of its terminals is often and perhaps usually a more serious matter than the loss of its cars. It would be not only much more expensive, but often impossible, for the railways of this country to handle their traffic at many points unless they required the prompt removal of the freight from the car. To permit one person to use the cars of a railroad company for a storehouse and to deny that privilege to another creates a discrimination between shippers which is often serious."

Again in Wilson Produce Co. v. Pennsylvania R. Co., at page 122, vol. 16, Interst. Com. Com'n R. it is said:

"There is no law which requires a railroad to give its cars and tracks under any terms for use as warehouses. * * * The * * * road is entitled to have its equipment and tracks freed within a reasonable time, and it may impose charges which will lead to such release as speedily as possible."

In a report on demurrage charges, 25 Interst. Com. Com'n R. 315, the Commission quotes with approval its previous statement that:

"The railroad is under no legal liability to continue to discharge the duty of warehouseman, but may insist that the freight shall be removed by the consignee."

It has frequently been held by the courts that after goods have arrived at their destination, and a reasonable time for delivery has elapsed—

"the carrier may place the goods in a warehouse, or store them with a responsible person, to be kept on account of or at the expense of the owner. Troy Waste Mfg. Co. v. N. Y. Cent., etc., R. R. Co., 158 App. Div. 352, 143 N. Y. Supp. 420, 425; N. Y. Hay Exchange Asso. v. P. R. R. Co., 14 Interst. Com. Com'n R. 178, 185; North Pa. R. R. Co. v. Commercial Bank, 123 U. S. 727, 734, 8 Sup. Ct. 266, 31 L. Ed. 287; 1 Moore on Carriers, p. 259.

It is difficult to understand how plaintiff, as against the railroad company, had acquired any right to insist upon having the lumber stored on the company's right of way or in its cars for any period beyond a reasonable time for unloading. If this be so, it follows that no change in the rate of demurrage made in accordance with the provisions of the congressional act, after the shipment of the lumber to Nevada was commenced, can be regarded as operating retrospectively. Such a change does not impair or affect any pre-existing rights or obligations.

[6] A rule cannot be regarded as retroactive unless it impairs some right vested according to existing law—unless it operates on obligations existing before it was enacted. 26 Ency. of Law, 692.

The withdrawal or modification of an offer does not affect any existing right, provided the withdrawal or modification takes place before the offer is accepted. The same may be said of the advance in demurrage rates made after the lumber arrived in Goldfield, because there was no contract or legal liability to devote cars and terminal facilities to the storage of lumber, beyond a reasonable time for unloading. The carrier was at liberty to store the lumber with some responsible person, or to store it on its own right of way, in which event it was bound to collect the same rate of demurrage as though the lumber remained on the cars, or, it might do what it evidently did do, apply to the Interstate Commerce Commission for an advance in the rates, in order to coerce a removal of freight. Horton-Hinckley Company was seasonably

advised of the increase; hence it was within its power, by paying the accrued charges and removing the lumber, to avoid paying any demurrage which was deemed excessive or unreasonable, or, in fact, to avoid paying any demurrage whatever.

I find the demurrage on the 18 cars to be $4,909. This sum is made up as follows: 1,244 days at $3.00 per day; 72 days at $10 per day; and 457 days at $1 per day. The account will then stand thus:

Proceeds from sale of four car loads of lumber shipped to Tonopah	$ 1,435 04	
Value of 314,728 feet of lumber sent to Goldfield at $40 per M	12,589 12	
		$14,024 16
Total freight charges on 22 cars	$ 7,360 23	
Demurrage on four Tonopah cars	207 00	
Demurrage on 18 Goldfield cars	4,909 00	
Total charges		$12,476 23
Amount due plaintiff		$ 1,547 93

In view of all the testimony, I am unable to award any exemplary damages.

Let a judgment be entered in favor of plaintiff for the sum of $1,547.93, with interest thereon at the rate of 7 per cent. per annum from the 5th day of November, 1907.

JOHNSON v. JOHNSON.

(District Court, D. Nevada. January 18, 1915.)

No. A-17.

1. COURTS ⊂=263—UNITED STATES COURTS—JURISDICTION OF ENTIRE CONTROVERSY—"JURISDICTION."

After jurisdiction on the ground of diverse citizenship attached to a wife's suit for an accounting and for a division of community property, the court was bound to consider all issues properly presented, and thereafter render a judgment and decree, and its duty to enforce its decrees is as binding as its duty to render them; "jurisdiction" being the power to hear and determine the subject-matter in controversy in the suit before the court, including the power to issue proper process to enforce such judgment or decree.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. ⊂=263.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

2. COURTS ⊂=263—UNITED STATES COURTS—ANCILLARY AND INCIDENTAL JURISDICTION—RECEIVERSHIP.

In a suit within the jurisdiction of the District Court, on the ground of diverse citizenship, to secure a division of community property and an accounting against a husband, where it was determined that the community property must be divided, and where a master found that the wife was entitled to an additional money judgment sufficient to exhaust the husband's estate, creditors of the husband, deceased insolvent, some of whose claims were superior to any judgment that might be rendered

in favor of plaintiff, might intervene and present their claims; whereupon the court, without surrendering any of the property to the administrator of the deceased husband appointed by the state court, was required to ascertain how much of the fund might equitably be applied to plaintiff's judgment, and administer complete justice in the controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. ⟸263.]

3. COURTS ⟸489 — UNITED STATES COURTS — DIVERSE CITIZENSHIP — STATE STATUTES.

The judicial power, authority, and duty of the United States District Court is wholly independent of state action and cannot directly or indirectly be destroyed, abridged, limited, or rendered less efficacious by any state statute or by any state authority whatever, so that Rev. Laws Nev. §§ 5972, 5974, 5975, could not confer on the District Courts of the state a practically exclusive jurisdiction over the property of a deceased party defendant in possession of the United States District Court by its receiver and in course of distribution to judgment and other creditors.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324–1330, 1333–1341, 1372–1374; Dec. Dig. ⟸489.]

4. COURTS ⟸505—UNITED STATES COURTS—JURISDICTION—PROPERTY IN CUSTODY OF STATE COURTS.

The United States District Court would not attempt to execute its judgment in favor of plaintiff, if the property of defendant's estate was in the possession and custody of an administrator appointed by the state court, since the federal court, upon reasons of necessity and comity, cannot seize and control property while it is in the custody of a state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. ⟸505.]

5. COURTS ⟸489—UNITED STATES COURTS—DIVERSE CITIZENSHIP—ADMINISTRATION OF ESTATES.

The powers exercised by the English Court of Chancery in probate matters, on the theory that the administrator of an estate was charged with the administration of a trust, prevailing at the adoption of the federal Constitution and the passage of the Judiciary Act, were vested in the United States Circuit Court, so that such court has general equity jurisdiction to administer, as between citizens of different states, the assets of a deceased party to a suit within its jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 404, 1324–1330, 1333–1341, 1372–1374; Dec. Dig. ⟸489.]

In Equity. Action by Roxa S. Johnson against William S. Johnson, with motions by Tonopah Banking Corporation and J. T. Garner, administrator with the will annexed of the estate of William S. Johnson, deceased, for orders permitting them to file complaints in intervention and a motion by the administrator for an order making all creditors of the decedent parties defendant. Motions to intervene allowed.

W. W. Griffin and Sweeney & Morehouse, all of Carson City, Nev., for plaintiff.

George A. Bartlett, of Carson City, Nev., for receiver.

C. L. Richards and Ayers & Gardiner, both of Tonopah, Nev., for administrator.

George B. Thatcher, of Carson City, Nev., and William Forman, of Tonopah, Nev., for George W. Summerfield and Ada Smith.

Mack & Green, of Reno, Nev., for Tonopah Banking Corporation.

FARRINGTON, District Judge. It was decided April 6, 1914, that the community property acquired during the marriage of Roxa S. Johnson and William S. Johnson must be divided between them. A master was appointed, who thereafter reported the character and value of the property. When this report came in, Mrs. Johnson was awarded an accounting, and the matter was again referred to the master, who filed a second report, in which he found that Mrs. Johnson is entitled to a judgment for $20,173.72, in addition to the share of the community property mentioned in the decree.

On the 16th day of November, the Tonopah Banking Corporation filed herein a notice that it would move for an order permitting it to file a complaint in intervention, based on the ground that it is a creditor of W. S. Johnson, now deceased; that the assets of the estate are in the possession and control of a receiver appointed by this court; that said corporation is materially interested in the distribution of the assets by reason of a judgment for the sum of $4,647.39 rendered in its favor and against said W. S. Johnson, December 24, 1913, in the district court of the state of Nevada for Washoe county.

On the same day, November 16, 1914, J. T. Garner, as administrator with the will annexed of the estate of William S. Johnson, deceased, filed in this court a notice of motion similar to that filed by the Tonopah Banking Corporation, in which it is stated:

> That the administrator will ask for an order making all creditors of W. S. Johnson, deceased, who have filed their claims in the state court, parties defendant to this action, and requiring and permitting them to appear herein and assert their respective claims, "or that the court order that a sufficient amount of the property of decedent be delivered to defendant to cover all of the claims aforesaid, together with defendant's commissions, costs, and expenses of administration and counsel fees; or that this court do order delivered to affiant all of the decedent's half of the common property, that any judgment obtained by plaintiff be made payable in due course of administration of the estate of decedent, as a general claim against said estate, and that plaintiff file her judgment in the matter of the estate of said deceased, and that her rights under said judgment be there determined; or that the court order all creditors of said decedent to file their claims herein, and that this court do act as a court of probate in determining the amount, priority, and payment of all claims against said decedent, including the claim of plaintiff; that if the court order said creditors to be made parties to this action then that the court, in such order, reserve to defendant the right to be heard upon the trial or hearing of said claims and to present evidence upon the question of the costs and expenses of administration, commissions, and counsel fees, and that the court fix and give judgment to defendant for the amount thereof and the priority thereof, and that the court make such other and further order as is meet in the premises."

Among the creditors named in the administrator's notice is Ada Smith, who claims a judgment for money loaned to the amount of $5,340.22. On the hearing of the motions, Ada Smith appeared by her attorney, and urged that the district court for Nye county has exclusive jurisdiction of all proceedings in settlement of the estate.

[1] Jurisdiction in this case is based on diverse citizenship. At the time suit was brought, Mrs. Johnson was a citizen and resident of California, and the late W. S. Johnson was a citizen and resident of Nevada. When jurisdiction once attaches, this court is bound to consider all issues properly presented, and thereafter render judgment and de-

cree. Its duty to enforce its decrees is no less obligatory than its duty to render them. This principle is supported by abundant authority.

"Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that, if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree. * * *

"The jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record.

"Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." Riggs v. Johnson County, 6 Wall. 166, 187, 18 L. Ed. 768; Leadville Coal Co. v. McCreery, 141 U. S. 475, 477, 12 Sup. Ct. 28, 35 L. Ed. 824; Phelps v. Mutual Reserve Fund Life Ass'n, 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717; Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154, 159.

[2-4] Mrs. Johnson bringing her suit in this court may have wished to avoid local prejudice. If she can be turned away with half relief, and remitted for the remainder to the very court which she wished to avoid, her constitutional right to invoke the jurisdiction of the federal court is of little worth.

A receiver was appointed, who took possession of the property in order that it might be preserved, and thus be available to satisfy the final decree. If this court contents itself with a decision that Mrs. Johnson is entitled to judgment for a definite sum of money in addition to one-half the community property, and then orders its receiver to surrender the property in its hands to the administrator to be distributed under direction of the state court, and directs Mrs. Johnson to apply to that tribunal to collect her judgment, how can such a course be justified? Can it be said that federal courts are unable to do equity in such cases, or that jurisdiction based on diverse citizenship when once acquired by a federal court is liable at any time by death of either party to be transferred to the probate court?

These questions answer themselves. The power and authority of this court rests on no such evanescent foundation.

I am aware that an attempt has been made to confer on the district courts of this state a jurisdiction, practically exclusive, over the property of deceased persons. Under sections 5972, 5974, and 5975 of the Revised Laws of this state, if controlling here, it would seem that no judgment can be rendered in favor of Mrs. Johnson until she has filed her claim with the clerk of the district court of Nye county; and, if such a judgment be rendered and entered in this court in her favor, it can be no more than this, "that the administrator pay in due course of administration the amount ascertained to be due."

The judicial power, authority, and duty of this court is wholly independent of state action. It cannot, directly or indirectly, be destroyed, abridged, limited, or rendered less efficacious by any state statute, or by any exertion of state authority whatever. In this connection the language of Mr. Justice Miller in Hess v. Reynolds, 113 U. S. 73, 77, 5 Sup. Ct. 377, 378 (28 L. Ed. 927), is pertinent:

"This jurisdiction of the courts of the United States, in controversies between citizens of different states, cannot be ousted or annulled by statutes of the states, assuming to confer it exclusively on their own courts.

"It may be convenient that all debts to be paid out of the assets of a deceased man's estate shall be established in the court to which the law of the domicil has confided the general administration of these assets. And the courts of the United States will pay respect to this principle, in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But neither the principle of convenience, nor the statutes of a state, can deprive them of jurisdiction to hear and determine a controversy between citizens of different states, when such a controversy is distinctly presented, because the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a state different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents."

A clear statement of the views of the Supreme Court of the United States on this subject is also found in Rio Grande R. Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. Ed. 400. The Rio Grande Railroad Company had obtained a money judgment in the United States Circuit Court for the Eastern District of Louisiana. After certain real and personal property had been taken on execution and advertised for sale, Gomila died; his representatives having been made parties, a new sale was ordered, but before the sale could take place, on motion of the administrator appointed by the state court, the marshal was ordered to desist, and surrender the property levied on to the administrator. The case was then taken to the Supreme Court of the United States on writ of error, where the decision of the federal court was reversed. It was held that only so much of the property, or of its proceeds, as might remain after satisfaction of the judgment under which the property had been seized, could be transferred to the administrator. The court said:

"The jurisdiction of a court of the United States once obtained over property by being brought within its custody continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state, or by any proceedings subsequently commenced in a state court. This exemption of the authority of the courts of the United States from interference by legislative or judicial action of the states is essential to their independence and efficiency. If their jurisdiction could in any particular be invaded and impaired by such state action, it would be difficult to perceive any limit to which the invasion and impairment might not be extended. To sanction the doctrine for which the executor, appointed by the probate court of the parish of Orleans, contends would be to subordinate the authority of the federal courts in essential attributes to the regulation of the state, a position which is wholly inadmissible. * * *

"When property is seized to satisfy a money judgment of the United States court, and thus brought within its custody it is appropriated to pay that judgment, and the court cannot surrender its jurisdiction over the property until it is applied to that judgment, or that judgment is otherwise satisfied. Only the part remaining after such appropriation goes, upon the death of the debtor, into the probate court as his assets. All proceedings under a levy of execution have relation back to the time of the seizure of the property. * * *

"We do not question the general doctrine laid down in Yonley v. Lavender, 21 Wall. 276, 279, 280 [22 L. Ed. 536], to the effect that the administration

laws of a state are not merely rules of practice for the courts, but laws limiting the rights of the parties, and will be observed by the federal courts in the enforcement of individual rights, and that those laws upon the death of a party withdraw the estate of the deceased from the operation of the execution laws of the state, and place them in the hands of his executor or administrator for the benefit of his creditors and distributees. But that doctrine only applies where the property has not been, previous to the death of the debtor, taken into custody by the federal court upon its process, and thus specifically appropriated to the satisfaction of such judgment. In this case, had Gomila died before the property in question had been seized upon process issued upon a judgment against him, the doctrine of the case cited might have been applicable."

To the same effect, see Hale v. Tyler (C. C.) 115 Fed. 833; Heaton v. Thatcher (C. C.) 59 Fed. 731.

It may be conceded that this court would not attempt to execute its judgment in favor of Mrs. Johnson if the property of the estate of W. S. Johnson were in the possession and custody of the administrator. This is so because the federal court cannot seize and control property while it is in the custody of a state court. Such a course is forbidden both by necessity and comity. Waterman v. Canal-Lousiana Bank Co., 215 U. S. 33, 44, 30 Sup. Ct. 10, 54 L. Ed. 80; Compton v. Jesup, 68 Fed. 263, 279, 15 C. C. A. 397.

It will be observed that, in the last quotation from the Gomila Case, it is said that the doctrine which withdraws the estate of a decedent from the execution laws of a state, and places it in the hands of an administrator, does not apply when, previous to the death of the debtor, his property has been taken into the custody of the federal court, and thus specifically appropriated.

The property involved in the present case now is, and for a period beginning long prior to the death of said decedent has been, in the custody and possession of this court. There is therefore no question of interference with the possession of the state court. That court neither had nor has any possession.

If the doctrine of the Gomila Case is sound, Mrs. Johnson is entitled to require this court to apply the property in the hands of the receiver in satisfaction of her judgment, if she obtains one, and the residue should then be remitted to the state court for administration. Such a course would be entirely free from embarrassment if the Johnson estate were solvent. This, unfortunately, is not the case. If the findings of the master are approved, and a judgment for $20,173.72 is entered in her favor, this, together with costs and expenses of the receivership, will, in all probability, be sufficient to exhaust the estate. Nothing will be left for other creditors, some of whom are alleged to hold claims superior to any judgment which can be rendered in favor of Mrs. Johnson.

Such a condition is not sufficient to deprive this court of its jurisdiction, or to relieve it of the duty to apply the property now in its custody to the satisfaction of whatever judgment Mrs. Johnson may obtain. But it does impress upon the court a duty to ascertain how much of the fund can legally and equitably be so applied. In order to ascertain that fact, it is necessary to listen to those who desire to intervene and exhibit their claims.

A proposal to surrender the whole or any definite portion of the property at this time to the administrator contravenes the whole theory of equity jurisdiction in relation to receivers and receivership funds.

"The principle that the court, which has actual possession of the fund, has the exclusive right to determine all claims and liens asserted against it, is fundamental. Hence every court of equity in such a case assumes to decide all controversies touching the subject-matter of the suit and the fund; to determine the existence and priority of all liens; and, finally, to distribute the surplus among those who are entitled to it." Kennedy v. I. C. & L. R. Co. (C. C.) 3 Fed. 97, 102; Thompson v. Scott, 23 Fed. Cas. No. 13,975.

In this view of the situation, the movants are seeking to intervene. In my opinion, it is the duty of this court, having once acquired jurisdiction, to retain it in order to do complete justice in the premises.

[5] As to the power of the court to take this action there can be no doubt. Until probate administration was regulated by statute and assigned to specified courts, it was a well-recognized branch of chancery jurisdiction. At the time of the adoption of the federal Constitution and the passage of the Judiciary Act, the Court of Chancery in England was the ordinary tribunal for such matters, and it was with the powers then exercised by that court that the United States Circuit Court was invested. When a representative or administrator of an estate was appointed, he was regarded as charged with the administration of a trust. The Ecclesiastical Courts had no power to deal with trusts, or to settle accounts, or to marshal and distribute assets; these things the Courts of Chancery then had ample power to do, and for that reason resort was had to them. 1 Story, Eq. Jurisp., § 532; Ball v. Tompkins (C. C.) 41 Fed. 486, 489; Payne v. Hook, 7 Wall. 430, 19 L. Ed. 260; State of Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 14 L. Ed. 249.

In Lawrence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130, it is said that the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction, cannot be defeated or impaired by laws of a state undertaking to give exclusive jurisdiction to its own courts.

In Clarke v. Perry, 5 Cal. 60, 63 Am. Dec. 82, it was held with reference to the equity jurisdiction of the courts of California that:

"The probate court is a court of special and limited jurisdictions. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains all of its jurisdictions. Where therefore a bill is filed in chancery against an administrator, to compel him to account, by one who has not been an actual party to a proceeding or settlement in the probate court, he may totally disregard such proceeding or settlement; and, although the settlement in the probate court is a final settlement, the complainant, who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the district court, and compel the administrator to a full account."

In 3 Pomeroy's Eq. Jurisp. (3d Ed.) p. 2294, in the note, it is said:

"The full original jurisdiction of the English Court of Chancery over administrations and matters pertaining to the settlement of estates is possessed by the United States Circuit Courts. Whenever these courts obtain jurisdiction of such a matter on account of the state citizenship of the parties, they will exercise the full powers and grant the full reliefs of chancery, unlimited

and unaffected by any restrictive legislation of the state in which the matter arose, or in which the parties are resident. The state statutes abrogating the equitable jurisdiction of the state courts, and conferring an exclusive jurisdiction upon the probate courts, have no effect whatever upon the powers of the United States tribunals. This jurisdiction of the United States courts is, however, concurrent with that of the state tribunals; and if a state probate or other court has already assumed jurisdiction, and an administration is pending before it, the United States Circuit Court will not interfere in the absence of fraud or other like ground of equitable cognizance."

There is no merit in the objection that the moving parties have been guilty of laches. Therefore they, and those for whom they appear, will be permitted to intervene.

All parties interested will have 20 days from the date hereof within which to take such steps as they may be advised.

In re GIBBONS.

(District Court, W. D. Washington, N. D. August 11, 1915.)

No. 4853.

1. BANKRUPTCY ⊜100—ADJUDICATION—CONTEST—LACHES.
That the wife of a bankrupt has allowed three years to elapse since the adjudication of bankruptcy constitutes such laches as will preclude her from then contesting the allegations of insolvency in the petition upon which the adjudication was founded.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141-144; Dec. Dig. ⊜100.]

2. BANKRUPTCY ⊜357—ADJUDICATION—JURY QUESTION.
Where the bankruptcy court which has exclusive jurisdiction has custody of the res, and a distribution of the fund is the only issue before the court, the status and amount of the indebtedness need not be submitted to a jury for determination.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541-544; Dec. Dig. ⊜357.]

In Bankruptcy. On order to show cause why the status and amount of the indebtedness should not be submitted to a jury. Order denied.

McClure & McClure, of Seattle, Wash., for trustee.

McCafferty & Robinson and Israel & Kohlhase, of Seattle, Wash., for Mary L. Gibbons.

Leopold M. Stern and J. W. Russell, both of Seattle, Wash., for petitioning creditors.

Clise & Poe, of Seattle, Wash., for Dexter Horton Bank.

NETERER, District Judge. On January 10, 1912, an involuntary petition in bankruptcy was filed against Pat Gibbons, and he was adjudged bankrupt on the 13th day of July of the same year. Such proceedings were had in the administration of the bankrupt estate that on the 24th of June, 1914, the trustee filed a petition, stating that the Seattle National Bank held $8,174.51, and declined to pay the said sum to the trustee for the reason that Mary L. Gibbons, wife of the bankrupt,

had made a claim to said money on account of it belonging to the community composed of Pat Gibbons and Mary L. Gibbons, and an order was obtained from the court, directing Mary L. Gibbons to appear and propound her claim to said money and to the further sum of $48,050 derived from the sale of certain coal lands. In response to this order, Mary L. Gibbons appeared and objected to the jurisdiction of the court, stating that the property was community property and that the court had no jurisdiction over any of the funds realized from the community property or the sale thereof. Her contention was denied by the referee, which holding was confirmed by this court. Appeal was made to the Circuit Court of Appeals. The Circuit Court affirmed the lower court, and used the following language:

"The real estate out of which the fund in controversy was realized was admittedly community property. The petitioner and the bankrupt had been married more than 29 years. The debts were incurred within that period. The status of the community property in the bankruptcy court and the rights of the members of the community in respect to the same are to be determined by the statutes and decisions of the state of Washington. Section 5918, Rem. & Bal. Code, gives the husband the management and control of the community real estate, and provides that all such community real estate shall be subject to liens of judgments recovered for community debts and to sale on execution issued thereon. By the decisions of the Supreme Court of that state it is well settled that, while all property acquired by the husband is prima facie community property, all debts incurred by him during the existence of the marriage relation are prima facie community debts. * * *

"In Thygesen v. Neufelder, 9 Wash. 455 [37 Pac. 672], it is held that a conveyance by a husband to an assignee for the benefit of the community operates as a transfer of the community property for the discharge of community obligations, and in Bimrose v. Matthews, 78 Wash. 38 [138 Pac. 319], it was held that a discharge of the husband in bankruptcy from the obligation of a community debt of necessity discharged also the wife, although she was not a party to the bankruptcy proceeding. The trustee, by operation of the bankruptcy act, became vested with the title of the bankrupt to all property which, prior to the filing of the petition against him, could have been sold under judicial process against him."

After the rendition of this decision by the Circuit Court of Appeals, a petition was filed by the trustee setting forth the fact that the estate was administered with the exception of the distribution of the funds, and "asks and prays that the matter of the administration and distribution of said funds be set for hearing in due course, and that a creditors' meeting be called to be held as required by law, and that the court adjudge and decree that the said Mary L. Gibbons has no claim in and to the said moneys or said funds or any part thereof." Upon the presentation of the petition, it was ordered by the court that Mary L. Gibbons, wife of Pat Gibbons, bankrupt, be required to appear before the referee in bankruptcy at a time and place stated, and show cause, if any she has, why an order should not be made and entered adjudging and decreeing that she has no right, title, claim, or interest to the sum of $8,174.51, rentals, or to the further sum of $48,050, derived from the sale of the coal property, and that, upon failure, she would be barred of all right, title, claim, or interest in and to any of the said property. Thereupon Mary L. Gibbons responded, objecting to the jurisdiction of the court "for the purpose of preserving her *rights* in those particulars, notwithstanding the decision of the Circuit

Court of Appeals," and denying on information and belief with relation to the funds in the possession of the bank, and then specifically denying that Pat Gibbons was the owner of the coal property, but alleging that the said property was community property, and that all indebtedness filed against the estate was the individual indebtedness of Pat Gibbons and others, and not community indebtedness; denying that Pat Gibbons, or the community composed of herself and Pat Gibbons, was bankrupt; and praying that the issue with relation to the indebtedness be determined by jury trial. And thereafter, on July 20, 1915, Mary L. Gibbons filed a paper denominated an answer to the petition in involuntary bankruptcy filed against Gibbons, in which she denies that Pat Gibbons, or the community composed of Pat Gibbons and Mary L. Gibbons, was, at the time of the filing of the petition, or at any other subsequent time, insolvent; denies that any act of bankruptcy was committed by Pat Gibbons while insolvent; and "demands and prays that the issue created herein as to the insolvency of Pat Gibbons, and the insolvency of the community composed of Pat Gibbons and Mary L. Gibbons, be submitted and tried out by jury, under the rules of this honorable court, and the acts of bankruptcy of Congress of 1898, and the amendments thereto." On the filing of this answer, supported by affidavit on behalf of Mary L. Gibbons, supporting a motion therefor, an order to show cause was issued, directing that the petitioning creditors show cause, at a day named, why an order should not be granted submitting to a jury trial the matters and issues of the said Mary L. Gibbons with relation to the petition of involuntary bankruptcy and the answer of Mary L. Gibbons as to the right, title, claim, and interest to the moneys or properties in the hands of the trustee.

Counsel have fully argued the matter before the court, it being contended by counsel for Mary L. Gibbons that this is the first opportunity she has had to meet the allegations of insolvency in the petition against Pat Gibbons; that she, being a member of the community of Pat Gibbons and wife, has a right to have that issue presented to a jury; that under section 19 of the Bankruptcy Act she is granted the right of a jury trial, upon demand; and that such right has not been lost to her, and cites Elliott & Co. v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

[1, 2] I think that the contentions of Mary L. Gibbons now made have been disposed of by this court by decision, not published, filed herein on the 28th day of August, 1914, which was confirmed by the Circuit Court of Appeals, in which the language above quoted was used. I also think that Mrs. Gibbons is guilty of such laches as would preclude her being heard now. Black on Bankruptcy, § 184; In re Urban & Suburban R. T. Co. (D. C.) 132 Fed. 140; Collier on Bankruptcy (10th Ed.) pp. 434, 435. Mary L. Gibbons has no right now to appear in court and contest the petition against Pat Gibbons upon which adjudication was made more than three years ago. Nor do I think that she is entitled to a trial by jury in determining the status and amount of the indebtedness. The only jury trial provided by the Bankruptcy Act is to determine the issue of insolvency and act of bankruptcy. Section 19, Bankruptcy Act. If entitled to a jury trial,

the right must be predicated on a right obtained from some other provision of law. None has been cited, nor do I know of any other provision. Section 711, U. S. Comp. Stat. 1901, p. 577, declares that the jurisdiction of the United States courts shall be exclusive in all matters and proceedings in bankruptcy, which means the marshaling and distribution of the assets, the discharge of the bankrupt from his debts, and such like powers.

A bankruptcy proceeding has been compared to an equitable attachment (In re Hinds, 12 Fed. Cas. 202) with respect to the purposes and effect upon the debtor's property (Farmers' Loan & Trust Co. v. Baker, 20 Misc. Rep. 387, 46 N. Y. Supp. 266, at page 273; F. L. & T. Co. v. M. E. & M. Works, 35 Minn. 543, 29 N. W. 349). It has been held to be a proceeding in rem in which the parties interested in the res are before the court (S. L. & T. Co. v. Benbow [D. C.] 96 Fed. 514–528), and any adjudication made in the allowance or disallowance of a claim is res adjudicata in a proceeding on such claim in another jurisdiction (Hargadine v. Hudson, 122 Fed. 232, 58 C. C. A. 596; Elmore v. Henderson, 179 Ala. 548, 60 South. 820, 43 L. R. A. [N. S.] 950; U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055). In the latter case, the court said:

"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include many others, and all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

The bankruptcy court having exclusive jurisdiction, and having custody of the res, and the distribution of the fund being the only issue before the court, there is no question, under the bankruptcy act or other law, to be submitted to a jury for determination.

The demand for jury trial is denied, and the matter referred to the referee for distribution of the funds of the estate in accordance with the rights as they may be established.

GIBBONS v. DEXTER HORTON TRUST & SAVINGS BANK et al.

(District Court, W. D. Washington, N. D. August 11, 1915.)

No. 69.

1. COURTS ⟸322—UNITED STATES COURTS—JURISDICTION DEPENDENT ON CITIZENSHIP.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1913, § 991]) § 24, providing that federal District Courts shall have original jurisdiction of civil suits at common law or in equity between citizens of different states or between citizens of a state and foreign states, citizens, or subjects, where absence of diversity of citizenship affirmatively appears on the face of a bill to set aside an adjudication in bankruptcy, for a resale of the bankrupt's property, a determination whether the debts were community debts, and to stay the bankruptcy proceedings, the bill must be dismissed for want of jurisdiction; diversity of citizenship being the only status that will give the court jurisdiction of the issues tendered.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876–881, 887; Dec. Dig. ⟸322.]

2. BANKRUPTCY ⟸439—CONFLICTING JURISDICTION — REVIEW OF PROCEEDINGS.

A federal District Court will not entertain a bill in equity for the purpose of adjudicating any matter or reviewing any proceeding in the course of administration in the bankruptcy court, including all matters of administration and determination of rights between contending parties with relation to the estate upon a fund in the custody of the court, since the jurisdiction of the bankruptcy court is exclusive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⟸439.]

3. BANKRUPTCY ⟸428—ADJUDICATION—COMMUNITY PROPERTY.

Rem. & Bal. Code Wash. § 5918, gives the husband the management and control of the community real estate, and provides that all such community real estate shall be subject to liens or judgments recovered for community debts and to sale on execution issued thereon. Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557 (Comp. St. 1913, § 9631), vests the trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon and the power of a judgment creditor holding an execution duly returned unsatisfied. Under the law of Washington, all property acquired by the husband after marriage is prima facie community property, and the debts incurred by him while married are prima facie community debts. *Held*, that an adjudication of bankruptcy against a married man in such state constitutes also an adjudication against the community, and his discharge discharges the community.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 782–786; Dec. Dig. ⟸428.]

In Equity. Bill by Mary L. Gibbons against the Dexter Horton Trust & Savings Bank and others to set aside an adjudication in bankruptcy and for a resale of the bankrupt's property. On motion to dismiss bill. Motion granted.

Israel & Kohlhase and McCafferty & Robinson, all of Seattle, Wash., for plaintiff.

Clise & Poe, of Seattle, Wash., for Dexter Horton Bank.

McClure & McClure, of Seattle, Wash., for J. S. Goldsmith.

Leopold M. Stern and J. W. Russell, both of Seattle, Wash., for J. L. Gottstein, Arthur Bastheim, and Fred V. Fisher.

NETERER, District Judge. The plaintiff files a bill in equity, alleging that she is a citizen of the state of Washington, that each and all of the defendants are citizens of the state of Washington, and of this district, and states, in substance, that she is the wife of one Pat Gibbons, and has been for practically 30 years; that the community composed of herself and her husband acquired certain lands in King county, Wash.; that on the 10th day of January, 1912, an involuntary petition of bankruptcy was filed against her husband, Pat Gibbons; that he was thereafter adjudged bankrupt; that various claims have been filed against the estate, asserted to be based upon community indebtedness; that the community land was sold by the bankruptcy court for $48,050, when in fact it was worth a great deal more; that certain moneys were paid to the Seattle National Bank on account of a lease which had been executed for the community land which was valuable chiefly for coal and coal being mined from the land; that on the 24th day of June, 1914, an order was served upon her in the bankruptcy proceedings, requiring her to appear before the referee in bankruptcy and assert and propound any right, title, interest, or claim she had to the money in the Seattle National Bank, or to the proceeds of the sale of the land; that she made a special appearance, challenging the jurisdiction of the court, and, upon a denial of her contention, appealed to the Circuit Court of Appeals, which confirmed the order of the referee and the District Court; that Pat Gibbons was not insolvent at the time of adjudication; that the community of Pat Gibbons and the plaintiff was solvent at said time, and is now solvent; that Pat Gibbons consented to adjudication in bankruptcy because of certain representations made to him with relation to the administration of the bankrupt estate by the party subsequently selected trustee in bankruptcy, who, it is alleged, advised Pat Gibbons that he would be selected trustee if adjudication was had, which were not fulfilled. Alleges that the community lands sold were of the value of $250,000, and prays that the order of adjudication against Pat Gibbons be set aside; that the facts with reference to the solvency or insolvency of said Pat Gibbons and the community consisting of said Pat Gibbons and the plaintiff was insolvent; that the said property be resold after determining the amount and character of the debts against the said Pat Gibbons, the separate debts and community debts against the said Pat Gibbons and the plaintiff as a community; and that an order be entered staying the bankruptcy proceedings until the matters complained of in the bill of equity should be adjudicated.

The defendants Dexter Horton Trust & Savings Bank, a corporation, M. & K. Gottstein, and J. S. Goldsmith, trustee, moved to dismiss the bill, upon the ground and for the reason that it affirmatively appears in the bill that this court has not jurisdiction.

[1] The motion to dismiss must be granted. Diversity of citizenship (section 24, Judicial Code) is the only status that would give the court jurisdiction of the issues tendered in this bill, and it affirmatively appears on the face of the bill that there is not diversity of citizenship.

[2] Aside from this question, the issues which are tendered here have in part been determined by the bankruptcy court, in which the

other issues sought to be raised are now pending. The plaintiff cannot now be permitted to relitigate matters which have been presented or are undisposed of by the bankruptcy court. It would present an anomalous situation if a court, sitting as a bankruptcy court, could administer an estate and adjudicate the rights of contending parties, if, upon adverse ruling, the court, as a court of equity, would entertain a bill of the defeated parties to review the bankruptcy proceeding. A bill in equity will not be entertained for the purpose of adjudicating any matter or reviewing any proceeding in the court of administration in the bankruptcy court. U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055. The jurisdiction of the bankruptcy court is intended to be exclusive of all other courts, and such proceedings include all matters of administration and the determining of rights between contending parties with relation to the estate upon a fund in the custody of the court.

[3] Section 5918, Rem. & Bal. Codes of Wash., gives the husband the management and control of the community real estate, and provides that all such community real estate shall be subject to liens of judgments recovered for community debts and to sale on execution issued thereon. Section 47 of the Bankruptcy Act vests the trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and the power of a judgment creditor holding an execution duly returned unsatisfied. It is well settled by the Supreme Court of Washington that all property acquired by the husband after marriage is prima facie community property, and all debts incurred by him during the existence of the marriage relation are prima facie community debts. The Circuit Court of Appeals of this circuit (222 Fed. 826, —— C. C. A. ——), on the very matter in issue, held, upon the authority of Thygesen v. Neufelder, 9 Wash. 455, 37 Pac. 672, and Bimrose v. Matthews, 78 Wash. 38, 138 Pac. 319, that the adjudication against Pat Gibbons was also an adjudication against the community, and that the discharge of Pat Gibbons discharged the community.

In re CUNNEY et al.

(District Court, D. Massachusetts. January 8, 1904.)

No. 5581.

1. BANKRUPTCY ⊜136—SUMMARY PROCEEDINGS TO COMPEL BANKRUPTS TO TURN OVER PROPERTY—GENERAL ORDERS—APPLICABILITY.

General Order XXXVII (89 Fed. xiv, 32 C. C. A. xiv), providing that in proceedings in equity to carry into effect the Bankruptcy Act, or to enforce rights and remedies given by it, the rules of equity practice shall be followed, applies only to equity proceedings properly so called, and not to summary proceedings in bankruptcy to compel bankrupts to turn over property to the trustees, though in summary proceedings the court will allow the bankrupts full opportunity for hearing and defense, without being limited by technical rules of procedure in equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊜136.]

2. BANKRUPTCY ⊂⊃136—SUMMARY PROCEEDINGS TO COMPEL BANKRUPTS TO TURN OVER PROPERTY—GENERAL ORDERS—APPLICABILITY.
Where the case of a trustee, in summary proceedings to compel bankrupts to turn over money to him, rests on the testimony of the bankrupts, the court need not, under any formal rule of equity, give credit to statements made in the sworn answer of the bankrupts rather than to their sworn testimony.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂⊃136.]

3. BANKRUPTCY ⊂⊃136—SUMMARY PROCEEDINGS TO COMPEL BANKRUPTS TO TURN OVER PROPERTY—GENERAL ORDERS—APPLICABILITY.
The transcript of a bankrupt's examination, though unsigned, but proved to be correct, is admissible in evidence in summary proceedings by the trustee to compel the bankrupt to turn over property in his possession, though the examination was unfinished, especially where the bankrupt was afforded opportunity to examine his testimony for correction of errors and to make any addition thereto.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂⊃136.]

4. BANKRUPTCY ⊂⊃136—COMPELLING BANKRUPT TO TURN OVER PROPERTY TO TRUSTEE—BURDEN OF PROOF.
A trustee, in summary proceedings to compel the bankrupt to turn over assets to the trustee, has the burden of proving by a preponderance of the evidence that the bankrupt had property in his possession or under his control.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂⊃136.]

5. BANKRUPTCY ⊂⊃136—FRAUDULENT TRANSFER BY BANKRUPT—REMEDY OF TRUSTEE.
Where a bankrupt made voluntary payments voidable as a preference, the trustee might have his remedy against the persons receiving the money; but the court could not direct the bankrupt to turn over the money to the trustee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂⊃136.]

In Bankruptcy. In the matter of John J. Cunney and Thomas Cunney. Petition by trustee for order directing bankrupts to turn over to him money. Matter recommitted to referee to hear further competent evidence.

William B. Sullivan, of Boston, Mass., for trustee.
W. Orison Underwood, of Boston, Mass., for bankrupts.

LOWELL, District Judge. The involuntary petition in this case was filed December 26, 1901, the act of bankruptcy alleged being a voluntary assignment. The adjudication was made June 23, 1902.

The trustee filed a petition praying that the bankrupts be ordered to turn over to him about $15,000. This sum of money the bankrupt James Cunney took from the business shortly before the voluntary assignment made by the firm, with intent to defraud the creditors. He paid $2,500 to his brother Michael in alleged settlement of an outstanding debt; $4,800 he paid to his brother-in-law Malloy in alleged settlement of another outstanding debt. The sum of $7,200, nearly all that was left, the two bankrupts, according to their testimony, drank

up and gambled away within about four months, beginning a month before the involuntary petition was filed, and ending three months afterwards.

[1, 2] It was not denied that the conduct of the bankrupts was indefensible, but it was urged that they have not the money now in their hands, and that they did not have it when the trustee filed his petition asking that they turn over the money to him. The bankrupt's counsel contended that by reason of General Order XXXVII (89 Fed. xiv, 32 C. C. A. xiv) the statements made by the bankrupts in their sworn answer to this petition must be taken as true, unless controlled by the testimony of two witnesses, or by that of one witness with corroborating circumstances. This contention is without force in the case at bar. General Order XXXVII applies only to equity proceedings, properly so called, and not to summary proceedings in bankruptcy like this. Even in summary proceedings the court allows the respondent full opportunity for hearing and defense, but it is not limited by the technical rules of procedure in equity. Moreover, the trustee's case is rested upon the testimony of the two bankrupts, and no formal rule of equity proceedings requires a court of equity to give credit to the statements made in a sworn answer rather than to the respondent's sworn testimony.

[3, 4] Other formal objections raised by the bankrupts' counsel need little notice. The transcript of the bankrupts' examination introduced in evidence, though unsigned, was proved to be correct, and was admissible, though the examination was unfinished. The court may find it necessary to keep an examination open after summary proceedings like these have been completed. The bankrupts were afforded full opportunity to examine their testimony for the correction of any errors in the transcript, and to make any addition thereto which they might see fit. The bankrupts' examination is deemed admissible against the bankrupts in all proceedings in bankruptcy by the established practice of this court. The burden of proof rested upon the trustee to satisfy the court, by appropriate evidence sufficient under all the circumstances, that the bankrupts had money belonging to their estate. These proceedings are not criminal, and so the trustee is not required to make his case out by proof beyond a reasonable doubt.

[5] It was admitted that the bankrupts retained money which they should have delivered to their voluntary assignee or to their trustee in bankruptcy. Their testimony on any matter is worthless, and their falsehood puts their discharge out of the question; but if they have no money now in their possession or control, and if they had none when the trustee's petition was filed, no order directing them to pay over money should issue. That the bankrupt James Cunney paid $7,300 to his brother Michael and to his brother-in-law Malloy is not disputed. These payments may have been made without consideration, and on the evidence before the court they appear at the best to have been voidable preferences. The trustee may well have his remedy against Michael Cunney and Malloy, but the court cannot say that the money paid them is now in the bankrupt's possession or control. The bankrupts say that the rest of the money has been spent in riotous liv-

ing. No testimony has been offered to control this statement or to indicate that the bankrupts have money now in hand. They are working as journeymen tanners at wages of $15 a week. Very slight evidence of their present possession or control of money would outweigh their worthless denial. As the trustee desires to make further inquiry, and as the circumstances are highly suspicious, to say the least, the judgment of the referee is reversed pro forma, and the matter recommitted to him to hear any further competent evidence submitted by the parties.

COCA-COLA CO. v. BENNETT et al.

(District Court, D. Kansas, Second Division. March 5, 1915.)

No. 12-N.

1. TRADE-MARKS AND TRADE-NAMES ⊂=53—INFRINGEMENT—SUIT FOR INJUNCTION.

A trade-mark is not infringed by its use on the very article for which it was designed, although by another than the registered owner, and such use will not be enjoined by a court of equity for the protection of an attempted monopoly of an unpatented article through exclusive contracts for its sale.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 61; Dec. Dig. ⊂=53.]

2. MONOPOLIES ⊂=21—RIGHT—SUIT FOR INFRINGEMENT—INJUNCTION.

Complainant's trade-mark "Coca-Cola" covers a beverage, and also the syrup by the use of which the beverage is made. Complainant, through an authorized agent, sold quantities of the syrup to defendants to be used in making the beverage, which defendants bottled and sold under complainant's trade-mark. Later complainant established an agency of its own to make and sell the beverage in the same territory, and not only refused to make further sales of syrup to defendants, but brought suit to enjoin them from alleged infringement of its trade-mark by using it on their product made from the syrup previously purchased. *Held*, that such use was not an infringement, and that, the evident purpose of the suit being only to aid complainant in monopolizing the sale of the beverage, to which it had no equitable right under the facts shown, an injunction would not be granted.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. ⊂=21.]

In Equity. Suit by the Coca-Cola Company against Charles G. Bennett and others. On final hearing. Decree for defendants.

Holmes, Yankey & Holmes, of Wichita, Kan., for plaintiff.
C. M. Williams, of Hutchinson, Kan., for defendants.

POLLOCK, District Judge. This is a suit to restrain infringement of trade-mark. The facts stipulated by the parties, necessary to decision, may be briefly summarized as follows:

Plaintiff is a corporate citizen of the state of Georgia, engaged in the business of manufacturing and selling a syrup product by it sold under its trade-mark or trade-name, "Coca-Cola." This entire syrup product manufactured by plaintiff is sold through two bottling corporations of the state of Tennessee, named The Coca-Cola Bottling

Company and Coca-Cola Bottling Company, under exclusive contracts made between the parties. With the consent of the parties said Tennessee corporations divided the territory of this country between themselves and other corporations formed, of which one is the Western Coca-Cola Company, a corporate citizen of the state of Illinois, located in the city of Chicago. After the formation of said Illinois corporation, plaintiff entered into a contract to supply said company with its syrup product to be resold in certain designated territory, including this state. Defendants Bennett, under the firm name of The Bennett Mineral & Distilled Water Company, doing business at the city of Hutchinson, this state, prior to January 1, 1913, purchased from the Western Coca-Cola Company, and employed the same in preparing, bottling, and selling the beverage coca-cola in bottles having crowns and corks bearing the trade-name of plaintiff, "Coca-Cola." On said date the Western Coca-Cola Company established an agency for bottling and selling of its completed product as a beverage in the city of Hutchinson, and thereafter would no longer sell to defendants; on the contrary, insisted defendants should sell to said company all its syrup products, crowns, and caps theretofore purchased, and cease doing business under the trade-name "Coca-Cola." This defendants refused to do, and at the time this suit was instituted defendants were engaged in bottling and selling coca-cola as a beverage manufactured from the syrup which theretofore they had purchased from Western Coca-Cola Company, and were so transacting such business when this suit to restrain infringement of trade-mark or trade-name was instituted.

The question here presented concerns itself solely with the right of plaintiff to the injunctive relief prayed. It is seen from the statement there arises in this case no question of the right of plaintiff to protect its business against unfair competition in the palming off by defendants of a spurious or inferior article for the goods manufactured from plaintiff's product, and no contention is made but that the product defendants were bottling and selling as a beverage under the trade-name of "Coca-Cola" when this suit was instituted was made from syrup manufactured by plaintiff for that purpose, and sold and delivered to them by authority of plaintiff. The only question at issue in this case under the pleadings and proofs concerns itself with the right of plaintiff to injunctive relief, restraining defendants from the manufacturing, bottling, and sale of coca-cola as a beverage under the trade-mark of plaintiff; said beverage being manufactured by defendants from syrup made by plaintiff for such purpose, and by defendants having been purchased from plaintiff, or its agent, for this purpose, this being done by defendants after the Western Coca-Cola Company had established an agency for such purpose in the city of Hutchinson, and had refused longer to sell the syrup product of plaintiff to defendants, or to longer license them to use the trade-mark of plaintiff.

The right of plaintiff to the injunctive relief prayed is denied by defendants on two grounds: First, because the syrup product from which the completed beverage by them being made, bottled, and sold under the trade-mark of plaintiff had for value been purchased in

good faith by defendants from plaintiff for the identical use and purpose to which it was being put; second, because the exclusive contracts employed by plaintiff and its agents under which its coca-cola business is conducted are in violation of the anti-trust laws of the state and nation. It appears the trade-mark of plaintiff, as registered January 31, 1893, provides as follows:

"The class of merchandise to which this trade-mark is appropriated is beverages, and the particular goods comprised in such class on which it is used by said company is nutrient or tonic beverages."

Under its trade-mark, registered October 31, 1905, it is provided:

"The class of merchandise to which this trade-mark is appropriated is beverages, and the particular description of goods comprised in said class upon which this trade-mark is used is tonic beverages and syrups for the manufacture of such beverages."

It is thus seen the registered trade-mark of plaintiff covers both the syrup product by it manufactured, from which the completed beverage is produced, and also the beverage known as coca-cola in its completed form. From this viewpoint it is argued by plaintiff, although defendants may have purchased from plaintiff or its accredited representative the syrup product from which that beverage is made, yet, as its trade-mark covers the completed beverage itself, defendants may not, without license or authority from plaintiff, make, bottle, and vend the beverage under the trade-mark of the plaintiff.

[1] It has been held the sale of merchandise in bulk by a manufacturer does not justify the vendee in using on his retail packages the labels which the manufacturer uses upon the same merchandise only when prepared by himself on smaller packages for the retail trade. Krauss v. Jos. R. Peebles' Sons Co. (C. C.) 58 Fed. 585. However this may be in cases where applicable, such are not the facts of the present case. Under the stipulated facts in the case at bar the syrup product employed by defendants in the use sought to be restrained was purchased from plaintiff, or its agents, to be employed in the very use now sought to be restrained; that is to say, the right to the relief sought is not predicated by plaintiff on the ground defendant could not have employed the syrup in the very manner now sought to be restrained when purchased, but, on the contrary, by lapse of time, that arrangements have been made with another, and defendants may not employ that which they had theretofore purchased for use. In other words, the very purpose of the suit is to protect plaintiff in the monopoly made by its exclusive contracts, and not to protect its trade-mark goods from competition with spurious or inferior products. Hesseltine, in his work on the Law of Trade-Marks, p. 112, says:

"Relief for infringement is afforded upon the ground that it is a fraud to use another's trade-mark, and thus pass off different goods as and for the goods of the proprietor of the trade-mark, rather than upon the ground of property in the mark itself. The essence of the wrong consists in the sale of the goods of owner, manufacturer, or dealer as and for those of another by means of such trade-mark. It is only where this false representation is directly or impliedly made that relief can be granted in equity."

In Russia Cement Co. v. Frauenhar, 133 Fed. 518, 66 C. C. A. 500, the Circuit Court of Appeals for the Second Circuit said:

"A court of equity will not enjoin a person from affixing to goods sold by him their true name and description, in the absence of any evidence of an attempted fraud, such as by representing his goods as of a different origin or quality or manufacture from what they actually are."

In Apollinaris Co. v. Scherer (C. C.) 27 Fed. 18, it is said:

"But the defendant is selling the genuine water, and therefore the trade-mark is not infringed. There is no exclusive right to the use of a name or symbol or emblematic device, except to denote the authenticity of the article with which it has become identified by association. The name has no office, except to vouch for the genuineness of the thing which it distinguishes from all counterfeits; and until it is sought to be used as a false token, to denote that the product or commodity to which it is applied is the product or commodity which it properly authenticates, the law of trade-mark cannot be invoked."

[2] It follows the plaintiff is not entitled to the injunctive relief prayed to restrain defendants from using the syrup product made by plaintiff in the identical manner contemplated by the parties at the time it was acquired by defendants. Not alone is this true, but, as has been seen, the real purpose of this suit, as shown from the record, is not to protect the trade-mark of plaintiff from infringement by defendants in palming off on the public their spurious or inferior goods under the trade-mark, and in the place of the beverage coca-cola as made from the syrup of plaintiff, to the consequent injury and damage of plaintiff; but the purpose is to secure the protection of the law to enforce and carry out the monopoly it has planned and enjoys in the manufacture and sale of nonpatented personal property through the medium of the exclusive contract system, under the guise of affording protection to its registered trade-marks. That the adoption, use in business, or registration of a trade-mark has no relation to and cannot be employed as a substitute for a patented invention in the creation or maintenance of a monopoly, as may be had in a patented article, is quite apparent. In Apollinaris Co. v. Scherer, supra, it is said:

"It was not possible by any contract or grant between Saxlehner and the complainant to create a territorial title to the products of the spring; no such title is known to the law of personal property. No analogy can be drawn from the law of patents for inventions, because the title to this species of property is purely statutory; and it is by force of arbitrary law alone that the title in the incorporeal property can be subdivided into territorial parts. The decisions which have been relied on in argument as sustaining the right of the owner of a patent to prevent a sale or use of the patented thing outside of the territorial limits for which a license has been granted, although the license authorized a sale and the sale was made within the territorial limits of the license, have therefore no application to the present case."

Such being found to be the object, scope, and purpose of the present suit, to my mind, brings it within the condemnation of the anti-trust laws of the state and the nation, and on this ground also the injunctive relief prayed must be denied. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; Cont. Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486.

It follows the petition must be dismissed for want of equity. It is so ordered.

THE BANNER.

(District Court, S. D. Alabama. April 24, 1915.)

No. 1457.

1. COLLISION ⊂⊃74—MOVING AND STATIONARY VESSELS—PRESUMPTION OF FAULT.

A moving vessel is prima facie in fault for a collision with one which is anchored or moored.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. ⊂⊃74.]

2. COLLISION ⊂⊃77—MOVING AND STATIONARY VESSELS—WATCHMAN—NECESSITY.

A vessel, properly moored and out of the usual track of moving vessels, is not bound to maintain a watch, unless local harbor regulations or custom require it.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140-149; Dec. Dig. ⊂⊃77.]

3. COLLISION ⊂⊃123—SUIT FOR DAMAGES—BURDEN OF PROOF.

To authorize recovery in a collision case, the libelant has the burden of proving fault or negligence on the part of the other vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 259-261; Dec. Dig. ⊂⊃123.]

4. COLLISION ⊂⊃74—DRIFTING AND MOORED VESSELS—INSCRUTABLE CAUSE.

A barge, without motive power and with no one on board, broke from her mooring at a pier in the night and was drifted by the tide against another moored vessel, causing her injury. There was evidence that the barge was in excellent condition and that she was properly moored and in a proper place. There was no storm, nor any evidence to show definitely how she came to be adrift. *Held*, that the evidence as to the manner in which she was moored was sufficient to overcome the presumption of fault arising from the collision itself, which must be attributed to a cause that was inscrutable, and for which no recovery could be had.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. ⊂⊃74.]

In Admiralty. Suit for collision by Evans Wood, master of the schooner Dora Allison, against the barge Banner. Decree for claimant.

Rickarby & Austill, of Mobile, Ala., for libelant.
Hanaw & Pillans, of Mobile, Ala., for claimant.

TOULMIN, District Judge. [1] "Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame by showing that it was not in her power to prevent the collision by adopting any practicable precautions." The Virginia and the Agnese, 97 U. S. 309, 24 L. Ed. 890; In re D. H. Miller, 76 Fed. 877, 878, 22 C. C. A. 597; The Lucille (D. C.) 169 Fed. 719. The court in the D. H. Miller Case said that Lord Esher said, referring to the duties of a ship navigating with reference to one at anchor, that "The one ship ought to be under perfect command, and therefore able to get out of the way of the other ship, if she sees her; and the other is a helpless thing, which cannot do anything."

A vessel under way is prima facie at fault for a collision with a vessel at anchor or moored. The vessel under way is bound to keep clear of another at anchor. This rule applies, if it is possible for the vessel under way, with safety to herself, to avoid a collision. The Director (D. C.) 180 Fed. 606–609; The D. H. Miller, supra.

The barge Banner, the vessel involved in this case, was unquestionably in motion at the time of its collision with the Dora Allison, which was moored to the north side of the slip of the Hieronymous Docks. Said barge had no motive power aboard of her, and was not being navigated or propelled by any motive power other than the tide, so far as the evidence in the case showed. She was simply drifting, or being carried along by the tide. She had no crew or any person on her to exercise command or control over her. There was no one on her to see the schooner, even if the latter had had a light exhibited, which the evidence showed she did not have. So it appears the barge floated along until it reached said schooner and collided with her in some unaccountable way, inflicting the damage claimed. In the collision, it appears to have turned over, as it was found next morning near the schooner in that condition.

The collision was shown to have occurred about midnight, or between 12 and 1 o'clock. If there had been a person on the barge, and if he could have seen the schooner, he would have been absolutely powerless to have avoided the collision. A "scow was adrift, without any one on board of her, which, of course, threw on her the burden of showing why she was adrift, and made out a prima facie case of negligence. * * * There were no lights; but, as she was moored to the wharf, this did not charge her with fault. * * * The scow would not have been adrift if she had been properly moored. This was sufficient to charge her owners with negligence." In re Eastern Dredging Co. (D. C.) 138 Fed. 942; Id. (D. C.) 159 Fed. 541; In re Eastern Dredging Co., 162 Fed. 860, 89 C. C. A. 550.

[2] The fact of collision between a moored vessel and one moving being shown, the burden of proof is on the moving vessel to show that it was free from fault; and it must repel the presumption of its negligence. The Lucille (D. C.) 169 Fed. 719, 720. A vessel, when properly moored and out of the usual track of moving vessels, is under no legal duty to maintain a watch, * * * unless the local harbour regulations require it. The Lucille, supra. No proof of such regulations here.

"No negligence to leave a scow in a slip tied up to a pier without a watchman, there being no custom to keep one in such case." The Kathryn B. Guinan, 176 Fed. 301, 99 C. C. A. 639. No such custom shown here. "Acts of negligence, which do not contribute to the accident as a proximate cause, do not render a ship liable." The Curtin, 217 Fed. 247, 133 C. C. A. 519; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Lord O'Neill, 66 Fed. 77, 13 C. C. A. 337.

Where evidence is so conflicting, or so vague and uncertain, that it is impossible to determine to what direct and specific acts a collision is attributable, it is a case of damage arising from a cause that is inscrutable, and under the settled modern rule in this country there can be no recovery or partial recovery therefor. The Jumna, 149 Fed. 171–173, 79 C. C. A. 119. "If damage is done by a vessel adrift, her owner is allowed to show affirmatively, if he can, that her drifting was the result of inevitable accident, or a vis major which human

skill and precaution * * * could not have prevented." In re Eastern Dredging Co. (D. C.) 159 Fed. 541, supra.

[3] Negligence is an essential to recovery of damages in collision cases. The mere happening of a collision does not give rise to a right of action for damages resulting therefrom, except in those cases where, under the navigation rules, one vessel is presumed to be in fault until she exonerates herself. Even in those cases the right of recovery is based, not upon mere collision, but upon the presumption of negligence.

[4] A collision may occur without the fault of either one of the two vessels. In this case it is claimed to have been the fault of the barge, which collided with the schooner. A collision may happen without blame being imputable to either party, as where the loss or damage is occasioned by a storm or other vis major, or where the collision occurs exclusively from natural causes and without any negligence on the part of either party. In those cases the misfortune must be borne by the party on whom it happens to fall. The rule is that the loss must rest where it fell, as no one is responsible for an accident which was produced by causes over which human agency could exercise no control. No one was responsible if the accident was inevitable. If its occurrence may with reason be referred to a sudden and extraordinary strain, or to a latent undiscovered defect in a rope, or the operation of both the causes, whether occasioned by either or both, it was inevitable. Hughes on Admiralty, page 270; Pars. Shipping and Admiralty, page 525.

Two of the witnesses in this case, who on the day after the accident visited the location and viewed the sunken barge and the wharf and piling thereof, where the barge had been moored, found signs and marks especially of paint on one of the piles, which suggested the theory that the barge had been carried by the rising tide onto the top of the pile referred to, and hung there until the ebb tide set in, and by the falling tide had been subjected to a severe strain, such as to part one of the lines with which the barge was moored, and to cause the other line, with which the barge was tied to the stringer on the wharf, to break said stringer, and thus the barge was released from its moorings. Partin, one of the libelant's witnesses, who had moored the barge at the place from which she had broken loose, expressed the opinion that she had turned over at the time and place she broke away from her moorings. He testified that he moved the barge from her mooring on the south side of the slip, where the owner, by its employés and servants, had moored her the day before, and subsequently, on the afternoon of the same day, he (the witness) moved her to the north side of the slip, and there moored her as hereinabove stated. He testified that she was properly moored and in a proper place.

The evidence was that the removal of the barge by Partin was without the knowledge or consent of her owner. The evidence further was that the barge was not only seaworthy, but was in an unusually good condition, did not leak more than is common with barges in first-class condition, and that on the night of the accident, as late as 8 or 9 o'clock, when the watchman examined her before leaving her for the night,

she did not have exceeding an inch, if as much, of water in her. The evidence also was that she was properly loaded with coal. She was loaded in the same manner as she had frequently been before and since the accident.

The master of the schooner testified that, in his opinion, it was about 12 o'clock at night when the barge collided with his schooner, falling across just in front of the bow of his vessel, breaking and carrying away a part of the jibboom, bowsprit, and other rigging, and turning over and sinking, bottom up, under the starboard bow of the schooner. If the barge had turned over and sunk at the place where she broke away from her mooring, which the evidence shows was some 75 feet from the place where the schooner was moored, it is difficult to understand how she could, in her condition, have drifted down to the schooner, where she fell across her bow, doing the damage complained of, and then sinking, with bottom up, where she was found next morning, under the starboard bow of the schooner, by her master.

There was no storm or unusual wind blowing at the time of the accident. Witness Partin said that there was a southeast wind blowing at the time he left the barge moored, about 5 or 6 o'clock on the evening preceding the accident. The barge was made fast with two lines, one about 2 inches in size, the other a little smaller. One was made fast to the piling, the other to the stringer at the top of the piling, and this one pulled the stringer loose, which would indicate quite a strong line. The barge had a slack line to allow for the rise and fall of the tide. She was not tied tight against the wharf. He stated that he did no know what happened after that, and did not know what the wind was about 12 o'clock that night. The master of the schooner, a witness, stated that at the time of the collision there was a light wind from the northeast. There is some conflict in the evidence as to the place where the barge turned over—whether at or near the place where she was moored, or about 75 feet distant from where the collision actually occurred. Witness Partin stated that the barge had pulled the stringer on the wharf loose, and sprung the piling out from the wharf, at the time she broke away from her moorings. Of course, he did not see this occur, for he was not present. This was his opinion, or supposition, based on what he saw next day, when he visited the place, and the tide was down. He, however, stated that the tide was rising slowly at the time he moored the barge, but that it was not high. It is possible the piling referred to might have been covered by the tide sufficiently to hide it from view.

There was no expert or positive evidence as to when the tide began to rise or to fall, or as to the condition of the tide that night, whether high, medium or low. There were some facts and circumstances tending to show that some time during the night the tide was high; at least sufficiently high to carry the barge over a pile which was near the side of the slip, the top of which was bearing out from the wharf. Partin, who moored the barge, testified that he saw no such piling when he moored the barge.

It is not necessary that the accident should be the result of a vis major. Where no fault can be shown, the accident may be said to be inevitable. The Jumna et al. (2 C. C. A.) 149 Fed. 171, 172, 79 C. C. A. 119. There is nothing in the evidence of any specific fault, act, or omission which shows how the barge got adrift, and to which is attributable the act of collision. As said by the court in The Jumna et al., supra:

"Fault may exist, but we are unable to discover it; it is inscrutable. Where the evidence is so conflicting that it is impossible to determine to what direct and specific acts the collision is attributable, it is a case of damage arising from a cause that is inscrutable. * * * Whether the case at bar be thus classified, or whether it be held to come within the admiralty definition of inevitable accident, is not material; in either event the loss must be borne by the party on whom it falls. * * * The question has now been definitely decided by a vast preponderance of authority that there can be no recovery or partial recovery unless fault is affirmatively shown." The Jumna, supra, and numerous authorities cited in the opinion.

There is nothing really to support the libelant's charge of negligence, except the presumption arising from the accident itself. It only establishes a prima facie case in favor of the libelant, which, in my opinion, the claimant has fully met by the evidence in the case. The Kathryn B. Guinan, 176 Fed. 301, 99 C. C. A. 639.

The libel is dismissed.

MITCHELL BROS. CO. v. DOYLE, U. S. Internal Revenue Collector.

(District Court, W. D. Michigan, S. D. April 30, 1915.)

1. INTERNAL REVENUE ⟸9—EXCISE TAX ON CORPORATIONS—INCOME.

A corporation, whose property consisted chiefly of timber lands and a sawmill and its business of the manufacture and sale of lumber and other timber products, in making its return of net income under the Corporation Tax Law (Act Aug. 5, 1909, c. 6, § 38 (2), 36 Stat. 112 [Comp. Stat. 1913, § 6301]), was entitled to deduct from its gross receipts as capital assets a sum at least equal to the market value at the time the act went into effect of the standing timber from which the lumber sold during the year was manufactured, although such timber was bought years before at a smaller price, and has since been carried on its books at the original cost. It was also entitled to deduct as capital assets any amount received from the sale of cut-over or other lands sold during the year, not exceeding their market value at the time the law went into effect.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.]

2. INTERNAL REVENUE ⟸9—EXCISE TAX ON CORPORATIONS—VALUATION OF PROPERTY.

Neither the government nor the corporation under such act is bound by the valuation at which property is carried on the books of the corporation.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.]

At Law. Action by the Mitchell Bros. Company against Emanuel J. Doyle, as Collector of Internal Revenue for the Fourth Collection District of Michigan. Judgment for plaintiff.

Norris, McPherson, Harrington & Waer, of Grand Rapids, Mich., for plaintiff.

Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., for defendant.

SESSIONS, District Judge. Plaintiff was incorporated in 1903, succeeding to and taking over the property of the former copartnership, Mitchell Bros. The property purchased and so taken over by the corporation consisted for the most part of timber, lands, and a large sawmill plant. Since its organization, plaintiff has been engaged in the lumber business, cutting and manufacturing its own timber into lumber and other forest products, and selling and marketing the same. In 1903, the average market value of its merchantable hardwood timber was $2.25 per thousand feet, of its pine timber $8 per thousand feet, and of cut-over or "stump" lands $2 per acre. Timber suitable only for cordwood had no market value. Plaintiff then paid the amounts above stated for its timber and lands, and has since carried them upon its books at the same prices. The plaintiff also purchased from Mitchell Bros. an office building and lot in the city of Cadillac for $3,500, and two vacant lots in the city of Grand Rapids for $500. The prices so paid were at that time the fair market values of these parcels of land.

After its purchase, plaintiff's timber, lands, and other property, from natural and other causes, steadily increased in value. During the years 1909, 1910, 1911, and 1912, the average and actual market value of its standing merchantable hardwood timber was from $4.20 to $4.50 per thousand feet, and of its pine $20 per thousand feet. The actual market value of its stump lands varied from $4 to $12 per acre. The office building and lot in the city of Cadillac was fairly worth $5,000, and the two lots in the city of Grand Rapids more than $700. In 1906 a chemical and charcoal plant was located in the city of Cadillac, and thereafter timber suitable for cordwood had a market value of 25 cents per cord.

In compliance with the provisions of the Corporation Tax Act of 1909 (36 Stat. 112, c. 6, § 38 [Comp. St. 1913, § 6301]) plaintiff made a return in each of the years 1909, 1910, 1911, and 1912. In computing its taxable net income in each of such returns plaintiff deducted from its gross receipts the then actual market value of the timber stumpage cut and converted into lumber during that year, and also the actual market value of its stump and other lands sold during the year. An assessment was duly made by the Commissioner of Internal Revenue upon each of such returns, and the excise taxes so levied were paid by the plaintiff. Afterwards, and following an investigation, the Commissioner of Internal Revenue made an additional assessment for each of the four years, based upon the difference between the prices paid by the plaintiff in 1903 for its timber, lands, and other property, as shown by and carried on its books, and the amounts deducted as and for the actual market values of such properties at the times of the making of the returns. The additional excise taxes so levied were paid by plaintiff under protest, and this suit is brought to recover back the amounts so paid.

[1] The issues here presented, although novel, are sharply defined. The plaintiff claims that its standing timber and other property were capital assets, and that the portion of the proceeds derived from the cutting, manufacture, and sale of such timber, measured by the actual stumpage value thereof, did not constitute income, and therefore that, in computing its taxable net income, it was entitled to deduct such actual stumpage value of its timber from its gross receipts. The Commissioner of Internal Revenue concedes the right of the plaintiff to deduct the original cost price of the timber, as shown by its books, from its gross receipts, but denies its right to make any deduction on account of increase in values. The Attorney General contends that all the proceeds derived from the manufacture and sale of the timber constituted income, and that plaintiff, in its returns of taxable net income, had no right to make any deductions whatsoever on account of either cost price or actual value of the timber stumpage.

The proofs in this case show conclusively that between the time of their purchase in 1903 and the 1st day of January, 1909, when the Excise Tax Law became effective, plaintiff's timber, lands, and other property had so increased in value that they were fully worth the amounts which were deducted from gross receipts as capital assets. It cannot be denied that the plaintiff's standing timber was a part of its capital assets, and that the conversion of the timber into lumber and the sale of the lumber constituted at least an indirect sale of the timber, and so of capital assets. The mere change of the timber into lumber or money did not transform capital into income. The miller who grinds his stock of wheat into flour and sells the flour does not thereby destroy or impair his capital and convert it into income. The same is true of the manufacturer who converts his cotton into cloth, the landowner who sells his lands for cash, the furniture maker who transforms lumber and other material into chairs and tables, the ironmaker who produces steel rails from iron ore, and every industrial institution where raw materials are converted into finished or other products or into money. In each instance income is and must be something over and above the original capital investment plus the cost of production and sale. This rule has been uniformly recognized by the Commissioner of Internal Revenue in the decisions and directions issued from his office for the guidance of the collectors of corporation excise taxes and of the taxpayers themselves.

Standing timber is as staple a product as wheat, cotton, or iron. It is a tangible and visible property, whose quantity, quality, and market value can be readily ascertained and determined. In these respects it is wholly unlike mineral ores in place under ground. If plaintiff had sold its standing timber on the 1st day of January, 1909, at its market value, could it be claimed that any part of the proceeds of such sale constituted taxable income, because more was realized than the original cost in 1903? Certainly not, for the reason that the increase in value had accrued prior to the time when the Excise Tax Law became operative. If plaintiff had purchased its timber 30 years ago from the government at $1.25 per acre, and had manufactured all of it into lumber and sold the lumber during the year 1909 at market prices

which prevailed on the first day of that year, could it be claimed that the entire proceeds of the lumber above the trifling purchase price of the timber and the cost of manufacture and sale constituted taxable net income? Can the government, at least in the absence of specific legislative declaration to that effect, reach back years before the enactment of its revenue statute for a controlling factor in determining the net income of a corporation? Can it ignore a substantial increase in value of property, which has occurred and accrued prior to the taking effect of the tax law, and thereby convert into income that which is not income within any meaning of the term? To state these questions is to answer them. Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45; Bailey v. Railroad Co., 106 U. S. 109, 114, 115, 1 Sup. Ct. 62, 27 L. Ed. 81.

The rule of apportionment of the increment or increase of values between the years prior to January 1, 1909, and those subsequent to that time, which has been recognized and acted upon by the Commissioner of Internal Revenue, does not aid the government in this case, for the reason that the amounts deducted by plaintiff from its gross receipts as capital assets did not exceed the actual market value of its property upon January 1, 1909. It makes no difference whether such deduction was made nominally on account of depreciation of property or for restoration of capital.

Tested by another well-settled rule that the gain, profit, or income of a corporation is that which may be withdrawn or expended without reducing the value of its property or impairing its capital, the contentions of the government must fail. Every tree cut from the lands of plaintiff after January 1, 1909, and manufactured into lumber, cordwood, or other products, and then sold, reduced its property and capital by the exact amount of the value of such standing tree, unless an equivalent portion of the proceeds of the sale was substituted therefor. The government is not concerned with the gains made, profits earned, or income received, whatever their form, by the plaintiff prior to the time when its tax law became operative. Whether a valid retroactive law could be enacted need not be determined, because no attempt has been made to tax such gains, profits, or income.

[2] The fact that plaintiff carried its properties upon its books at their original cost prices is neither material nor important. Mere bookkeeping entries cannot preclude the government from collecting its revenues. Nor are such entries conclusive upon the taxpayer, when it is shown, as here, that they represent and indicate ancient, instead of present, actual values. The bookkeeper creates nothing. His methods, figures, and records must yield to proven and established facts. Baldwin Locomotive Works v. McCoach (D. C.) 215 Fed. 967; United States v. Nipissing Mines Co. (D. C.) 202 Fed. 803.

What has been said of timber converted into lumber, cordwood, and other forest products, and then sold, applies with even greater force to plaintiff's stump lands and city lots. There was no intermediate transformation of the real estate into other forms of property before its sale. According to the proofs, the lands were sold and converted into money at no more than their actual market value on the

1st day of January, 1909. On that date they were capital assets, and the moneys thereafter derived therefrom did not become taxable income. While no case exactly in point has been cited, the weight of authority is in accord with the views herein expressed. Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285; Von Baumbach v. Sargent Land Co., 219 Fed. 31, 134 C. C. A. 649; Sargent Land Co. v. Von Baumbach (D. C.) 207 Fed. 423; United States v. Nipissing Mines Co. (D. C.) 202 Fed. 803.

Judgment will be entered in favor of the plaintiff for the amount of the taxes paid by it under protest.

FRESCOLN v. PUGET SOUND TRACTION, LIGHT & POWER CO.

(District Court, W. D. Washington, N. D. August 6, 1915.)

No. 3033.

1. DEATH ⊂=10, 11—SURVIVAL OF ACTION FOR INJURY.

Rem. & Bal. Code Wash. § 183, declares that, when the death of any person is caused by the wrongful or negligent act of another, his heirs or personal representatives may maintain an action against the person causing death. Section 194 declares that no action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of death, if he have a wife or child living, or if he have other dependents upon him for support, but that such action may be prosecuted or commenced in favor of such persons. Plaintiff's husband, who was injured while a passenger on defendant's car, instituted an action before his death. *Held*, that upon his death plaintiff might revive such action and might at the same time institute a separate action for damages from death, the two causes being separable.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. ⊂=10, 11.]

2. JUDGMENT ⊂=828—DEFENSES—FORMER RECOVERY.

The action for wrongful death which may be maintained by a wife or personal representative of deceased under Rem. & Bal. Code Wash. § 183, is based on the same grounds of negligence as an action begun by deceased for the injuries culminating in his death, which was continued under section 194, by the widow; and hence a judgment by the state court of competent jurisdiction denying recovery in the action for personal injuries is a bar to an action in the federal court for wrongful death.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. ⊂=828.]

At Law. Action by Anna F. Frescoln against the Puget Sound Traction, Light & Power Company, a corporation. On motion to strike an affirmative defense. Motion denied.

Thomas H. Bain, of Seattle, Wash., for plaintiff.

James B. Howe and H. S. Elliott, both of Seattle, Wash., for defendant.

NETERER, District Judge. This is an action commenced by Anna F. Frescoln, widow of J. W. Frescoln, to recover $25,000 for the death of her husband. It is alleged that on the 22d day of November, 1913,

J. W. Frescoln was, through the careless and reckless operation of the street car upon which he was a passenger, killed. The defendant has answered, setting forth certain affirmative defenses, one of which alleges, in substance, that on January 22, 1914, the deceased, J. W. Frescoln, had commenced an action in the superior court of King county against this defendant, for injuries received at the time and upon the facts and under the conditions set forth in the complaint of the plaintiff; that the issues in the said cause were made up and the cause set for trial on October 13, 1914; that on the 15th of September, 1914, the said J. W. Frescoln died; that thereafter, upon application, plaintiff was substituted in her own right and as administratrix; that she filed a supplementary complaint, to which the defendant answered, and on March 16, 1915, the cause came on for trial before a jury in the state court; that a verdict for plaintiff in the sum of $2,550 was returned; but that, upon motion, the court entered judgment for the defendant non obstante veredicto. The defendant prays that the plaintiff may not maintain this action until such time as such cause has been determined by the Supreme Court, where it is now pending on appeal. The various pleadings and orders in said action are attached to the answer as Exhibits A, B, C, D, E, and F. The plaintiff has moved that these exhibits be stricken and that each paragraph of the said defense and plea in bar be stricken for the reason:

"That all of said matter is irrelevant and has nothing to do with the action brought under the above title, and for the further reason that the action referred to in said matter was brought and maintained under a different provision of the law and statute of the state of Washington."

[1] An examination of the supplemental complaint filed in the state court proceeding shows that it was not a suit to recover for injuries suffered by her on account of her husband's death, but was a continuation of the action commenced by the husband for injuries to him, in which she was substituted as plaintiff in his stead for the benefit of herself and the estate, and sought to recover damages for the pain and suffering endured by the deceased up to the time of his death, medical expenses, etc., which proceeding was carried on under provisions of section 194, Rem. & Bal. Code of Wash., which provides:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children. * * *"

The plaintiff in this case seeks to recover damages because of injuries sustained by her personally, such as loss of affection and companionship, and loss of support which would be occasioned by reason of her husband's death, and this action is based upon section 183, Rem. & Bal. Code Wash., which provides:

"* * * When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. * * *"

This proceeding and the proceeding referred to were unknown to the common law and can only be maintained by reason of the provisions of the statutes of Washington. On the death of a husband who had commenced an action to recover damages for injuries to himself, the cause may be continued by the widow and minor children upon being properly substituted as plaintiffs (Swanson v. Pacific Coast Shipping Co., 60 Wash. 87, 110 Pac. 795), and the substitution of the widow in such action does not preclude her from instituting an action on her own behalf to recover damages which are peculiar to herself (Swanson v. Pacific Coast Shipping Co., supra; Thompson v. Seattle Ry. Co., 71 Wash. 436, 128 Pac. 1070).

[2] The right of recovery in either case is predicated upon some act of omission or commission on the part of the defendant in the discharge of an imposed duty. As set forth in the answer, the judgment of the state court was that the act of the defendant did not cause the death upon which either action was predicated. If the adjudication of the state court could be res adjudicata in this action, then the motion must be denied. Can the plaintiff commence an action wherein she seeks to recover damages to herself based upon acts of negligence of the defendant which a competent court has already adjudicated do not exist? While the right of recovery in the instant case is not the same right of recovery as in the other case, each case is predicated upon and supported by the same facts. It would seem to be rather an anomalous situation if a party could predicate a right of recovery and have judgment awarded against him, and die, and his widow thereafter, upon allegations of negligence, institute a proceeding based upon the same act of negligence, and be permitted to litigate over the same facts. Suppose that the first case had been tried prior to the decease of J. W. Frescoln, and a verdict returned in favor of the plaintiff, and judgment entered non obstante veredicto for the defendant, and he had then died, could the plaintiff be permitted to prosecute this action now in the face of the former judgment? The plaintiff in this case does not occupy a different relation than if the other case had been adjudicated prior to J. W. Frescoln's death. The Supreme Court of Virginia, in Brammer's Adm'r v. Norfolk & W. Ry. Co., in passing upon the same issue that is here presented, and upon the same statutory authority, in 57 S. E. at page 595, said:

"It would be an anomalous situation if the language used in our statute could be so construed that after a court of competent jurisdiction has ascertained, in a suit brought by a party himself, that the wrongful acts which constitute the sole foundation of any recovery against the defendant are not of actionable character, and that the injured person is not entitled to maintain an action by reason of them, or to recover damages on their account, other parties, in another and subsequent proceeding, may proceed to show, in an action for their benefit, founded upon the same alleged acts of the defendant, that at the time of the intestate's death he was as a matter of fact, the judgment of the court to the contrary notwithstanding, entitled to maintain an action against the defendant company and to recover damages for the very acts in respect of which recovery was denied the very man who suffered the injuries which resulted in his death."

The Supreme Court of the United States, in Southern Pacific Ry. Co. v. U. S., 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, holds to the

principle that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies. In that case the court held that a former decision of the court establishing the sufficiency of certain maps as to lands there in dispute was res adjudicata as to the sufficiency of such maps when the question was raised in the latter case, with reference to other lands in dispute, since the land in both suits had a common source of title, and the title depended upon the existence or nonexistence of the same state of facts.

Plaintiff's right of recovery in this case is based upon the assumption that the defendant was negligent. A competent court having adjudicated in favor of the defendant with relation to the negligent acts relied upon, the foundation of the plaintiff's right of recovery is removed, and, until that judgment is reversed, the plaintiff's complaint can have no standing in this court.

The motion to strike is therefore denied.

In re COVINGTON LUMBER CO.

(District Court, W. D. Washington, N. D. October 22, 1914.)

No. 5293.

SALES ⊂=462—CONDITIONAL SALES—PRIORITY—"SIGN."

Rem. & Bal. Code Wash. § 3670, declares that all conditional sales of personal property, where the vendee is given possession, shall be absolute as to purchasers, incumbrancers, and subsequent creditors in good faith, unless within 10 days after taking possession a memorandum of the sale, stating its terms and conditions, and signed by the vendor and vendee, shall be filed in the auditor's office of the county of the vendee's residence. An instrument showing a conditional sale was filed and entered with the county auditor of the county of the vendee's residence and indexed under appropriate heads, showing the time of filing, name of vendor, name of vendee, date of the instrument, and the amount of the purchase price. The instrument, however, contained only the vendor's printed name, though it was signed as accepted by the vendor's salesman. *Held* that, as the delivery of the goods by the vendor was an acceptance, and as it is immaterial whether the signature be printed or not, the word "sign" meaning to attach a name or cause it to be attached to a writing by any of the known methods of impressing a name on paper, the vendor could, upon the vendee's nonperformance, retake the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1350; Dec. Dig. ⊂=462.

For other definitions, see Words and Phrases, First and Second Series, Sign.]

In Bankruptcy. In the matter of the bankruptcy of the Covington Lumber Company. On petition by the trustee for review of an order of the referee directing the delivery of property, conditionally sold to the bankrupt by the Stetson-Ross Machine Works, to the seller. Order of the referee affirmed.

Reynolds, Ballinger & Hutson, of Seattle, Wash., for petitioner.
McClure & McClure, of Seattle, Wash., for trustee.

NETERER, District Judge. On May 21, 1913, the bankrupt purchased from the Stetson-Ross Machine Works the following personal property:

One 6x15" Six, with double profile.
4 profile yokes set up.
2 sets Philbrick side heads.
Jointing attachments.
One set of knives.
One Stetson-Ross side head and profile grinder with hard knife attachment

—under a conditional sale contract, for which it agreed to pay, within six months after the date of shipment, $2,600—one-quarter cash, and the balance in two, four, and six months after delivery. It was agreed that title should remain in the consignor until fully paid for in cash, with the usual conditions of such sale contract. This was signed:

"Covington Lumber Company, By E. W. Breiter, Pres.
"Accepted by A. Chandler, Salesman for Stetson-Ross Machine Works.
"Subject to approval at main office, Seattle, Wash.
"Received and accepted.
"Stetson-Ross Machine Works, by ————."

Thereafter, on July 1, 1913, the property was delivered to the Covington Lumber Company, and on the 8th of July, 1913, the contract was by Stetson-Ross Machine Works duly filed in the office of the county auditor of King county, being the county in which the personal property therein described was and is located, and the place in which the principal place of business of Covington Lumber Company is situated. The first and second payments, in accordance with the said contract of purchase, have been made. The Stetson-Ross Machine Works has tendered for cancellation the evidence of indebtedness of the third and fourth payments, default in the payment of which has been made, and has asked a return of the said property. The referee directed that the personal property be delivered into the possession of the petitioner. Petition for review has been filed by the trustee.

It is contended by the trustee that the conditional sale contract was not signed by the vendor; that the printed name upon the contract is not "signed" pursuant to the provisions of the laws of Washington, and hence is without effect. Section 3670, Rem. & Bal. Code of Washington, provides:

"All conditional sales of personal property * * * containing a conditional right to purchase where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county wherein, at the date of the vendee's taking possession of the property, the vendee resides."

It does not appear that there are any subsequent creditors. It was admitted before the bar that this instrument was filed for record by

Stetson-Ross Machinery Company with the county auditor of King county, and entered in the proper record, and indexed as provided by law, under appropriate heads, giving the—

"Time of filing;" "name of vendor;" "name of vendee;" "date of instrument;" "amount of purchase price."

The delivery of the goods by the vendor was an acceptance of the contract, and the filing for record of such contract, subscribed by the salesman for the vendor, with the vendor's name printed thereon, conveys the presumption that the vendor adopted such printed name as its signature for the purposes of the statute; and, nothing appearing to overcome this presumption, the provisions of this statute must be held to have been fully complied with. Signatures adopted by persons are sufficient to give validity to instruments, and it is immaterial whether the signature be printed or not, if it is adopted and recognized as the signature of the party. 36 Cyc. 448.

"To 'sign' means to attach a name or cause it to be attached to a writing by any of the known methods of impressing the name on paper, with the intention of signing it, and where the name of the prosecuting attorney appeared in print on an indictment, it is a sufficient compliance with Rev. Stat. 1881, § 1669, requiring an indictment to be 'signed by the prosecuting attorney.'" 7 Words and Phrases, p. 6512.

I think the decision of the referee should be affirmed. An order may be presented.

THERMOGÈNE CO., Limited, v. THERMOZINE CO., Inc.

(District Court, S. D. New York. July 9, 1915.)

TRADE-MARKS AND TRADE-NAMES ⊂=43—NAMES SUBJECT TO OWNERSHIP—DESCRIPTION OF ARTICLE—"THERMOGÈNE"—"THERMOGEN"—"THERME."

The registered trade-mark "Thermogène," a French word meaning to produce heat, the English equivalent of which is "Thermogen," defined as producing heat, both words compounded from the Greek word "Therme," heat, and the suffix "gen," as applied to complainant's cotton wadding, so prepared as to act as a counterirritant and to produce local heat at the point of application, and reducing swellings and inflammations, is not arbitrary or fanciful, but is a word of precise description, which cannot be registered as a trade-mark, so that defendant's mark "Thermozine," as applied to a dry poultice, where the cotton is accompanied by a package of wax to be applied to the cotton before using, intended to reduce inflammation by counterirritation, could not be an infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 48, 49; Dec. Dig. ⊂=43.]

In Equity. Suit for infringement of registered trade-mark by the Thermogène Company, Limited, against the Thermozine Company, Incorporated. Dismissed.

Hervey, Barber & McKee, of New York City (Lanier McKee, of New York City, of counsel), for complainant.

Edward H. Daly, of New York City (Joseph F. Daly, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. Complainant sues for infringement of its registered trade-mark "Thermogène" by defendant's trade-mark "Thermozine." Complainant's trade-mark is applied to cotton wadding, so prepared as to act as a counterirritant and to reduce swellings and inflammatory conditions. Defendant's trade-mark is applied to goods designated in the declaration upon which the trade-mark was granted as a dry poultice, but the cotton, instead of being so prepared as to act alone as a counterirritant, was accompanied by a package of wax, which had to be applied to the cotton before using. The goods were in each case intended to reduce inflammation by counterirritation, and I consider them of substantially the same class.

The defendant insists that the word "Thermogène" is a French word meaning giving birth to heat, and produces a standard French dictionary containing the word with this definition. The strict English equivalent is "Thermogen," which is defined in the Century Dictionary as producing heat. Both these words are compounded from the Greek word "Therme," heat, and the suffix "gen," from which the word "genesis," or birth, is derived. Both the French and the English words are uncommon, but apparently in established use.

The physiological effect of the operation of the complainant's preparation is in fact the production of local heat. If, for example, the preparation be applied to a swollen joint, the effect is to draw the blood to the surface of the skin and away from the joint itself, thus reducing the inflammation, but, in so doing, producing heat as a local rise of temperature at the point of application will, I understand, attest. Entirely aside from whether a local rise of temperature would be caused, there is no doubt that a feeling of heat is one of the most pronounced effects of such a counterirritant.

In view of the foregoing facts, I am constrained to hold that the word "Thermogène" is really, as contended by defendant's counsel, a word of precise description. Though it be a fact that complainant's word is a foreign word, little or not at all known in this country, there is still no exclusive right to its use as a trade-mark.

As was said by Mr. Justice Chitty in the case of Davis & Co. v. Stribolt & Co., 59 L. T. Rep. N. S. 854, in discussing the Norwegian name "Bokol":

> "To say that every word is a fancy word because it is unknown to an average Englishman would be plainly to lay down a proposition which could not, for a moment, be maintained. There are many good English words descriptive of articles which are unknown to an average Englishman, taking rather a high standard. Now, for the sake of caution and limiting my proposition to the European languages, I am of the opinion that, in reference to an article produced in a foreign country and imported into England, where it was previously unknown and without a name, the word used in that foreign country as the common term to describe or denote the articles is not a fancy word within the meaning of the act."

The difficulty with any other method of reasoning in cases of this sort is that the court is practically left without any guide in reaching a determination if it abandons the strict rule, which I admit has been more strongly adhered to in the English cases than in many of our

own courts, that a term which is really reasonably descriptive of any goods, whether or not the term be rare, cannot be registered as a trade-mark. This is illustrated by the English cases Re Grossmith's Trade-Mark "Emollio," 60 L. T. Rep. N. S. 612; The Trade-Mark "Sanitas," 58 L. T. Rep. N. S. 166; Van Duzer's Trade-Mark, 56 L. T. Rep. N. S. 286.

I reach the conclusion I have in this particular case with some hesitation, owing to the fact that Judge Lacombe granted a preliminary injunction in this suit. He apparently, however, only considered the fact that the defendant's name plainly infringed the name used by complainant, and did not, so far as appears from his memorandum, have before him the fact that the name "Thermogène" is a word in use in the French language, and that substantially the same word appears in the English dictionaries also. I should certainly have reached the same conclusion that he did if the dictionary words had not been brought to my attention and fully examined and discussed.

While there has been some divergence in the decisions of the state courts and among the federal courts, other than the Supreme Court of the United States, I think the latter has sustained the rather strict view in regard to trade-marks which I have adopted in this case.

In the recent case of Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, the Supreme Court held that the word "Rubberoid" was descriptive and could not be appropriated as a trade-mark by the complainant. The goods to which the term "Rubberoid" applied were roofing which contained no rubber, but was supposed to have qualities like rubber, in that it was more or less flexible and impervious to water.

After careful consideration I am of the opinion that the word "Thermogène" is not arbitrary or fanciful, but a descriptive term, and that therefore it is not the proper subject of a trade-mark.

For the foregoing reasons the bill must be dismissed.

LESAMIS et al. v. GREENBERG.

(Circuit Court of Appeals, Ninth Circuit. August 9, 1915.)

No. 2514.

1. MINES AND MINERALS ⊂=99—MINING PARTNERSHIP—FIRM AGREEMENT—CONSTRUCTION.

A firm agreement stipulated that plaintiff should be a full partner with the others and have a quarter undivided interest in mining claims acquired or to be acquired. The other members, on the day of the execution of the agreement, conveyed to plaintiff an undivided fourth of all mining properties then held by the copartners in consideration of $6,000 cash and $24,000 "to be paid of the first money taken out of the ground." *Held*, that the quoted words referred to the first money taken out of the ground to which the partner was entitled, and the intendment was that the first money should be the gross amount to which the partner was entitled.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 223, 224; Dec. Dig. ⊂=99.]

2. CONTRACTS ⊂=170—CONSTRUCTION—ACTS OF PARTIES.

The manner in which parties to a contract treated its stipulations is an aid to its construction, where it is ambiguous; but, where the contract can be construed by taking it alone and viewing it as a whole, that manner of interpretation should be adopted.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig ⊂=170.]

3. MINES AND MINERALS ⊂=100 — MINING PARTNERSHIP — DISSOLUTION — RIGHTS OF PARTNERS.

Where partners have an equal interest in the firm property, the proceeds on a sale of assets on the dissolution of the firm must be applied on the basis of an equal division.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 225; Dec. Dig. ⊂=100.]

4. MINES AND MINERALS ⊂=98—MINING PARTNERSHIP—FIRM PROPERTY.

Three persons owning mining properties made a firm agreement with a fourth person, whereby he should be made a partner with a quarter undivided interest in all mining and other properties then owned or which might thereafter be acquired, and the three persons at the same time executed to the fourth a deed of an undivided one-fourth of all mining properties then held by them for a specified consideration. *Held*, that mining claims owned by the three persons at the time of the agreement and conveyance were firm property and must be so disposed of on dissolution of the firm, especially where all the parties so treated the property while conducting the firm business.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. ⊂=98.]

5. JUDICIAL SALES ⊂=31—EXECUTION ON DECREE—CONFIRMATION—EFFECT.

Irregularity of the clerk in issuing, under Civ. Code Alaska, §§ 267, 382, an execution on a decree in a suit for the dissolution of a firm and for an accounting, instead of delivering to the officer a certified copy of the decree for his execution, is cured by confirmation of the officer's sale, made in conformity with section 278.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59–67; Dec. Dig. ⊂=31.]

6. JUDICIAL SALES ⊂=7—AUTHORITY OF MARSHAL—DECREE—ENFORCEMENT.

Under the Alaska Code, providing that where a judgment is a lien on real property no levy of execution is necessary, a levy is unnecessary under a decree requiring the marshal of Alaska to sell property, and the

marshal may execute the decree without any independent or subsequent order of court.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. ⟸7.]

7. APPEAL AND ERROR ⟸460—STAY OF PROCEEDINGS—STATUTORY PROVISIONS. Under Civ. Code Alaska, § 508, declaring that provisions of law regulating the procedure in cases brought by appeal or writ of error to the Supreme Court or the Circuit Court of Appeals shall regulate the procedure as to appeals and writs of error from the Alaska courts, and the Revised Statutes, providing for supersedeas and the manner in which it may be obtained, an Alaska court decreeing a sale of property need not postpone the sale until an appeal to the United States Circuit Court of Appeals has been heard, in the absence of any supersedeas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217–2226, 2245, 2246; Dec. Dig. ⟸460.]

Appeal from the District Court of the United States for the Second Division of the District of Alaska; Cornelius D. Murnane, Judge.

Suit by H. Greenberg against Jack Lesamis and others. From a decree granting relief, defendants appeal. Modified and affirmed.

O. D. Cochran and G. J. Lomen, both of Nome, Alaska, and Thomas R. White, of San Francisco, Cal., for appellants.

William A. Gilmore, of Seattle, Wash., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a suit instituted by appellee for dissolution of a mining partnership and an accounting.

On March 19, 1910, Jack Lesamis, John Tyapay, Andy Garbin, and the appellee Greenberg entered into an agreement of copartnership, whereby it was stipulated that:

"H. Greenberg is, and shall be a full-fledged partner with the above-mentioned parties (Lesamis, Tyapay and Garbin), and have one-quarter undivided interest in all claims, lodes, water rights acquired or to be acquired and owned by the above-mentioned parties. It is further agreed that H. Greenberg is to furnish the above-mentioned parties with provisions from time to time up to July, 1910."

On the same day Tyapay, Garbin, and Lesamis executed a deed to Greenberg for an undivided one-fourth of all the mining properties then held by them, the consideration being $30,000; "six thousand dollars ($6,000.00) in lawful money of the United States of America to them in hand paid by said party of the second part (Greenberg), the receipt whereof is hereby acknowledged, and the balance of twenty-four thousand to be paid of the first money taken out of the ground." The partnership was called "Klery Creek Mining Company." The parties commenced mining operations at once, and, plaintiff alleges, continued until the fall of 1911, when a disagreement arose; hence the suit to dissolve the partnership.

On September 2, 1911, Garbin transferred and assigned to the defendant Stanley all his interest in the mining claims and in the partnership assets, and on the same day Lesamis likewise transferred and assigned all his interest in said claims and assets to Sam Sallo. In a

separate answer Stanley and Sallo claim the respective shares and demands of Garbin and Lesamis in the partnership assets.

After a full hearing and trial upon the merits of the cause, the court made findings, and, among other things, found that the mining claims were put into the partnership, and became and were partnership assets, and that the Klery Creek Mining Company operated the mines from March 19, 1910, to September 1, 1911, but that on the latter date the parties disagreed and were unable to carry on their business together longer; that Stanley and Sallo took, and now hold, whatever interest they have in the partnership property and assets with full knowledge of the business conditions of the partnership; that they so hold such property and demands in trust for the defendants Garbin and Lesamis, respectively; that the total gold production for 1910 of the Klery Creek Mining Company was $16,251.42, and the total for 1911 was $9,786.88; that the total indebtedness of the company due to Robinson, Magids & Co., or its assignee, Philip Murphy, was the sum of $19,314.94; and that the parties were indebted to the mining company in sums as follows, respectively: Lesamis $4,429.21, Tyapay $4,703.21, Garbin $4,215.40, Greenberg $5,967.10—the court holding that the $24,000 deferred payment was payable from the net profits of the mining operations, and not from Greenberg's one-fourth interest therein.

A decree was entered in pursuance of these findings.

[1, 2] The appellants insist, in the first place, that the court erred in its interpretation of the contract of sale, or the conveyance of the undivided one-fourth interest in the mining claims to the appellee, relative to the manner of payment of the $24,000 deferred payment as part consideration for the conveyance. The stipulation is that such balance is "to be paid of the first money taken out of the ground." The District Court was induced, by reason of the acts of the parties and their seeming construction of the paper, to hold that such balance of the purchase price was to be paid from the net proceeds of the mining claims, which means that all the net product of the mines was to be applied in discharge of such balance. It must be conceded that the stipulation does not so read. It is plain that the payment does not become due until the money is taken out of the ground, and, by reason of the contingency, might never mature. But the controlling idea respecting the construction of the paper is that Greenberg was purchasing a one-fourth interest only, and was to pay $30,000 for that interest, $6,000 of which he paid in cash. The balance he was to pay when the money was taken out of the ground; not he and his partners, nor the firm. He could pay that, therefore, only out of his interest in the money taken out of the ground. Otherwise his partners would be contributing three-fourths of the money to pay his obligation to them. This could not have been intended, and the contract is susceptible of no such construction. Of course, the manner of the parties' treatment of the contract and its stipulations is often an aid to construction of the instrument, where the terms are ambiguous and their meaning involved. But, where the contract can be rendered by taking it by the four corners and viewing it as a whole, that manner of interpretation

is most satisfactory, and should be adopted. So construing the contract, the plain meaning of the words "of the first money taken out of the ground" is the first money taken out of the ground to which the grantee was entitled, which would be one-fourth of the amount so taken. And the intendment is that the first money shall be the gross amount to which the grantee is entitled, and not the net. We think therefore the trial court was in error in its interpretation of the contract. Taking the court's finding as to the gross products of the mines, which is: For the year 1910, $16,251.42; 1911, $9,786.88—aggregating, $26,038.30—the appellee would be entitled to have one-fourth thereof, or $6,509.57, applied on the $24,000 deferred payment. In other words, that amount on a settlement would be coming to each of the parties. But, as the business of the firm resulted in a deficit, the adjustment must be apportioned in the payment of the indebtedness of the firm. So apportioning it, the amount of the indebtedness to the mining company of each of the appellants Lesamis, Tyapay, and Garbin, as found by the trial court, would be reduced by $1,553.88, and that of the appellee increased by $4,661.66, leaving such indebtedness as follows:

Lesamis	$ 2,875 33
Tyapay	3,149 33
Garbin	2,661 52
Greenberg	10,628 76
Total	$19,314 94

The finding of the trial court should be modified to conform to this deduction.

[3] As sales of assets are made, of course, the partners will share equally in the proceeds, and be entitled to have the same applied in that proportion to their indebtedness to the firm, and the adjustment in the end will be on the basis of an equal division of the partnership property.

The amount of the indebtedness thus found due by the partners to the firm is the amount of the indebtedness of the firm to Robinson, Magids & Co., or Philip Murphy, the assignee, which is practically all its indebtedness. The testimony shows but one small account above that, of $2.50, and no one is insisting upon that.

[4] It is next insisted that the mining claims did not constitute partnership property. But we are of the view that such claims were intended by the parties to become partnership property, and they were so treated by the parties while conducting the business of the firm. The claims are therefore subject to the partnership indebtedness as partnership assets.

Again, the appellants urge that the last year's business was conducted by Greenberg alone, and not by and on account of the firm. This is wholly refuted by the strong preponderance of the evidence, and, the trial court so finding, it is unnecessary that we here make further comment upon the testimony.

Further objections are urged, namely, that Robinson, Magids & Co. were given a preference over other claims, that Stanley and Sallo were entitled to credit for assessment work, and that the decree was

prematurely entered. We have examined these, and find them without merit.

[5] Error is also assigned because of the court's refusal to quash the execution, on motion directed to that purpose. It is first suggested that the clerk has no authority to issue execution upon judgments of this nature. The Civil Code of Alaska directs that, on judgments in actions at law, the clerk shall issue the execution. Section 267, Civil Code Alaska (Fed. Stat. Ann. 101); and by section 382 (1 Fed. Stat. Ann. 126) this provision is made applicable in equitable judgments, so far as the nature of the judgment may require or admit.

The ordinary practice in equity is, where the property is directed to be sold by the master or the marshal, as the case may be, for the clerk to issue to the officer a certified copy of the decree, and with this in hand the officer executes the decree by sale, return, etc., and upon his return of the sale, if regular, it is confirmed by the court. If there was irregularity here in issuing an execution by the clerk instead of making and delivering to the officer a certified copy of the decree for his execution, that was an irregularity merely, which is cured by the confirmation, and no error can be assigned respecting it at this time. The property seems to have been advertised and sold in conformity with the statute of Alaska, Civil Code, § 278 (1 Fed. Stat. Ann. 105).

[6] It is next objected that there was no levy. The Alaska Code is taken bodily from the Oregon statute, and it has been held that, under the Oregon statute, where the judgment is a lien upon real property, no levy of the execution is necessary. This in a suit for foreclosure. Bank of British Columbia v. Page, 7 Or. 454. But the usual method of sale in equity procedure is by direction in the decree that the property be sold by a master. 2 Bates on Fed. Eq. Procedure, 772. And we see no reason why the practice may not apply in equitable actions, in the jurisdiction of Alaska, where the nature of the judgment is not suited to the ordinary execution provided for by Code. The decree in the case at bar provides that the marshal of Alaska shall sell the assets. It was not requisite for an execution of the decree that any independent or subsequent order of the court be made.

[7] Again, it is urged that, under the motion, the court should have postponed the sale until the appeal to this court was heard. Section 508, Alaska Code (1 Fed. Stat. Ann. 148), provides that all provisions of law regulating the procedure and practice, in cases brought by appeal or writ of error to the Supreme Court or the Circuit Court of Appeals, shall regulate the procedure and practice pertaining to appeals and writs of error from the Alaska courts. The Revised Statutes of the United States provide for supersedeas, and the manner in which it may be obtained. Otherwise the courts will not ordinarily stay execution or postpone sales pending hearing on appeal.

Finding No. 11 will be changed to conform to this opinion, and the decree will be modified accordingly. Otherwise it will be affirmed, neither party to recover costs on the appeal.

BOARD OF COMMERCE OF ANN ARBOR, MICH., v. SECURITY TRUST CO.

In re CLIMAX SPECIALTY CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2587.

1. BANKRUPTCY ⟸333—CLAIMS—SUFFICIENCY OF EVIDENCE.
A manufacturing company agreed with a board of commerce which furnished it a factory site and defrayed the cost of moving its plant to maintain an annual pay roll in specified amounts for seven years, except and contingent upon strikes, labor difficulties, fire, acts of elements, panics, and other causes beyond the control of the company. The company became bankrupt, having previously complied with its contract, and the board filed sworn proof of its claim for the breach of contract, alleging that the breach was not brought about by strikes, etc. *Held*, that the proof of claim was prima facie proof that the breach of contract was not so caused, and, in the absence of any evidence on the subject by the trustee, sufficiently proved the claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 519; Dec. Dig. ⟸333.]

2. CONTRACTS ⟸303—BREACH—EXCUSES FOR NONCOMPLIANCE—BANKRUPTCY.
The company's bankruptcy was not included in the causes beyond the control of the company which excused performance, since such general words must be restrained to the genus of the contingencies named unless the specified contingencies exhaust the genus, and bankruptcy, though it may result from strikes, etc., is not ejusdem generis.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1443; Dec. Dig. ⟸303.]

3. DAMAGES ⟸78—LIQUIDATED DAMAGES OR PENALTY.
A board of commerce in Michigan, which raised a fund to bring manufacturing plants to a city, contracted with a manufacturing company to furnish it a free site and defray the cost of moving to such city, the company to maintain for seven years an annual pay roll in specified amounts, it being further agreed that the penalty for a failure to maintain such pay roll for two consecutive years should be the forfeiture of $10,000 as liquidated damages. It appeared that the anticipated expenditures by the board amounted to about $10,000. The company became bankrupt. *Held*, that the stipulated sum was recoverable as liquidated damages, since in Michigan damages are limited to compensation for the loss actually sustained if ascertainable, but, where the loss cannot be measured by a pecuniary standard, the sum named by the parties, is recoverable as damages, and, while neither the board nor its members were pecuniarily injured by the company's breach, the board was contracting for the profit to be derived by the community and citizens at large and generally, and such profits were so conjectural, highly uncertain, vague, and incapable of measurement as to authorize the parties to fix their own measure of damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157–163; Dec. Dig. ⟸78.]

4. DAMAGES ⟸78—CONSTRUCTION OF CONTRACT—WRITTEN AND PRINTED PROVISIONS.
The contract with the provision for a penalty having been printed and the words "as liquidated damages" interlined, it must be construed as if "liquidated damages" only had been written.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157–163; Dec. Dig. ⟸78.]

5. CONTRACTS ⟸187—ACTIONS—CONTRACTS FOR BENEFIT OF THIRD PERSON.
The contributors to the fund raised by subscription could not recover for the company's breach, as in Michigan an unnamed third person cannot recover on a contract, although made in his behalf.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798–807; Dec. Dig. ⟸187.]

6. DAMAGES ⟸80—LIQUIDATED DAMAGES OR PENALTY.
The liquidated damages recoverable would at most amount to $30,000, and not as claimed to $60,000, and this amount was not so unreasonable or unconscionable as to make the stipulation one for a penalty, though the same amount would be due whether there was no pay roll for the whole of two years, or whether the pay roll continued but was substantially smaller than the stipulated sum, and though the stipulation might induce the company to employ help it did not actually need in order to maintain its pay roll.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 170–175; Dec. Dig. ⟸80.]

7. DAMAGES ⟸76—LIQUIDATED DAMAGES OR PENALTY.
The stipulation was not as claimed merely collateral to the object of the contract, and hence intended to secure performance and not to compensate loss, as the maintenance of the agreed pay roll was the main purpose of the contract on the part of the board.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 154, 155; Dec. Dig. ⟸76.]

8. BANKRUPTCY ⟸318—CLAIMS PROVABLE—CLAIMS ACCRUING IN CONSEQUENCE OF BANKRUPTCY.
The company's bankruptcy disabled it from performing the contract and was an anticipatory breach thereof, and the board's claim for the liquidated damages for such breach was provable in bankruptcy under Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1913, § 9647]) § 63a (4), authorizing the proof of claims founded upon an open account or a contract express or implied, notwithstanding Form No. 31 (89 Fed. xlii, 32 C. C. A. lxvi), requiring the creditor to state on oath that the bankrupt was "at or before" the filing of the petition indebted to such creditor, as notwithstanding this provision claims accruing in consequence of bankruptcy are provable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. ⟸318.]

9. BANKRUPTCY ⟸314—CLAIMS PROVABLE—CLAIMS ACCRUING IN CONSEQUENCE OF BANKRUPTCY.
Where bankruptcy disables the bankrupt from performing a contract, the claim for the anticipatory breach of the contract in consequence of the bankruptcy exists as of the date of the filing of an involuntary petition, and hence is provable, though the bankrupt is not necessarily dispossessed of his property or prevented from carrying on his business until the adjudication, as the adjudication finds the averment of an act of bankruptcy to be true as of the time it was made, and the bankruptcy necessarily ensues as of the date of the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. ⟸314.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of the Climax Specialty Company, bankrupt; Security Trust Company, trustee. From an order affirming the rejection of a claim by the referee, the Board of Commerce of Ann Arbor, Mich., appeals. Reversed and remanded.

The appellant, Board of Commerce of Ann Arbor, Mich., is a corporation of that state. Its articles of incorporation are not in evidence and its powers appear only as disclosed by the testimony of its secretary, who was the only witness called in the case. He said, without objection, that it was organized for the purpose of promoting the growth and welfare of the city of Ann Arbor and that the articles so stated; that it was not a corporation for gain, but was allowed to hold property; that the articles were drawn broad enough so that it could make money for the city, if it had a chance to do so. Its members were mostly merchants of the city and it had a subscribed industrial fund of $40,000, of which not more than $10,000 were payable in any one year. This fund was to be used—a part of it had been used—to bring manufacturers and manufacturing companies to Ann Arbor. The result of this, no doubt, would be the upbuilding of the city to which he referred, through increased business activity and population, with the benefits and advantages of various kinds to the community naturally and necessarily resulting therefrom, if such companies carried on their business after coming to the city.

The industrial fund was raised by subscription of individuals payable to a trustee on assessment of not more than 25 per cent. in any one year, made by a committee of 15 of the members of the Board, and upon the recommendation of the Board.

When the subscriptions were paid, the trustee deposited the money in bank and it was checked out by the Board. The money must necessarily have been deposited in the name of the Board. The industrial fund was subscribed for the purpose of carrying out the work of the Board by citizens, most of whom were members of the Board, but some were not. "As an additional check, besides the Board of Commerce, as to whether or not an assessment should be made," the committee of 15 was organized to decide that question. The purpose of this was that subscribers who did not belong to the Board would have "also something to say about it." The fund was regarded as a fund of the Board, and the only control the committee of 15 had over it was to order an assessment.

The only limitations on the Board in spending the fund were that the expenditure should not be more than 25 per cent. of the subscribed fund in any one year, and that the committee should approve the assessment and get the money. The industrial fund had an auxiliary fund raised by a committee of the Board. The Board had a membership of from 200 to 225, with annual dues of $4. The subscriptions were not made to the Board directly, "because it was intended to be used entirely for the purpose of bringing manufacturing companies there." In addition to this fund, the Board raised money and spent it in a variety of ways outside of bringing in manufacturing corporations.

Prior to the advent of the Climax Specialty Company, whose contract with the Board furnishes the subject-matter of this controversy, the Board had, in pursuance of its purposes, built a plant for the Newton Ladder Company, which had moved to Ann Arbor, having furnished to it the money for moving and for its factory, and there had been returned to the Board some of the money advanced by it out of the industrial fund to the Haggerty Ladder Company.

The Climax Specialty Company, a corporation of New York, doing business at Rochester, had a factory there, presumably upon its own land, and, on January 26, 1910, entered into the contract with the Board of Commerce set forth in the margin [1]; the italicized parts within brackets being interlineations

[1] "This agreement made this 26th day of January, A. D. 1910, by and between the Board of Commerce of Ann Arbor, a corporation duly incorporated and organized under the laws of the State of Michigan, hereinafter called the Board of Commerce, party of the first part, and the Climax Specialty Company of Seneca Falls, New York, a corporation duly incorporated and organized under the laws of New York and John C. Davis of Seneca Falls, New York, parties of the second part and hereinafter called in this agreement the Climax Specialty Company, witnesses:

"The Board of Commerce agree to procure and deed to the Climax Specialty Company a suitable factory site, containing four or five acres of land, such factory site to be selected by the Climax Specialty Company from sites offered by the Board of Commerce.

"The Board of Commerce agree to defray the cost of moving the plant of the Climax Specialty Company from Seneca Falls, New York, to Ann Arbor and of erecting the ma-

inserted before the contract was executed. It was drawn by the president and secretary of the board, the interlineations relating to contingencies of strikes, labor difficulties, etc., and other causes beyond the control of the company, being inserted at the request of the president of the company, or his agent; the interlineation, "as liquidated damages," being inserted by those who drew the contract, one of whom, the secretary, testified without objection: "We did that ourselves, our object being—we knew we were spending $10,000; we knew that." In answer to the question, "State whether or not when this sum of $10,000 was put in the contract you then had in mind these expenditures, and that it was possible that the Board of Commerce might lose an amount in the neighborhood of $10,000," he said, "We expected that the expenditures would be about $10,000."

The company moved to Ann Arbor. Its expenses for that purpose, about $7,500, were paid by the Board by its checks, and a site for its new factory was furnished by the Board at a cost of $2,500. It is fairly to be inferred that the Board did sell for the company the $75,000 in bonds, as agreed, and complied in all respects with its promises.

The evidence does not show when the company began operations at its new location, or their extent, or the amount of its pay roll. It does not appear from the record that the company ever actively prosecuted its business at Ann Arbor. In one of his opinions, the referee said: "It is undisputed that there

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chinery in the plant here up to an amount not to exceed seven thousand five hundred dollars ($7,500.00), payments to be made promptly from time to time as the expenses are incurred.

"It is agreed that on or before thirty days from the date of this agreement the capital stock of the Climax Specialty Company is to be increased to two hundred thousand dollars ($200,000.00), par value, either by reincorporation or otherwise; that a bond issue of one hundred thousand dollars ($100,000.00), bearing interest at 6%, maturing as later agreed upon, is to be authorized and placed in the hands of a trustee to be agreed upon, that this bond issue is to be secured by the real estate of the Climax Specialty Company in Seneca Falls, except the residence of John C. Davis, and Ann Arbor. * * *

"That this issue of bonds, seventy-five thousand dollars ($75,000.00) is to be set aside for the completion of a new factory plant in Ann Arbor and their machinery and for the payment of the present debts of the Climax Specialty Company and to provide for future working capital. * * *

"The Board of Commerce agree to sell the first seventy-five thousand dollars ($75,000.00) of bonds issued under the one hundred thousand dollars ($100,000.00) authorization within sixty days of the signing of this contract by the Climax Specialty Company and the proceeds of such sale shall be held by the trustee of the mortgage to be used and expended for the following purposes and as follows:

"First.—Thirteen [*seventeen*] thousand five hundred dollars ($13,500.00) [*$17,500.*] for the payment of the bank indebtedness of the Climax Specialty Company in Seneca Falls, which payment shall include the discharge of all mortgages or liens against the property of said Climax Specialty Company or John C. Davis in Seneca Falls.

"Second.—To pay for the erection of the buildings at Ann Arbor according to the plans and specifications now on file with the Board of Commerce. [*Payments to be made according to terms agreed with contractor.*]

"Third.—The balance of the seventy-five thousand dollars ($75,000.00) provided by the sale of the bonds to be turned over to the Climax Specialty Company upon the removal of their entire plant to Ann Arbor and the beginning of full operation of said plant in Ann Arbor.

"The payments by the trustee are to be made upon orders signed by the Climax Specialty Company and the Board of Commerce.

"In consideration of the foregoing and one dollar ($1.00) in hand paid, the Climax Specialty Company and John C. Davis agree to remove the entire plant of the Climax Specialty Company from Seneca Falls, New York, to Ann Arbor, Michigan. They agree to maintain a pay roll, exclusive of the salary of manager or superintendent, or salesmen on the road, at their factory in Ann Arbor of fifty thousand dollars ($50,000.00) the first year after their removal to Ann Arbor [*January 1, 1911*], of seventy-five thousand dollars ($75,000.00) the second year and of one hundred and fifty thousand dollars ($150,000.00) for each of the succeeding five years. It is agreed that the penalty for failure to maintain a pay roll as agreed upon for two consecutive years shall be the forfeiture of ten thousand dollars ($10,000.00) [*as liquidated damages*] by the Climax Specialty Company to the Board of Commerce, [*except and contingent upon strikes, labor difficulties, fire, acts of elements, panics and other causes beyond the control of the Climax Specialty Co.*] * * *"

was no breach of contract prior to the filing of the petition in bankruptcy." In view of this statement and the fact that counsel in their arguments and briefs make no point to the contrary, it may be assumed that the factory was operated up to the date, May 10, 1911, the petition in bankruptcy was filed; but as the contract was made January 26, 1910, and the pay roll was to be maintained for the certain years beginning January 1, 1911, it may fairly be inferred, since a new plant must be constructed, that its active operations did not begin a considerable length of time before January 1, 1911.

The company was adjudged a bankrupt by its consent July 24, 1911. Thereupon the Board filed with the referee its "Proof of Claim" against the bankrupt's estate, asserting an indebtedness of $10,000, for which the consideration was alleged to be set forth in its contract and in which its claim was definitely described as follows: "* * * That said claim is for the liquidated damages of ten thousand dollars ($10,000.00) provided for in said contract, and that said Climax Specialty Company did not, as provided for in said contract, maintain a pay roll, exclusive of the salary of the manager or superintendent and salesmen on the road, at their factory in Ann Arbor, of fifty thousand dollars ($50,000.00) for the first year after January 1, 1911, and that there have been no strikes, labor difficulties, fires, acts of the elements, panics or other causes beyond the control of said Climax Specialty Company to prevent it from maintaining said pay roll."

On objections by the trustee in bankruptcy, the referee found the designated sum to be a penalty; that the Board was not and could not be financially injured by reason of the failure of the bankrupt to maintain its pay roll; that no moneys, if recovered by the Board, would be repaid, in whole or in part, to any of the parties contributing to the fund; that no damages had been proved by the plaintiff; that the proof of claim based on the breach of contract does not prove itself and is in the nature of unliquidated damages; can only be allowed after proper proof and is not entitled to allowance under section 57d of the Bankruptcy Act (Comp. St. 1913, § 9641), because the claim is not provable; that the contract could be enforced, if at all, only to the extent that actual damages are proved; that the debts of the estate were large and the assets only nominal; that the claim was not based on any actual damages sustained upon any moneys expended; that the moneys of the estate should not be paid upon such claims unless established and sustained by clear and convincing evidence and by rules of law that are unquestioned; that under Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664, the claim could not be filed and allowed, since it did not exist at and before the filing of the petition in bankruptcy; and that therefore the claim was not provable.

The referee rejected the claim, his action being affirmed by the District Court.

In the assignments of error, it is claimed the court erred in sustaining the objections of the trustee based upon the grounds that: (1) The bankrupt was not indebted to the claimant; (2) the contract was against public policy; (3) the contract was lacking in mutuality; (4) the claimant had not performed its obligations to be performed; (5) the claimant had not suffered any damage by reason of the failure of the bankrupt to maintain a pay roll of $50,000 for the year beginning January 1, 1911; (6) if there was any damage, it was speculative in character; (7) the stipulated damage was a penalty; (8) the bankrupt was prevented, by causes beyond its control, from complying with its contract; (9) the bankrupt was prevented from fulfilling its contract in large measure by labor difficulties and panics which were causes beyond its control; and (10) the claimant had not a provable claim.

The second, third, fourth, eighth, and ninth assignments may be disposed of by the statement that no reason is given—and none appears—why the contract is against public policy, or is lacking in mutuality, or was not performed by the Board of Commerce according to its terms, or compliance by the company was prevented by any causes beyond its control.

The other assignments are now dealt with upon a consideration of the three questions, whether or not: (1) The claimant has sufficiently proved his claim; (2) the claim is for liquidated damages, or is for a penalty; and (3) the claim is provable in bankruptcy.

H. B. Graves, of Detroit, Mich., for appellant.
A. E. Fixel, of Detroit, Mich., for appellee.

Before WARRINGTON and DENISON, Circuit Judges, and HOLLISTER, District Judge.

HOLLISTER, District Judge (after stating the facts as above). [1, 2] The objection that the claim is not sufficiently proved is based upon the fact that from the evidence it does not appear the breach of contract by the company was not brought about by strikes, labor difficulties, fires, acts of the elements, panics, or other causes beyond its control. In the sworn proof of claim these negatives were clearly alleged, and, in the absence of proof to the contrary, are held to be sufficiently proved under the Bankruptcy Act, since such allegations are prima facie evidence and the sworn proof of claim is some evidence, even when it is denied. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584. These designated exceptions and contingencies are all matters which were peculiarly within the knowledge of the company. Under such circumstances, the prima facie proof of the proof of claim itself must stand, unless the one against whom the averment was made shows an excuse from compliance by proving the causes named. This is clearly held in United States v. Denver, etc., R. R. Co., 191 U. S. 84, 92, 24 Sup. Ct. 33, 35 [48 L. Ed. 106], in which Mr. Justice Brown said:

"When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative."

So far as appears, the breach of the contract was caused by the bankruptcy of the company. But what caused the bankruptcy is left to conjecture. In many cases, no doubt, the status of bankruptcy may result from circumstances over which the failing debtor has no control. But often it is his own fault. In any event, as against the negative averment in the proof of claim, the trustee must show that the condition of bankruptcy was brought about by circumstances beyond the company's control. He has offered no evidence on the subject.

In addition to this, it may be said that bankruptcy is not a cause of the same kind as strikes, labor difficulties, fires, acts of elements, and panics. Bankruptcy may, indeed, be the result of these, but it is not ejusdem generis. They have to do with unforeseen contingencies and calamities arising from without, and operating upon, the company or its property, independent of the company's personal conduct of its business and the manufacture and sale of goods, and are causes which really may be, and are treated in this contract as being, beyond the control of the company. Such general words as, "other causes beyond the control of the company," must be restrained to the genus of the contingencies named (Sandiman v. Breach, 7 Barn. & Cres. 96,

99; Hawkins v. Great Western Railroad, 17 Mich. *57, *62, 97 Am. Dec. 179; Hickman v. Cabot, 183 Fed. 747, 106 C. C. A. 183), unless the specified contingencies exhaust the genus (United States v. Mescall, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77). The rule is to be applied here, and not the exception; for, as pointed out by counsel, war, riot, and pestilence are contingencies which might well have been mentioned with the others. Assuming for the present the claim to be provable, we think it sufficiently proved.

[3] The case calls for the proper construction to be given the company's agreement:

"They (the company) agree to maintain a pay roll, exclusive of the salary of manager or superintendent, or salesmen on the road, at their factory in Ann Arbor of fifty thousand dollars ($50,000.00) the first year after their removal to Ann Arbor [*January 1, 1911*], of seventy-five thousand dollars ($75,000.00) the second year and of one hundred and fifty thousand dollars ($150,000.00) for each of the succeeding five years. It is agreed that the penalty for failure to maintain a pay roll as agreed upon for two consecutive years shall be the forfeiture of ten thousand dollars ($10,000.00) [*as liquidated damages*] by the Climax Specialty Company to the Board of Commerce. * * *"

—and involves a subject concerning which there is much confusion and contrariety of opinion in many of the decisions involving contracts in which, for a breach, a fixed sum is named to be recovered by the injured party, sometimes called a "penalty" and sometimes "liquidated damages." In some cases "penalty" has been construed "liquidated damages," and in some, "liquidated damages" has been construed a "penalty," the courts disregarding the exact language and its legal significance, which, under the usual rules of construction, would be taken as indicating the intention of the parties.

If the contract is construed to mean "liquidated damages," the recovery for a breach is the sum stipulated without proof of actual damage. If it is construed to mean "penalty," the recovery is only for the actual damage sustained.

Until comparatively recently, the tendency of the courts has been to favor a construction which would result in paying the injured party only the amount actually lost by the breach, rather than permit him to recover a liquidated sum, although the contract expressly provided for liquidated damages in the event of a breach. This was based upon the equitable consideration, applied also in courts of law, that for breach of contract a party ought not to recover more than he had actually lost, even if the strict language of the contract provided that he could do so.

The subject is discussed at length in Sun Print. & Pub. Ass'n v. Moore, 183 U. S. 642, 659, et seq., 22 Sup. Ct. 240, 46 L. Ed. 366, with copious references to the English decisions, prior decisions of the Supreme Court, and some of the state decisions; and again in United States v. Bethlehem Steel Co., 205 U. S. 105, 118, et seq., 27 Sup. Ct. 450, 455, 51 L. Ed. 731, in which it was said by Mr. Justice Peckham:

"There has in almost innumerable instances been a question as to the meaning of language used in that part of a contract which related to the payment of damages for its non-fulfillment, whether the provision therein made was one for liquidated damages or whether it meant a penalty simply, the damages to be proved up to the amount of the penalty. * * * The courts at

one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. * * * The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out."

The rule therefore prevailing in the courts of the United States—and, it may be said, generally, in the state courts—is that "liquidated damages" may be read "penalty," and "penalty," "liquidated damages," according to the contract itself and the circumstances of the case; and that, when the parties have used the language "liquidated damages," the language chosen by them shall prevail in its legal meaning, unless the nature of the contract and the circumstances show an intention to provide a penalty.

But this contract was executed and was to be performed in Michigan, and must be construed in the light of decisions of the Supreme Court of that state. Liverpool Co. v. Phenix Ins. Co., 129 U. S. 397, 446, et seq., 9 Sup. Ct. 469, 32 L. Ed. 788; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956. Whether, in the last analysis, the rule in Michigan is or is not different from that prevailing in the United States courts and generally, is not of importance, and we proceed to a consideration of the question in the light thrown upon it by the decisions of the Supreme Court of that state.

In Jaquith v. Hudson, 5 Mich. 123 (1858), Judge Christiancy is of opinion that the intention of the parties is immaterial, and that the court will construe the contract, whatever its language, in accordance with the fact, whether or not the stipulated sum was, under the circumstances, a "penalty," or "liquidated damages." He said (5 Mich. *137):

"* * * The actual intention of the parties, in this class of cases, relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention *is not*, and *cannot be made*, the *real basis of these decisions*."

He lays down two principles which, he says, result from, and reconcile, the great majority of cases, both in England and in this country (5 Mich. *133, *134):

"*First*. The law, following the dictates of equity and natural justice, in cases of this kind, adopts the *principle of just compensation* for the *loss* or *injury actually sustained;* considering it no greater violation of this principle to confine the injured party to the recovery of less, than to enable him, by the aid of the court, to extort *more*. It is the application, in a court of law, of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives *only* the *damages actually sustained*. This principle may be stated, in other words, to be, that courts of justice will not recognize or enforce a contract, or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy, as to make it rather matter of surprise that courts of law had not always, and in all cases,

adopted it to the same extent as courts of equity. And, happily for the purposes of justice, the tendency of courts of law seems now to be towards the full recognition of the principle, in all cases.

"This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the *law of the contract*; and they will not permit the parties by express stipulation, or any form of language, however clear the intent, to set it aside. * * *"

He then proceeds to declare the important qualification:

"But the court will apply this principle, and disregard the express stipulation of parties, *only* in those cases where it is obvious from the contract before them, and the whole subject-matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties, would violate this principle, which alone the court recognizes as the law of the contract.

"The violation, or disregard of this principle of compensation, may appear to the court in various ways—from the contract, the sum mentioned, and the subject-matter. * * *

(5 Mich. *137) "The foregoing remarks are all to be confined to that class of cases where it was clear, from the sum mentioned and the subject-matter, that the principle of compensation had been disregarded."

He then calls attention to another class of cases (5 Mich. *137, *138):

"But, *secondly*, there are great numbers of cases, where, from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to *ascertain* for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this, the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the *best* and *most certain mode* of ascertaining the actual damage, or what sum will amount to a just compensation. * * *

"In this class of cases, where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, whether they have done so in fact? And here, the *intention* of the parties is the *governing consideration*; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject-matter, and often the situation of the parties with respect to each other and to the subject-matter, will be considered. * * * And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount."

This idea of compensation for the loss actually sustained, if it may be ascertained, and in the sum named by the parties as damages, in cases of such character that the loss cannot be measured by a pecuniary standard, runs through all the Michigan cases.[2] In some of them

[2] Jaquith v. Hudson, 5 Mich. 123, 137; Daily v. Litchfield, 10 Mich. 29, 37; Davis v. Freeman, 10 Mich. 188, 190, 191, 192; Richmond v. Robinson, 12 Mich. 193, 201, 202; Butterfield v. Seligman, 17 Mich. 95; Richardson v. Woehler, 26 Mich. 90; Trustees, etc., v. Walrath, 27 Mich. 232; Myer v. Hart, 40 Mich. 517, 523, 29 Am. Rep. 553; Whiting v. Village of New Baltimore, 127 Mich. 66, 71, 86 N. W. 403; Lamson v. City of Marshall, 133 Mich. 250, 262,

it is said the amount stipulated must not be excessive, unjust, unconscionable, or unreasonable; but as late as Calbeck v. Ford, 140 Mich. 48, 56, 57, 103 N. W. 516, 520 (1905), the court quote at length the views of Judge Christiancy, and follow the quotation with the statement:

"This case has been frequently referred to with approval, and is a clear and authoritative statement of the rule as expounded by this court."

In Ross v. Loescher, 152 Mich. 386, 388, 116 N. W. 193, 194, 125 Am. St. Rep. 418 (1908), the court, considering the question whether the stipulated amount in that case was a penalty or not, refer to Judge Christiancy's opinion and say:

"But the principle is there established that courts will 'disregard the express stipulation of parties, *only* in those cases where it is obvious from the contract before them, and the whole subject-matter, that the principle of compensation has been disrgarded.' "

And cite to the point, Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256, to which reference will be made, and they have again given their interpretation of the rule so emphatically declared by that great judge:

"In cases where it is difficult to accurately determine the damages which one party may suffer by the failure of the other to perform his contract, the parties themselves may agree upon such sum as in their judgment will be ample compensation for the breach."

The application of these rules to the facts in this case is not uncertain; but, before stating our conclusion on this branch of it, consideration should be given to the effect of the interlineation, "as liquidated damages," and to the claim of counsel for appellee that in no event can the Board of Commerce itself, or its members, sustain any pecuniary injury from the breach of the contract.

[4] The first of these invokes the application of that rule in construing contracts, which gives force to a provision in handwriting as against an inconsistent printed provision. Thomas v. Taggart, 209 U. S. 385, 389, 28 Sup. Ct. 519, 52 L. Ed. 845; Pike's Peak, etc., Co. v. Power, etc., Co., 165 Fed. 184, 92 C. C. A. 392 (C. C. A. 8). So that, so far as the language itself is concerned, the parties intended to write "liquidated damages," and the contract (the intention as indicated by choice of language being immaterial) must be treated as if "liquidated damages" only had been written.

[5] The second must be dwelt upon at greater length, for it is true that neither the Board nor its members were, as such, pecuniarily injured by the failure of the company to keep its promise. It is not denied that the Board had the right to contract, but the trustee, we as-

263, 95 N. W. 78; City of Detroit v. People's Telephone Co., 135 Mich. 696, 98 N. W. 745; Calbeck v. Ford, 140 Mich. 48, 55, 56, 57, 103 N. W. 516; Township of Springwells v. Detroit, etc., Ry., 140 Mich. 277, 279, 103 N. W. 700; Western Gas Construction Co. v. Dowagiac Gas & Fuel Co., 146 Mich. 119, 109 N. W. 29, 10 Ann. Cas. 224; Powell v. Dwyer, 149 Mich. 141, 145, 146, 112 N. W. 499, 11 L. R. A. (N. S.) 978; **Ross v. Loescher, 152 Mich. 386, 388, 116 N. W. 193, 125 Am. St. Rep. 418.**

sume, would limit its recovery to nominal damages only, in any event—a conclusion, which, if true, would make this provision quite immaterial, whether it be regarded as a "penalty" or as "liquidated damages." Nor could the contributors to the fund recover, for, in Michigan, an unnamed third person cannot recover on a contract between the contracting parties, although made in his behalf. Pipp v. Reynolds, 20 Mich. 88; Knights, etc., v. Sharp, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780.

The substance of the trustee's claim is therefore that the contract imposed no obligations on the company, and no one could recover for the company's breach; and this, too, although the Board had power to make money for the city, if it had a chance to do so, as said by the secretary. A court of justice will go a long way in withholding its acquiescence in such a conclusion. The purposes of the Board and the subscribers were public in their nature, looking to the financial, industrial, and social development of the city; the increase of its importance and prosperity, having in mind the many benefits and advantages, quite beyond possibility of enumeration, likely to follow the transplanting of so large a concern having an annual expenditure for pay roll in the amount designated. Not only would benefits result in a financial way by the expenditure of wages in the amounts of these pay rolls, though even such benefits are not susceptible of accurate measurement; but the possibilities in improvement to the city in many directions are easily conceivable which cannot be laid up against any pecuniary standard and which are not based on monetary considerations. All of these, the Board, the subscribers to the fund, and the company itself, must have had in mind as the consideration which was to flow from the compliance by the company with its promises, considerations in which the board and its members and the subscribers to the fund could have no direct pecuniary interest. These were the profits in the many ways suggested by the expenditure of the $10,000.

The Board, in its contract, was acting in a trust capacity. We have found no case involving the precise rights of such a Board in such a contract as is exhibited here, but we think the same principle will be found in cases in Michigan dealing with the rights of a public board in contracts in which a sum was fixed and held to be "liquidated damages," though the particular board, as such, or the municipal corporation it represented, could in no event suffer pecuniary damages from a breach.

In Whiting v. Village of New Baltimore, 127 Mich. 66, 86 N. W. 403, the village granted a franchise to one Dyar for an electric railroad, requiring a deposit of $2,000, to be returned upon the completion of the road within the time prescribed; in default of which the money was to be placed in the village treasury in such fund as the trustees of the village might direct. The sum deposited was held to be "liquidated damages," the road not having been completed within the time agreed upon. In the opinion, it was said (page 71 of 127 Mich., page 405 of 86 N. W.):

"It may be conceded that the village, in its corporate capacity, suffered no damages by failure to build the road; but the contract was made by the cor-

porate officers for and in the interests of the inhabitants, and for such damages they could and did agree with Mr. Dyar."

So, in City of Detroit v. People's Telephone Co., 135 Mich. 696, at page 698, 98 N. W. 745, at page 746, a case much like and following, the last cited, the court say:

"In that case, as in this, the municipal body, as such, suffered no damages by reason of the failure of the corporation to comply with the terms of its grant. But it was said that the contract was made by the corporate officers for and in the interest of the inhabitants. It might be added that their damages, likewise, would not be susceptible of proof, and this furnishes a strong reason for holding that the parties intended by their stipulation to treat such damages as liquidated."

In Township of Springwells v. Detroit, etc., Ry. Co., 140 Mich. 277, at page 280, 103 N. W. 700, at page 701, a street railroad company, in compliance with the terms of a franchise, gave a bond to secure the performance of its duty under the franchise, and the amount of the bond was held to be liquidated damages and not a penalty; the court saying:

"To hold that the parties in this case provided for a penalty, as contended by defendants, is to determine that they were at much pains to do an entirely idle and profitless thing. Such a construction ought not to be given to the agreement of the parties, if any other reasonable one is open to the court. The construction of a line of railway was the prominent thing in the minds of the parties. The weight of the rails, the gauge, the planking at crossings, and other details of construction, were merely the elements which were descriptive of and went to make up the completed whole. The bond in suit was intended to enforce a substantial performance of the contract for the benefit of the inhabitants of Springwells, and for that purpose provided for damages in default of such performance. The status of the parties, and the fact that otherwise no damages would be ascertainable, warrant the construction that the parties intended the provision for $10,000 as liquidated damages for a substantial failure to perform the entire contract, rather than as a penalty to secure the exact performance of each separate provision for construction."

It is clear enough that the mere removal of the company from Rochester to Ann Arbor and the construction of a new plant on the site provided would be of little advantage to the city of Ann Arbor. The purposes of the expenditure of $10,000 were for the benefits to be derived by the inhabitants from the continued operation of the plant, with the number of men contemplated by the expenditures for the pay rolls designated. If the plant were not operated at all, the loss to those who had contributed would be the $10,000, an expenditure in which the community was not concerned. The community's concern, for which the board was contracting, was the profit to be derived, from the ways suggested, by the community and citizens generally, and the Michigan rule becomes directly applicable, because such profits were conjectural, highly uncertain, vague, and not measurable in dollars and cents.

[6] But it is said the stipulated sum being applicable to any two years during which the certain pay rolls were to be maintained, there could be a recovery of $60,000, a sum disproportionate to the actual loss sustained and altogether unreasonable and unconscionable. We cannot grant this premise, and need not therefore discuss its conclu-

sion. On a complete breach the liquidated damage would, at most, amount to $30,000, a figure not, as we think, unreasonable or unconscionable in view of the purposes of the contract and the nonexistence of any measure by which the public damages can be ascertained, they being too uncertain and conjectural and of a kind the law rejects when sought to be recovered for a breach of contract.

Looking at the contemplated profits to the community from their monetary value only, the loss for the breach for two consecutive years might, so far as measurable, be a sum much larger in actual money than $10,000. It is true, it might be much less, all depending upon the extent of the failure of the company to maintain the agreed pay roll. It is urged by counsel that this must be a penalty, because, rather than lose the $10,000 during any two-year period in which the pay roll might approximate the amount agreed upon, it would be to the interest of the company to employ help it actually did not need, and thus maintain its pay roll. This argument has no force, for the reason that among the contemplated advantages of the contract to the citizens were those which might result to the community by a going concern paying to its employés during a certain period a certain sum of money to be distributed in the locality in the way wages are usually distributed. Under such circumstances, it was not important to citizens that the company employed more men than it really needed. In these considerations, the large purposes involved, through which the city would be upbuilt, and not susceptible of measurement in money from any standpoint, are given no place. The accomplishment of these purposes was also a part of the profit the inhabitants were to reap through the contract's fulfillment. This case is easily distinguished from O'Brien v. Illinois Surety Co., 203 Fed. 436, 121 C. C. A. 546 (C. C. A. 6), in which a bond for the performance of many things was held by this court to be a penalty, because it applied no matter whether the breach was trifling or substantial, while here we hold the same amount would be due whether there was no pay roll for the entire two years or whether the pay roll for two years continued but substantially smaller than the stipulated sum. The stipulated amount does not seem unconscionable or unreasonable in view of the purposes for which the contract was made.

The New York citation (Ward v. Hudson River Bldg. Co., 125 N. Y. 230, 26 N. E. 256), cited in Ross v. Loescher, 152 Mich. 386, 388, 116 N. W. 193, 125 Am. St. Rep. 418, is only of importance in its relation to the claim of the appellee that the stipulated amount is disproportionate to the loss sustained. The finding that the amount is neither unconscionable nor unreasonable would seem to dispose of that claim. But the case is referred to here only because it was discussed at length in Sun Print. & Pub. Ass'n v. Moore, 183 U. S. 642, at pages 668, 669, 22 Sup. Ct. 240, at page 251 [46 L. Ed. 366], in which then Mr. Justice White said:

"The meaning of the court is made clear by the following statement, appearing on the same page with the above excerpt: 'We may, at most, say that where they have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount

is not, *on the face of the contract*, out of all proportion to the probable loss, it will be treated as liquidated damages.'"

From these cross-references it may be assumed that the Supreme Court of the United States, the Supreme Court of Michigan, and the Court of Appeals of New York, agree that it is only when the stipulated amount is, upon the face of the contract, out of all proportion to the probable loss, that it will be treated as a "penalty," and not as "liquidated damages," even if designated by the parties to be the latter. The face of this contract makes no such disclosure.

[7] It is urged further that the stipulation was only collateral to the object of the contract, and hence intended to secure performance and not to compensate loss. This cannot be, because the maintenance of the agreed pay roll was, on the part of the board, the main purpose of the contract.

The Board lays the damage in $10,000 on the theory that the consideration failed. The total damage, however, was not that sum, but the loss of the advantage which would accrue by the expenditure of the $10,000. It, of course, can only recover the stipulated sum.

The trustee relies much on Davis v. Freeman, 10 Mich. 188, but we think he is not justified in doing so. There Davis and Ingersoll contracted with Freeman to draw, during the following winter, all the pine timber on a certain lot of land at $1.50 per 1,000 feet, for which they were to be paid in necessary supplies up to $1 per thousand feet, as fast as the logs were barked, inspected and scaled, Freeman to furnish enough supplies to begin the work in advance of the barking of any logs, "it being understood that the advance is to be part of the one dollar payment, and the balance, fifty cents per thousand feet, to be paid in money when this contract is completed, it being understood that the balance kept back is to secure the completion of this contract; and it is hereby agreed between the parties that the fifty cents per thousand feet is settled, fixed and liquidated damages, in case this contract is not completed by said first party." Davis and Ingersoll failed to draw all the timber. In Freeman's suit against them, one of the questions was whether 50 cents per thousand feet was to be regarded as stipulated damages or in the nature of a penalty for not completing the contract. It was held that the stipulation was, in itself, a "penalty," and was not by way of compensation, because, it is to be inferred, the damage for the nonperformance by the defendants was such loss as might be shown by proof. This pertinent remark was made in the opinion (10 Mich. 191):

"If the contract had provided for the payment of fifty cents per thousand feet as liquidated damages for the timber not drawn, the case would be altogether different."

Whatever may be said of that case, it does not in the least negative the rule so clearly stated and consistently followed in Michigan; for the contract under discussion gives no opportunity, upon its breach, for the proof of any actual damage. For its breach, the community in whose behalf it was made would, except for the stipulation, lose its contemplated fruits, and the provision for the payment of a stipulated sum has no meaning.

We hold that the stipulated sum in this contract means "liquidated damages."

[8] Is the claim provable in bankruptcy?

The contract is executory. The time for its completion would ripen long after the date of the company's bankruptcy. If the company had itself made compliance with its agreement impossible, or had repudiated its agreement, there is no doubt that the doctrine of anticipatory breach would have been applicable and the board could have elected to defer suit until the time of performance had elapsed, or could have sued at once for the breach. This doctrine was established in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, in which the English and American cases are reviewed; was declared by this court in Weber v. Grand Lodge, 169 Fed. 522, 533, 95 C. C. A. 20, in El Paso Cattle Co. v. Stafford, 176 Fed. 41, 47, 99 C. C. A. 515; was reaffirmed in The Eliza Lines, 199 U. S. 119, 129, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406, and in Citizens' Bank v. Davisson, 229 U. S. 212, 224, 33 Sup. Ct. 625, 57 L. Ed. 1153, Ann. Cas. 1915A, 272; and is the settled law in the United States and in England.

This rule is held to apply also to cases in which, by reason of bankruptcy, disability to perform results. In the case In re Neff, 157 Fed. 57, 61, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349, it was said by Mr. Justice Lurton, then a judge of this court:

"Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance."

He cited In re Swift, 112 Fed. 315, 50 C. C. A. 264 (C. C. A. 1), and In re Pettingill (D. C.) 137 Fed. 143, in which Judge Putnam and Judge Lowell, respectively, expressed the same opinion. In these cases the authorities are carefully collated and considered. In the case In re Swift, there was an executory contract to deliver certain stocks at a future time on demand. No demand was made. In the case In re Pettingill, there was a contract to purchase stock at par at a time specified. In the case In re Neff, the bankrupt was one of the makers of promissory notes payable in a certain sum at a future date. In those cases, as in this, the petition in bankruptcy was filed before the time of performance, the bankruptcy proceedings were involuntary, and the adjudication was made at the date subsequent to the filing of the petition.

The trustee claims that, whatever the rights of a creditor upon an anticipatory breach might amount to otherwise, they are of no value here because, under the forms of proof prescribed by the Supreme Court of the United States in cases of bankruptcy, it is required (Form No. 31 [89 Fed. xlii, 32 C. C. A. lxvi]) that the creditor shall set forth upon oath that the person against whom the petition in bankruptcy has been filed "was at and before the filing of said petition, and still is, justly and truly indebted to" the creditor; and, since the debt did not accrue before bankruptcy, and only accrued because of bankruptcy, it cannot be proved. He cites to the point Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664, to which reference will be made.

We have found the sum stipulated to be "liquidated damages," a fixed, certain sum, the right to recover which accrued to the board upon the bankruptcy of the company. That right did not strictly exist "before" the filing of the petition, though it did exist and accrued at that time. The question is not new. It was dealt with by Judge Lurton, Judge Putnam, and Judge Lowell in the cases referred to. Judge Lurton says: [3]

"It is sufficient that a claim becomes provable as a consequence of bankruptcy. The right to sue for and recover damages then accrues."

He quotes from Judge Lowell's opinion: [4]

"For admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident."

Judge Putnam says: [5]

"The trustee maintains that the form of proof prescribed by the Supreme Court requires that it should state that the debt proved existed 'at and before the filing' of the petition for adjudication of bankruptcy; but, in view of the statute, this must be construed, as is commonly done, to give such effect to the word 'and' that it may read either 'or' or 'and,' as circumstances may require. * * * There can be no question that it is sufficient if the debt existed at the point of time of the filing of the petition in bankruptcy."

Section 63a of the Bankruptcy Act enumerates the kinds of debts which may be proved and allowed against the bankrupt's estate:

"(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, * * *; (4) founded upon an open account, or upon a contract express or implied."

If, as we have found, bankruptcy is an anticipatory breach and the right to sue is coincident with the bankruptcy, it would seem that the fixed sum can be proved either under subdivision 1 or under subdivision 4. It is here that Zavelo v. Reeves becomes applicable; and it makes against the trustee. It was said by Mr. Justice Pitney (pages 630 and 631 of 227 U. S., page 367 of 33 Sup. Ct., 57 L. Ed. 676, Ann. Cas. 1914D, 664), referring to section 63:

"Of the several classes of liabilities, those in clauses 1, 2 and 3 are in terms described as existing at or before the filing of the petition."

"Clause 4," he says, "describes simply debts that are 'founded upon an open account, or upon a contract express or implied,' not in terms referring to the time of the inception of the indebtedness. But, reading the whole of section 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under section 63a—4 include only such as existed at the time of the filing of the petition in bankruptcy."

Following these statements, he says, that in the promulgation of the general orders and forms in bankruptcy, including form 31, the court in effect adopted the construction of section 63 embodied in the quotation last made. From this it would seem that 4 is broad enough to

[3] In re Neff, 157 Fed. 61, 62, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349.

[4] In re Pettingill [D. C.] 137 Fed. 143, 146.

[5] In re Swift, 112 Fed. 315, 321, 50 C. C. A. 264.

let in such a claim as this, and 1 is not so narrow as to exclude it; for the claim, as we have seen, became an enforceable debt coincident with, and therefore at, the date of bankruptcy. Without deciding however, that the case comes within section 1 (Comp. St. 1913, § 9586),[6] we hold that it is clearly covered by section 4 (section 9588).

The case does not call for a consideration of the question of the provability of a claim under a lease for rent coming due after bankruptcy, discussed by Judge Warrington in Courtney v. Fidelity Trust Co., 219 Fed. 57, — C. C. A. —, and upon which the authorities are at variance; for there are contingencies which may, after bankruptcy, affect the stipulated amount to be paid as rent under a lease, which are not pertinent to this case, or to the others cited holding an executory contract for the payment of money to be broken by bankruptcy.

[9] But it might by urged that, since, in involuntary proceedings, the bankrupt is not necessarily dispossessed of his property or prevented from carrying on his business until the adjudication in bankruptcy, there could be no breach brought about by, and existing at the time of, the filing of the petition in bankruptcy; and that the breach could not arise until, by adjudication, the debtor was declared to be a bankrupt.

We think such a contention could not prevail. The petition in bankruptcy necessarily sets forth an act of bankruptcy which must exist before the filing of the petition. The adjudication finds the averment in that behalf to be true, and necessarily as of the time it was made. The adjudication is but declaratory of the truth of the allegations of the petition and finds that the debtor was at that time bankrupt.

It is said in Acme Harvester Co. v. Beekman Lum. Co., 222 U. S. 300, 307, 32 Sup. Ct. 96, 99, 56 L. Ed. 208, by Mr. Justice Day:

"The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under section 70a of the Act of 1898 (Comp. St. 1913, § 9654) the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings."

In Everett v. Judson, 228 U. S. 474, 478, 33 Sup. Ct. 568, 569, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154, Mr. Justice Day says:

"While it is true that section 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition."

A receiver may be appointed pending the hearing on an involuntary petition, "in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts

[6] See Cobb v. Overman, 109 Fed. 65, 48 C. C. A. 223 (C. C. A. 4), and cases there cited. In this case also the petition was involuntary.

after the filing of the petition and until it is dismissed or the trustee is qualified." Section 2, Bankruptcy Act (Comp. St. 1913, § 9586). No attachment in the interval between filing the petition and the adjudication may be levied upon the bankrupt's estate. Acme Harvester Co. v. Beekman Lum. Co., 222 U. S. 300, 307, 32 Sup. Ct. 96, 56 L. Ed. 208; Jones v. Springer, 226 U. S. 148, 155, 33 Sup. Ct. 64, 57 L. Ed. 161. The particular point need be pursued no further than to say that it is not the adjudication which creates the condition, the existence of which makes the Bankruptcy Act applicable. The adjudication fixes the status theretofore existing as alleged in the petition. If the court, by its adjudication, finds upon the petition and proof, or by consent, as in this case, the condition of bankruptcy existed, then bankruptcy ensues necessarily as of the date of the filing of the petition. As said before, the Neff Case, the Pettingill Case, and the Swift Case were also instituted by involuntary petition. It so appears in the reports of the decisions in the two cases last named and is shown by the record in the Neff Case. This question was referred to only in the Swift Case. It was there said by Judge Putnam (page 321 of 112 Fed., 50 C. C. A. 264):

"The contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof in connection with the adjudication which followed. Of course, as everything related back to the filing of the petition, the ripening of the claim did not occur before it was filed, nor afterwards, but simultaneously with it, as already said. Consequently, by necessary effect, there was created and existed, when the proceedings commenced, a provable claim."

We think the rule of anticipatory breach is applicable to the facts in this case, and that it requires the conclusion that the company's agreement was broken at the time the petition in bankruptcy was filed.

From all of these considerations, it follows that the claim of the Board of Commerce was provable, and was proved, in the liquidated sum of $10,000, and should be allowed.

The judgment below must therefore be reversed, with costs against the appellee, and the cause remanded for proceedings necessary to the allowance of the claim.

COTTER v. COTTER.

(Circuit Court of Appeals, Ninth Circuit. August 9, 1915.)

No. 2532.

1. DIVORCE ⊂=3—JURISDICTION OF AMERICAN COURTS.

When the American colonies and the states of the Union adopted the common law of England, they did not adopt the ecclesiastical law pertaining to marriage and divorce, so that, in the absence of constitutional provision or express legislation, no American tribunal has jurisdiction to grant a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 4; Dec. Dig. ⊂=3.]

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2. DIVORCE ⟸331—JURISDICTION OF STATE COURT—ALLEGATION IN ACTION ON DECREE AWARDING ALIMONY.

In an action in the territory of Alaska on a decree of the superior court of the state of Washington awarding alimony in a divorce suit, the allegation of the complaint that such court was one of general jurisdiction was sufficient to sustain the action, as showing that the court had jurisdiction to grant divorces, since jurisdiction to grant divorces is so generally conferred upon courts of general jurisdiction in the United States that it is the exception and not the rule that such courts have no jurisdiction over such causes.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. ⟸331.]

3. DIVORCE ⟸331—JURISDICTION OF STATE COURT—ALLEGATION IN ACTION ON DECREE AWARDING ALIMONY—SUFFICIENCY.

In an action in the territory of Alaska, on a decree of the superior court of the state of Washington awarding alimony in a divorce suit, the complaint, alleging that the court was empowered, under the laws of the state, to grant permanent alimony, citing the clause of the statute relied on, also alleging that the court was of general jurisdiction, stated a cause of action as against the objection that it did not show that the state court had jurisdiction to grant divorces.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. ⟸331.]

4. DIVORCE ⟸331—ALIMONY—SUIT TO RECOVER—JURISDICTION OF DECREEING COURT.

In an action on a decree of a state court awarding permanent alimony, the plaintiff fails if the proof does not sustain the jurisdiction of the state court in divorce cases.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. ⟸331.]

5. DIVORCE ⟸241—ALIMONY—JURISDICTION OF WASHINGTON SUPERIOR COURT.

Under Ballinger's Ann. Codes & St. Wash. § 5723, providing that in granting a divorce the court shall make equitable disposition of the property of the parties, having regard to their respective merits, and the condition in which they will be left by the divorce, the superior court of the state of Washington had power to award permanent alimony in the form of monthly payments for the support and maintenance of the wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 679, 680, 690; Dec. Dig. ⟸241.]

6. DIVORCE ⟸331—ALIMONY—SUIT ON DECREE IN ANOTHER JURISDICTION.

A decree awarding alimony payable in future installments constitutes a proper basis for suit in another jurisdiction under the "full faith and credit" clause of the federal Constitution, unless the right to receive the alimony is so discretionary with the court rendering the decree that, even in the absence of application to modify it, no vested right in the payments exists.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. ⟸331.]

7. DIVORCE ⟸245—ALIMONY—MODIFICATION OF DECREE—POWER OF COURTS.

In the state of Washington, while the court may permanently discontinue, until further order, alimony granted in monthly installments, it may not modify a decree as to installments past due and unpaid.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691–695; Dec. Dig. ⟸245.]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Action at law by Sadie Cotter against Frank J. Cotter. From dis-

missal of the cause upon sustention of demurrer to the complaint, plaintiff prosecutes error. Reversed and remanded, with directions to overrule the demurrer.

This is an action instituted in the District Court for the Territory of Alaska, Third Division, based upon a decree for alimony rendered in the superior court of the state of Washington for King county. Among the allegations in the complaint are the following: "That said decree further provided and ordered that the defendant pay to the plaintiff, as permanent alimony, the sum of $50 per month, the same to be paid on the 1st day of each and every month from the date of the entry of said decree. That said decree further provided that the defendant should pay certain outstanding indebtedness incurred by the plaintiff in the sum of $750. That no part of same has been paid except the sum of $120, and there is now due and owing from the defendant to the plaintiff the sum of $630, together with interest thereon at the rate of 8 per cent. (8%) per annum from date until paid. That the defendant has not paid said alimony or any part thereof, and there is now due and owing on account of the same, from the defendant to the plaintiff, the full sum of $650, together with interest thereon at the rate of 8 per cent. per annum from date until paid. * * * That said superior court for King county, in the state of Washington, is duly empowered and authorized under the laws of said state to grant permanent alimony, as provided by said decree, a copy of the statutes of the state of Washington relative thereto being as follows, and hereby made a part of this complaint: 'In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.'" The prayer is for $1,280, and interest thereon at 8 per cent.; that defendant be required to pay a reasonable sum into court to defray the expenses of the action and for counsel fees, and for further relief. A demurrer was interposed to the complaint, assigning as reasons therefor that the court has no jurisdiction of the subject-matter, that the plaintiff has no legal capacity to sue, and that the complaint does not state facts sufficient to constitute a cause of action. This was sustained, and, the cause having been dismissed, plaintiff prosecutes error.

John Lyons and E. E. Ritchie, both of Valdez, Alaska, and Thomas R. Lyons and Ira D. Orton, both of Seattle, Wash., for plaintiff in error.

S. O. Morford, of Seward, Alaska, for defendant in error.

WOLVERTON, District Judge (after stating the facts as above). In support of the demurrer, the defendant in error insists that the complaint is defective in that it does not show that the superior courts of the state of Washington have jurisdiction to grant divorces.

[1-4] Formerly in England the ecclesiastical courts possessed exclusive jurisdiction over matrimonial causes, and such was the case at the time of the adoption of the American Constitution. Ecclesiastical courts have not been established in this country, and when it is said that the colonies and the states of the Union adopted the common law of England, it is not true that they adopted the ecclesiastical law pertaining to marriage and divorce, or the power incidental thereto of granting divorces in any form. Hence it is affirmed on authority that, in the absence of constitutional provision or express legislation, no American tribunal has jurisdiction to grant a divorce. 14 Cyc.

581, 582; 9 Am. & Eng. Enc. of Law (2d Ed.) 739. But we think it will not be gainsaid that the jurisdiction to grant divorces is so generally conferred upon the courts of general jurisdiction in this country that it is the exception and not the rule that such courts are without jurisdiction pertaining to such causes, and it would seem that the allegation that the Washington court is a court of general jurisdiction is sufficient to sustain the action. If this position be questioned, the ninth paragraph of the complaint does allege that the Washington court was empowered, under the laws of the state, to grant permanent alimony, citing the clause of the statute relied upon. Under this clause, as we shall presently see, the court did possess the authority to grant the alimony now sought to be recovered. In view of this paragraph, looking to the complaint as a whole, there can be no doubt that it states a cause of suit as against the specific objection. Of course, if the proof should not sustain the jurisdiction in divorce causes, the plaintiff must fail, but not for the reason that the complaint does not state a cause of suit.

It is further urged that the superior court of Washington was without power or authority to grant alimony to the plaintiff, and that, even if it had such power, the decree rendered was not such a one as suit could be maintained upon in another jurisdiction, because the decree or judgment is not for any sum certain, but for alleged alimony, payable in the future by installments.

[5] Answering these contentions in the order stated, it may be premised that the statute of Washington provides, as alleged in the complaint, that:

"In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage." 2 Ballinger's Codes & Statutes, § 5723.

Construing this statute, the court upheld a decree of the superior court awarding to the plaintiff $20 per month alimony and $50 attorney's fee. In re Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736. Remarking upon the effect of this decision, the court in a later case (Mahncke v. Mahncke, 43 Wash. 425, 426, 86 Pac. 645, 646), says:

"We have heretofore held that Bal. Code, § 5723 (P. C. § 4637)"—being the section above quoted—"confers upon courts of this state power to award permanent alimony in the form of monthly or annual payments for support and maintenance."

See, also, Markowski v. Markowski, 44 Wash. 594, 87 Pac. 914; Claiborne v. Claiborne, 47 Wash. 200, 91 Pac. 763; Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278.

There would seem to be no further question respecting the court's power to grant alimony in divorce proceedings in the state of Washington.

[6] Respecting the remaining contention, it has been judicially settled by the Supreme Court that a decree awarding alimony payable in future installments constitutes a proper basis for suit in another jurisdiction, under the "full faith and credit" clause of the federal Constitution, unless the right to receive the alimony is so discretionary with the court rendering the decree that, even in the absence of application to modify the decree, no vested right exists. Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; Barber v. Barber, 21 How. 582, 16 L. Ed. 226; Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810.

[7] In Washington, while the court may discontinue alimony permanently where granted in monthly installments until further order of the court (Mahncke v. Mahncke, supra), it may not modify a decree as to installments of alimony past due and unpaid (Harris v. Harris, 71 Wash. 307, 128 Pac. 673; Beers v. Beers, 74 Wash. 458, 133 Pac. 605).

These considerations lead to a reversal of the judgment, and the cause will be remanded, with directions to the court below to overrule the demurrer, and for such other proceedings as may seem proper, not inconsistent with this opinion.

It should be further stated, in order that there may be no misunderstanding, that the Alaska court, exercising jurisdiction respecting the action to recover on this judgment, is not exercising jurisdiction relative to divorce proceedings, and has no power to require the defendant to pay into court plaintiff's expenses attending the cause, or counsel fees, as prayed. Whatever costs she is entitled to must follow the judgment recovered if she is successful. Barber v. Barber, supra.

HILL COUNTY v. SHAW & BORDEN CO.

(Circuit Court of Appeals, Ninth Circuit. August 9, 1915.)

No. 2520.

1. COUNTIES ⟸113—CONTRACTS FOR SUPPLIES—STATUTES.
   Rev. Codes Mont. § 2897, requiring the county commissioners to contract with a newspaper of general circulation published within the county for the county printing, including blanks and blank books, is a prohibition against contracting with any other than a newspaper of the county, and any contract in derogation thereof is void.
   [Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174–180; Dec. Dig. ⟸113.]

2. CONTRACTS ⟸138—INVALIDITY—QUANTUM MERUIT—TROVER.
   Where a contract for the purchase of property which has been converted by the buyer is merely malum prohibitum and did not contravene public policy, and no penalty was imposed for a violation of the statute, there could be a recovery on a quantum meruit or of the property itself or in trover.
   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. ⟸138.]

8. COUNTIES ⊂=129—CONTRACTS FOR SUPPLIES—LIABILITY.

A county which, without complying with a statute directing the county commissioners to contract with some newspaper of general circulation published in the county for supplies, procures supplies for keeping county records elsewhere and appropriates them, is liable for conversion thereof independent of the contract.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 197; Dec. Dig. ⊂=129.]

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action by the Shaw & Borden Company against Hill County. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This is an action for conversion of certain books and other property, which Hill county procured of Shaw & Borden Company, a corporation, defendant in error, for use by the county for keeping its records and carrying on the public business of the county. The books and property were procured from Shaw & Borden Company under a subcontract with one B. B. Weldy, who was under contract with the county to furnish them. The complaint sets up the fact that the county entered into a contract in writing with Weldy, proprietor and publisher of a newspaper which had been published in the county for more than six months prior thereto, for furnishing such books and property, and that the Shaw & Borden Company agreed with Weldy to sell, furnish, and deliver to the county the property in question. It is further alleged:

"That this plaintiff has never owned nor published a newspaper and has never owned nor operated a printing establishment in the state of Montana, by reason of which the said defendant asserts and claims that the said Weldy was prohibited by section 2897 of the Revised Codes from subletting his said contract with said county, or any portion thereof to this plaintiff and from contracting and agreeing with this plaintiff to furnish and deliver the said books and other property so described in Exhibit A to said county, and denies any liability or obligation to pay this plaintiff or said Weldy for said books or other property or any part thereof, and has refused and still refuses to pay any amount whatsoever therefor."

Then follow allegations of ownership in Shaw & Borden Company, value, and conversion by the county, and prayer for judgment for the value of the property.

C. A. Spaulding, of Helena, Mont., and L. V. Beaulieu and Victor R. Griggs, both of Havre, Mont., for plaintiff in error.

John B. Clayberg, of San Francisco, Cal., and Gunn, Rasch & Hall, of Helena, Mont., for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). [1] The statutory provision of which it is alleged the contract of the defendant in error is in violation is as follows (we quote from appellant's brief, as its correctness is not questioned):

"It is hereby made the duty of the county commissioners of the several counties of the state of Montana to contract with some newspaper of general circulation, published within the county, and having been published continuously in such county at least six months immediately preceding the awarding of such contract to do and perform all the printing for which said counties may be chargeable, including all legal advertising required by law to be made, blanks, blank books, and official publications, at not exceeding the following prices: * * * All newspapers which may receive any contract for printing under this act which may not be able to execute any part of such

contract shall be required to sublet such contract or portion to some newspaper or printing establishment within the state, which may be competent to execute such work, at not to exceed the rates herein mentioned."

This statute has been held to be constitutional and valid by the Supreme Court of Montana in a case involving the validity of the very contract which defendant in error seeks to disavow for the purpose of recovery in the present action. Hersey v. Neilson et al., 47 Mont. 132, 131 Pac. 30, Ann. Cas. 1914C, 963.

The contention presented here is that, notwithstanding the illegality of such contract, the plaintiff is entitled to recover the property delivered to the county, or rather the value thereof; the county having converted the same to its own use.

It will be premised that the plaintiff's contract was and is illegal and void because prohibited by law. The law requires the commissioners of the county to contract with some newspaper of the county, and the newspaper contracted with to sublet, if at all, to some newspaper of the state. The requirement is a prohibition against contracting with any other parties than those specified, and any contract in derogation thereof is nugatory and void.

"The general principle," says the Supreme Court of California, "is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction malum in se, or which is prohibited by statute, on the ground of public policy." Swanger v. Mayberry et al., 59 Cal. 91, 94.

And the Supreme Court of the United States has expressed itself thus:

"The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield, in Holman v. Johnson, 1 Cowper, 341, decided in 1775, that: 'The objection that a contract is immoral or illegal as between the plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: Ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.' The cases upholding this doctrine are numerous and emphatic. Indeed, there is really no dispute concerning it." Pullman's Car Co. v. Transportation Co., 171 U. S. 138, 150, 18 Sup. Ct. 808, 43 L. Ed. 108.

[2] It is a doctrine of the courts, however, now well established, that sanction will be given a cause of action proceeding as for quantum meruit, or for recovery of property or in trover, where the property has been converted, aside from the contract and independent thereof, where the contract is merely malum prohibitum, not malum in se nor involving moral turpitude, and does not contravene public policy, and where the statute imposes no penalty for its infraction. This upon the principle that the courts will always try to do justice between the parties where they can do so consistently with adherence to law. Thus it was held, in City of Concordia v. Hagaman et al., 1 Kan. App. 35, 41 Pac 133, that:

"In the absence of a penal prohibitive statute, on grounds of public policy alone, an express contract entered into between the mayor and council of a city of the second class and one who is at the time a councilman of such city, for the performance of services for the city, will not be enforced. Such contract, while not absolutely void, may be avoided by the city, at will, so long as it remains executory; but when it was entered into in good faith, was for the doing of lawful and necessary work for the city, and has been, without objection, fully executed, the city receiving and retaining the benefit thereof, a recovery may be had on the quantum meruit for what the services were reasonably worth."

See, also, Brown v. City of Atchison, 39 Kan. 37, 17 Pac. 465, 7 Am. St. Rep. 515.

Pelosi v. Bugbee, 217 Mass. 579, 105 N. E. 222, presents a case where a peddler made sale of a diamond ring to a party, under a conditional contract. The ring was subsequently pledged to a pawnbroker. The contract not having been complied with, the peddler sued to recover the property. It was contended that he, being without a license when he sold the ring, could not recover. The action was not upon the contract, but independent thereof, and for the property, and it was said by the court:

"It is clear upon principle and authority that, while the plaintiff cannot enforce the illegal contract, he may maintain an action for conversion."

Parkersburg v. Brown, 106 U. S. 487, 503, 1 Sup. Ct. 442, 455 (27 L. Ed. 238), was a case for recovery against the city of certain realty which had been conveyed to a trustee as security for a loan by the issuance of bonds, which bonds it proved the city had no authority to issue, because the act under which the city authorities proceeded was declared unconstitutional. Of this state of the case the court said:

"There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely malum prohibitum, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose, the value of that which it has actually received."

So it was said in Chapman v. County of Douglas, 107 U. S. 348, 355, 2 Sup. Ct. 62, 68 (27 L. Ed. 378):

"As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in Marsh v. Fulton County, 10 Wall. 676, 684 [19 L. Ed. 1040], and repeated in Louisiana v. Wood, 102 U. S. 294 [26 L. Ed. 153], 'the obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' * * * The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld. The policy of the law extends no further than merely to defeat what it does not permit, and imposes upon the parties no penalty. It thus falls within the rule, as stated by Mr. Pollock, in his Principles of Contract (264): 'When no penalty is imposed, and the intention of the Legislature appears to be simply that

the agreement is not to be enforced, then neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.'"

And again, in Pullman's Car Co. v. Transportation Co., supra, the court, quoting from 139 U. S. 60, 11 Sup. Ct. 489, 35 L. Ed. 69 (Central Transp. Co. v. Pullman's Car Co.), says:

"The courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it had no right to retain. To maintain such an action is not to affirm, but disaffirm, the unlawful contract."

See, also, Citizens' National Bank v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, and Rankin, Receiver, v. Emigh, 218 U. S. 27, 30 Sup. Ct. 672, 54 L. Ed. 915.

The Supreme Court of Montana has adopted this view of the law in principle. In State v. Dickerman, 16 Mont. 278, 40 Pac. 698, the court held that:

"Where a school district contracted for a loan on bonds which were afterwards declared to be void, it is liable for money advanced in good faith under the contract which was used for school purposes."

And in Morse v. Board of Commissioners, 19 Mont. 450, 453, 48 Pac. 745, 746, wherein one of the board of county commissioners sold certain property to the county, contrary to a statute prohibiting such an action, and subsequently the commissioner, whose name was Cain, sold the property to Morse, and Morse having his claim for the value of the property allowed by another board, the question arose whether he was entitled to his claim. Speaking to the subject, the court says:

"The district court held the contract of sale of the property between Cain and the county to be void, because prohibited by statute. This left the title to the property still in Cain. The court did not and could not, by such adjudication, confiscate Cain's property. If, after such adjudication by the district court, the county kept possession of the property and appropriated it to its use, it could not avoid paying the reasonable value thereof, because the contract by which it obtained it was ultra vires, illegal, and void."

[3] Now, while the statute in question directs the county commissioners to contract with some newspaper of general circulation, published in the county, for county supplies, and requires the newspaper receiving the contract to sublet to some newspaper or printing establishment in the state, a noncompliance with either of these provisions would not be an act malum in se, or contrary to public morals; nor is it attended with any penalty because an infraction of the law. And, the county having possessed itself of the supplies, and appropriated them, so that it cannot return them in kind, we are impelled to the conclusion that it is liable in conversion upon the action here instituted; not upon the contract, but independent thereof, for the value of the supplies.

Affirmed.

SHAFER et al. v. SPRUKS.

(Circuit Court of Appeals, Third Circuit. May 8, 1913.)

No. 1699.

1. EQUITY ⊂=66—MAXIMS—DOING EQUITY.
He who seeks equity must do equity.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188-190; Dec. Dig. ⊂=66.]

2. CORPORATIONS ⊂=477—BOND ISSUE—ULTRA VIRES.
Where the stockholders of a corporation authorized the directors to arrange the details and to secure a loan by bonds and a mortgage on the property of the company, and the directors authorized the executive committee to have proper papers drawn and executed for the bonding of the company and to secure the mortgage and bonds, the provision made by the committee for a lien upon the company's after-acquired property was not, as a matter of law, an unwarranted act, instead of a discretionary detail.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857-1863, 1865-1869; Dec. Dig. ⊂=477.]

3. CORPORATIONS ⊂=426—BOND ISSUE—ESTOPPEL TO SET UP ULTRA VIRES.
Assuming that the act of the executive committee of a corporation in providing that a mortgage should be a lien upon its after-acquired property was unwarranted, the corporation which received the bonds reciting such lien from the trustee-mortgagee, negotiated them at par, paid the interest coupons, and used the proceeds for the payment of a debt to one of its officers, who ten years later borrowed from a bank upon the bonds as collateral, was equitably estopped as against such bank from averring a want of authority to create the lien on the after-acquired property, and had no standing in a court of equity to remove the cloud of such lien from after-acquired property.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702-1704, 1707, 1708, 1710-1716; Dec. Dig. ⊂=426.]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; C. B. Witmer, Judge.

Bill in equity by David Spruks, receiver of the Lackawanna Dairy Company, against H. C. Shafer, trustee, and the Scranton Savings Bank. From a decree confirming a master's report finding for complainant, the defendant bank appeals. Decree reversed, and record remanded, with direction to dismiss the bill.

Samuel B. Price, Cole B. Price, and John H. Price, all of Scranton, Pa., for appellant.

George D. Taylor, of Scranton, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below David Spruks, receiver of the Lackawanna Dairy Company, an insolvent corporation of West Virginia, brought a bill in equity against H. C. Shafer, trustee, for an issue of bonds under a mortgage given by said company and against the Scranton Savings Bank, a corporation of Pennsylvania, the owner of such bonds. The bill sought to remove a

cloud on parcel No. 2 of the insolvent company's real estate, which the bank asserted by reason of an alleged lien thereon of its bonds. The case was referred to a master, whose report, holding no such lien existed, was confirmed by the court. Thereupon the bank sued out this appeal.

The facts are not in dispute. On October 8, 1899, the stockholders of the dairy company authorized the company to borrow $20,000 "and that the board of directors of said company be authorized to arrange the details and direct the officers to secure the same by bonds and mortgage upon the property of the said company." On the same day the directors resolved:

"That the board of directors authorize the executive committee to have the proper papers drawn and executed for the bonding of the company in the sum of $20,000, and that they also be authorized to secure the mortgage and the bonds for the same amount."

In pursuance thereof the executive officers executed the $20,000 bonds here involved, which bonds, after reciting that they were secured by the mortgage, made this statement:

"Which mortgage covers all the real estate, machinery, plant, fixtures and equipment of every description now owned or hereafter acquired by the Lackawanna Dairy Company, and all its franchises, rights and privileges."

The bonds were also indorsed with the certificate of the trustee to whom the mortgage was given to the effect:

"That this bond is one of a series of two hundred bonds of one hundred dollars ($100) each, referred to in the within mentioned mortgage, executed to the undersigned trustee named therein."

In point of fact the mortgage, whether purposely or by mistake does not now appear, contained no provision covering after-acquired property. These bonds were, on June 9, 1900, used at par by the company in part payment of a loan previously made to it by L. A. Lange, one of its officers. Subsequently Lange, on July 11, 1910, borrowed from the Scranton Savings Bank $7,800, the latter accepting and still holding said bonds as collateral for the loan. Subsequent to the giving of the mortgage, which covered the ground on which the company's dairy was located, the company acquired the adjoining lot of ground, referred to above as parcel No. 2. On the receiver attempting to sell this tract, the savings bank asserted, on such after-acquired property, the lien averred in its bonds to be embodied in its mortgage. Thereupon the receiver filed this bill to remove the cloud of the asserted lien. It will be noticed that the rights of purchasers or subsequent incumbrancers are not here involved.

[1] As the receiver simply stands in the dairy company's shoes, the case is one between that company and the holder of its bonds. Moreover, it is the dairy company that is here seeking relief in a court of equity, a right to resort to whose aid is always based on that golden rule of all equitable procedure, that he must do, who seeks, equity.

[2] Now the facts of this case, as noted above, are that the company, by its executive officers, executed these bonds; made them

payable to bearer; had them certified by the mortgage trustee as being secured by a concurrent mortgage covering after-acquired property; used such certified bonds for their full face value to pay its debts; allowed them to stand for ten years unchallenged; ratified them by paying the attached coupons; and, after allowing them to stand thus accredited in the hands of the original holder, has made it possible for the savings bank to invest its funds therein. The mere statement of these facts discloses the inequitable character of the dairy company's demand. While enjoying the fruits of its officers' acts, it now seeks to disavow that to which the fruit owes its existence. To justify a result so inequitable it interposes the plea of ultra vires and want of corporate authority in its executive officers to include after-acquired property as subjects of lien. We are pointed to no authority which constrains this court to hold that the provision made by executive officers for a lien on after-acquired property was, in view of the broad character of the resolutions of the stockholders and the directors, an unwarranted act. The placing of after-acquired property under the lien of a mortgage is a common provision in such instruments. And in view of this it may with much force be contended that, in the broad terms of the stockholders' resolution authorizing the board of directors "to arrange the details" and to secure the same "upon the property of the said company," there was no qualification as to the nature of the details or restriction to present, as distinguished from after-acquired property. So, also, the resolution of the board was of the most general scope, for thereby the executive officers were directed "to have the proper papers drawn and executed for the bonding of the company." As we have said, no authority goes to the length of constraining us to hold, as a matter of law, that under these broad powers the inclusion of after-acquired property under a lien was an unwarranted and unlawful act, and not a discretionary detail.

[3] Assuming, however, for present purposes, that the act of the executive officers in stipulating for a lien on after-acquired property was unwarranted, the fact still remains that the company, after receiving the bonds from the trustee-mortgagee, not only negotiated them but received and used the proceeds. As noted above, no rights of third parties are here involved. The case is one between the original parties, the obligor, and the holder of the bond. Under such conditions and with the obligor receiving and still retaining the par proceeds of the bonds, it has no standing to invoke the aid of a court of equity to repudiate and disavow the act which secured the retained benefit from its obligee. This is in accord with the general salutary principle that a principal cannot retain the benefit of ultra vires acts and at the same time repudiate them; for, if, as held in Chapman v. Douglass, 107 U. S. 355, 2 Sup. Ct. 62, 27 L. Ed. 378, a legal liability springs from a moral duty to make restitution, it logically follows that a failure to make such restitution creates an equitable disability in him who inequitably retains. We therefore hold that the dairy company, having appropriated the full proceeds of these bonds which contemplated a lien on after-acquired property, is equitably estopped

from averring a lack of authority to create it and has no standing in a court of equity to remove the cloud of such lien from parcel No. 2.

The decree below is therefore reversed, and the record will be remanded, with directions to dismiss the bill at the costs of the estate.

THE PLYMOUTH.

THE LEHIGH & WILKESBARRE COAL CO. NO. 11.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

Nos. 295, 296.

NAVIGABLE WATERS ⟸24—OBSTRUCTION BY WRECK—DUTY OF OWNER TO WORK.

Res. March 2, 1868, No. 16, § 1, 15 Stat. 249 (Comp. St. 1913, § 8452), authorizes the Lighthouse Board, when in their judgment deemed necessary, to place a light vessel or other suitable warning over any wreck. Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. 1913, § 9920), requires the owner of any vessel wrecked in a navigable channel to mark it with a buoy or beacon during the day and a lantern at night until its removal. *Held*, that the owner of a vessel sunk in the Hudson river fully complied with the requirements of this statute by applying for and securing the services of the Lighthouse Department to mark the place of the wreck, and could not be held responsible for the result of misplacing a buoy by the Department, which it had no authority to move, even though it paid the Department for the service.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 66; Dec. Dig. ⟸24.]

Appeals from the District Court of the United States for the Southern District of New York.

For opinion below, see 220 Fed. 348.

Haight, Sandford & Smith, of New York City (H. M. Hewitt and W. Parker Sedgwick, both of New York City, of counsel), for appellant.

J. T. Kilbreth, of New York City, for appellee Lehigh & Wilkesbarre Coal Co.

James J. Macklin, of New York City (De Lagnel Berier, of New York City, of counsel), for The Plymouth.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. June 6, 1913, the tug Plymouth, with a hawser tow of three coal-laden barges in one tier, was passing up the North River along the Red Hook anchorage grounds bound for Boston via Buttermilk channel in the East River and Long Island Sound. Her master, seeing a wreck buoy to the west and north of permanent buoy No. 14, undertook to pass between them. In doing so, barge No. 11, which was the port barge in the tier, ran over the bow of barge No. 22, which had been sunk on the morning of June 3d, while in tow of the tug Sachem, in a collision between that tug

and the steamer Eddie, and was lying across the stream. The Lehigh & Wilkesbarre Coal Company, owner of barge No. 11, filed a libel against the Hartford & New York Transportation Company, owner of barge No. 22, charging it with negligence in not properly marking the wreck. The Hartford Company filed a cross-libel for damages to the wreck, charging the Lehigh Company with negligence in towing barge No. 11 over it.

The proofs showed that the Hartford Company kept a tug by the wreck to warn navigators from the time of the collision until the afternoon, when the Lighthouse Department at its request, placed a gas burning buoy there. The Hartford Company did not abandon barge No. 22 and promptly raised her after the accident. The government made a charge to the company for buoying the wreck.

The District Judge found that the navigation of the Plymouth was not negligent, dismissed the libel of the Hartford Company, and held it liable to the cross-libelant for damages sustained by barge No. 11, on the ground that the buoy was placed so far to the westward of the vessel, which was lying in an easterly and westerly direction, as to mislead navigators as to its location. He treated the government as the agent of the Hartford Company, because it had requested the Lighthouse Department to buoy the wreck, and had paid the usual charge for so doing. We agree with him in everything, but this last conclusion.

The act of March 2, 1868 (15 Stat. 249), reads:

"That the Lighthouse Board be, and they are hereby authorized, when, in their judgment, it is deemed necessary, to place a light vessel, or other suitable warning of danger, on or over any wreck or temporary obstruction to the entrance of any harbor, or in the channel or fairway of any bay or sound."

Section 15 of the act of March 3, 1899 (30 Stat. 1152), reads:

"Sec. 15. That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

It is quite obvious that if the Lighthouse Department had marked this wreck of its own motion, as it might have done, the Hartford Company could not have moved the buoy or interfered with it in any way, whether it thought it properly placed or not, and if the Hartford Company had itself buoyed the wreck the Lighthouse Department in the exercise of its governmental authority could have changed

the location of the buoy or replaced it with another. We think the Hartford Company fully complied with the requirements of the act of 1899, when it secured the services of the Lighthouse Department. No wiser or safer course could be taken than to rely upon the resources and competency of the Lighthouse Department in such case. It makes no difference in our opinion that the government made a charge for its service. It was all the same acting, not as the private agent of the Hartford Company, but in its sovereign capacity under the act of 1868, as agent for the whole public. The Hartford Company could not have ordered the buoy to be withdrawn, or have changed its location, or have controlled the Lighthouse Department in any way as a principal may control his agent.

There is no American authority on the subject, but we think The Douglas, 7 Prob. Div. 151 (1882), exactly in point. Under the Removal of Wrecks Act of 1877, the harbor master of the port of London had authority like that conferred by the act of 1868 on the Lighthouse Board. The Douglas was sunk in a collision as the result of the negligence of her master, who instructed a tug to request the harbor master to take care of the wreck. The harbor master promised to do so, but neglected to place lights for several hours, within which time the Mary Nixon, without fault on her part, ran into the wreck and sustained damage. It was held by the Court of Appeals that the master and mate of the Douglas had a right to rely upon the harbor master's doing his duty, and that the owners of the wreck were in no way responsible for the accident. Counsel seeks to distinguish this case on the ground that, unlike our act of 1899, the Removals Act does not expressly require the owner of a wreck in navigable waters to buoy her. But without any statute the law lays this obligation upon every owner who does not abandon a wrecked vessel.

The decree is modified, with costs of this court to the Hartford & New York Transportation Company, and without costs of the District Court to either party.

NEW YORK DOCK CO. v. DELAWARE, L. & W. R. CO.
DELAWARE, L. & W. R. CO. v. NEW YORK DOCK CO.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

Nos. 226, 227.

CONTRACTS ⇐189—CONSTRUCTION—LIABILITY FOR INJURY TO PROPERTY OF THIRD PERSON IN PERFORMANCE.

By a contract by a dock company to transfer cars of a railroad company across New York Harbor on its car floats, it was made absolutely liable for injury to property in transit until its floats should be brought to the float bridges of the railroad company, after which the cars were to be removed by the railroad company. *Held* that, in the absence of any such provision for absolute liability on the part of the railroad company, it could only be held liable for injury to cars and property of another company on a float, occurring while removing its own cars, on the ground of negligence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 811-845, 900-902, 905; Dec. Dig. ⇐189.]

Appeals from the District Court of the United States for the Southern District of New York.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Roscoe H. Hupper, both of New York City, of counsel), for appellant.

A. J. McMahon, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. May 29, 1912, the New York Dock Company loaded on its car float No. 6 14 cars to be delivered at the float bridges of the Delaware, Lackawanna & Western Railroad Company and of the Erie Railroad Company in the harbor of New York. The float was 240 feet long, 40 feet beam, with three tracks; the middle track being the shortest and connectible with either of the outside tracks by a switch. There were five cars on the port track, four on the middle, and five on the starboard—the first two on the middle and the first two on the starboard track being destined for the float bridge of the Delaware, Lackawanna & Western Railroad Company, respondent, at Hoboken; the remaining ten to the float bridge of the Erie Railroad Company. The float arrived at Hoboken when the tide was high, so that the float bridge, being a pontoon, was much higher than the deck of the car float. From this moment on, under the agreement between the companies, the duty of discharging the cars consigned to the railroad company rested solely on it.

In accordance with the usual practice the railroad company's locomotive, weighing some 80 tons, backed down on the south track of the float bridge, lowering it so that the toggle pins on the port corner of the car float could be inserted in the toggles on the float bridge, then went ahead, switched onto the track on the north side of the float bridge, and came down to the car float so that the toggle pins on the starboard corner of the car float could be inserted into the toggles of the float bridge. The two toggle pins in the middle of the car float were then made fast in the same way. Then the servants of the railroad company unbraked its two forward cars on the starboard track of the car float and uncoupled them from the three Erie cars behind them. The locomotive coupled onto them and pulled them up across the float bridge toward the yard. The float bridge, as it was relieved of the weight of the locomotive and of the two cars, rose in the water, lifting the bow and depressing the stern of the car float. All this was in ordinary course and to be expected. What was not to be expected was that the three Erie cars ran back, the last of them overhanging the stern of the car float, breaking in two, and discharging a large part of its load of bag coffee into the river.

The cause of the accident was unquestionably that these three Erie cars were not braked, and the question was whether this was due to the negligence of the libelant's servants in not braking them when the car float was loaded at its terminal, or of the respondent's in unbraking them when pulling off its cars at its float bridge. To recover the damages sustained, the Dock Company filed its libel against the Railroad Company, and the Railroad Company a cross-libel against

the Dock Company. Judge Mayer in the District Court found that the neglect was the Dock Company's in loading the cars, and accordingly dismissed the libel of the Dock Company, and directed a decree in favor of the Railroad Company on its cross-libel. We think his conclusion on the testimony was right.

The Dock Company, however, conceding, for the purposes of argument, its negligence in loading the cars on the car float, takes the position that under the contract between it and the Railroad Company the latter was absolutely liable for anything that occurred after the car float arrived at its float bridge. This is founded upon articles 5 and 6, which read as follows:

"Fifth. The responsibility of the Terminal Company for all property to be transported westward shall continue from the time the same is received from the consignor or consignors thereof at its aforesaid premises, until the same loaded into cars shall have been brought to the float bridges of the Railroad Company at Hoboken in readiness to be attached thereto.

"Sixth. The said responsibility of the Terminal Company for the safety of all cars and freight shall be absolute and unqualified, without any exception or exemption whatever, without regard to the cause or occasion of the loss or damage, if any, and without regard to the degree of care or want of care exercised by the Terminal Company."

This agreement applied only to the cars of the Railroad Company, whereas the damage done was to the cars of the Erie Company. Moreover, it imposed no similar drastic liability on the Railroad Company as to its own equipment.

Finally, the Dock Company claims that the District Judge erred, as matter of law, in saying:

"In order that the Dock Company shall prevail, it must be satisfactorily established that one of the employés of the Railroad Company released the brakes on all of the five cars on the north track."

The contention is that the Railroad Company's servants, exercising ordinary care, would have discovered that the Erie cars were unbraked, and could have prevented the accident. It is sought to bring the case within the principle of Davies v. Mann, 10 M. & W. 546, and Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 558, 11 Sup. Ct. 653, 35 L. Ed. 270, that contributory negligence in an action at law will not prevent the plaintiff from recovering, if the defendant by the exercise of ordinary care could have prevented the consequence of the plaintiff's negligence. The theory is that in such case the negligence of the plaintiff did not contribute to the damage. The libelant's negligence was not merely contributory, but primary. Everything that occurred in the behavior of the float itself after it was made fast to the Railroad Company's float bridge was to be expected. The Dock Company was bound to know that the bow of the float would be raised as the Railroad Company's locomotive with its two cars went to the yard, and that the Erie cars, if unbraked, would run astern. On the other hand, the Railroad Company's servants had a right to assume that the Erie cars were properly braked and to act accordingly. If the defect had been perfectly obvious, as in the case of Radley v. Northwestern Ry. Co., 1 App. Cas. 754, the Railroad Company might have been held, not merely for half damages, as is usual in the admiralty,

but solely at fault, because the libelant's negligence would not have contributed to what occurred. But this was not the case. The danger could only have been discovered by inspection.

The decree is affirmed.

In re JOHN M. LINCK CONST. CO.

Petition of LARSEN.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 288.

BANKRUPTCY ⊂=444—PETITIONS TO REVISE—TIME FOR FILING.

Under rule 38 for the Second circuit (150 Fed. liv, 79 C. C. A. liv), providing that petitions to review orders in bankruptcy must be filed and served within 10 days after the entry of the order sought to be reviewed, where the District Judge on October 30th fixed the allowance to the trustee's attorney, and on December 3d a creditor obtained an order to show cause why the allowance should not be reduced, which the District Judge denied, a petition to revise subsequently filed was too late, as it should have been taken within 10 days after the original order was entered, and could not be extended by a motion to resettle.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–927; Dec. Dig. ⊂=444.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

Ferdinand E. M. Bullowa and I. M. Wormser, both of New York City (Lawrence E. Brown, of New York City, of counsel), for petitioner.

H. B. Singer, of New York City, for respondent.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. October 15, 1914, Henry B. Singer, as attorney for the trustee, filed with the referee his petition for a reasonable allowance for his services, together with his disbursements.

October 20th the referee reported that the trustee was entitled to $170.05 as commission, and that the petitioner was entitled to a greater compensation than double this allowance.

October 30th the District Judge fixed the allowance at $1,200 for services and $22.85 for disbursements.

December 3d Ludvig Larsen, a creditor, obtained an order upon the trustee to show cause why this allowance to his attorney for services should not be reduced to $650, which the District Judge denied.

This petition to revise comes too late. It should have been taken within 10 days after the original order was entered. Rule 38, Circuit Court of Appeals (150 Fed. liv, 79 C. C. A. liv). The time cannot be extended by a motion to resettle.

Petition denied.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

MEAD-MORRISON MFG. CO. v. EXETER MACH. WORKS.

(Circuit Court of Appeals, Third Circuit. July 8, 1915.)

No. 1911.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—HOISTING APPARATUS FOR COAL TOWERS.

The Norris patent, No. 722,613, for a hoisting apparatus for coal towers, in which, for the two separate geared engines of the prior art, are substituted direct acting engines mounted on one base, with the result of economizing space in the tower, increasing the number of buckets of coal hoisted in a minute from 3 to 5, while the engines are run at lower speed, and also neutralizing and so lessening the vibration which in the use of the geared engines was so extreme as to injure the tower, cause frequent breakdowns, and tire the operatives, discloses patentable invention, and covers a true combination of marked efficiency in which the engines co-operate to accomplish a new and much improved result.

2. PATENTS ⊂=328—INFRINGEMENT—VALIDITY.

Norris patent, No. 722,613, for hoisting apparatus for coal towers, *held* valid and infringed.

3. PATENTS ⊂=35—VALIDITY—HOISTING APPARATUS.

The contribution to an important industry of a device which lessens the strain and tension in a trying field of labor enhances its value and tends to show its highly useful operative character.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. ⊂=35.]

4. PATENTS ⊂=101—ADVANTAGES NOT DISCLOSED IN SPECIFICATION.

Where the disclosure in a patent is sufficient to enable those versed in the art thereafter to use the patented device, the requirements of the law are fully satisfied, without claiming every advantage such device may have. Very often subsequent use shows that claimed advantages did not materialize, or brings to light unsuspected merits, and the fact that there is no mention in a patent of what later appears to be the most striking advantage should not serve to defeat it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. ⊂=101.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Chas. B. Witmer, Judge.

Suit in equity by the Mead-Morrison Manufacturing Company against the Exeter Machine Works. Decree for defendant, and complainant appeals. Reversed.

For opinion below, see 215 Fed. 731.

Emery, Booth, Janney & Varney, of Boston, Mass. (Thomas B. Booth, of Boston, Mass., of counsel), for appellant.

E. G. Siggers, of Washington, D. C., and A. L. Williams, of Wilkes-Barre, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This case centers on the presence or absence of invention in patent No. 722,613, granted March 10, 1903, to Almon E. Norris for hoisting apparatus. The novelty and utility of the device are clear. The court below, in an opinion reported at 215 Fed. 731, held the patent was invalid for lack of invention. From a decree so adjudging and dismissing the bill the owner of the patent appealed.

[1, 2] Taking the hoisting art, in which Norris' device has been widely used, as conveniently illustrative, we may say the proofs show that

prior to Norris' patent, motive power for hoisting coal in buckets from the hold of a vessel consisted of two engines, which were placed near each other on a platform located in a tower. Each of these engines was geared to the shaft of a hoisting drum. To this tower was attached one end of a boom, which could swing both vertically and horizontally. Mounted on the boom was a carrier or trolley, from which was suspended a coal-carrying bucket. The larger of these two engines, called the hoisting engine, controlled the movement of the bucket up and down, the other in and out. As the engines were geared to drums on which the hoisting ropes wound, they had to be run at high speed to enable the buckets to make the three trips a minute which was required to unload a cargo of coal with due dispatch. Such speed, coupled with the fact that the engines were restricted in size and weight by the smallness of the tower house floor, resulted in great and objectionable vibration of the tower, the character of which will be noted hereafter. The device of the plaintiff almost entirely eliminated this vibration, reduced the wear and tear of the engines, and increased the speed of unloading to the extent of five buckets a minute instead of three. This was accomplished by the simple expedient of nesting a trolley engine between the two cylinders of a hoisting engine and making the two engines a unitary structure. Mechanically this gave to each engine the combined weight and solidity of both, and made each of much larger power and weight than was possible before. Through this gain in weight direct instead of geared engines could be used and run at a lower speed, space was saved, wear and tear were lessened, and, what seems at first thought wholly impossible, the vibration caused by one engine was largely neutralized by that of the other engine. These several features are conclusively shown by the proofs. Thus the president of the City Fuel Company of Boston, which used both the prior and the patented types of engine, testified:

"To the direct engine there is scarcely any vibration. To the indirect, the vibration is very excessive. The vibration to the direct engine is scarcely noticeable, whereas we frequently have complaints from our men as to the excessive vibration from the geared engines, and have often heard the remark applied to a geared engine, 'This tower will shake your teeth out.' I have spent a great deal of time myself in our different towers, and am very familiar with the question of vibration, which I find so great in the towers with geared engines that I do not go into them any more without it being of extreme necessity; whereas I find a great deal of pleasure in going into our tower at East Boston, which has a direct engine, as it works so smoothly and with scarcely no vibration to the tower itself. * * *"

He further testified that with a direct acting engine five bucket trips a minute were made as against three with a geared engine, and that with larger buckets; that owing to the excessive vibration men only work a third as long with a geared as they do with a direct; that one tower equipped with direct engines handles practically three times as much coal as two towers equipped with geared engines. He testifies that this quick dispatch has enabled them to secure larger vessels and reduce their freight from 5 to 10 cents a ton. One of the foreman engineers of the New England Coal & Coke Company testified substantially to the same marked difference in hoisting capacity of the direct engine, and added:

"The vibration of the geared engine was tremendous. Well, to run a geared engine for 10 hours the vibration and shake would almost completely tire a man out at the end of that time; and, as regards trouble caused by the vibration, there were a great many breakdowns. The direct connected engines could be operated for 10 hours without tiring a man."

He testified these breakdowns occurred during discharges; that they were kept about all the time tightening the foundation bolts to keep the engine to the floor; that the steam pipes were broken; the different parts of the engine shaken apart while it was running, and the vibration broke parts of the tower. He said there were no breakdowns from vibration on direct engines, and as a reason said:

"I believe it to be on account of the slower speed the engine travels at, and both engines being mounted in the center of the tower, one on top of the other, and also the absence of gears."

An experienced designer and erector of coal-hoisting plants testified that it was difficult to hold geared engines on their beds, that all sorts of methods were tried, but they could not hold them; that this caused breakdowns. He says:

"They can do a great deal more work with the direct-connected type—I should say about 30 per cent. more with the direct-connected type, on continuous running. As a matter of fact, it is hard to run for any length of time with the geared engines without breakdowns, but with the direct connected type we have no trouble that way. As a matter of fact, the men do run them on long stretches. They work night and day with the direct-connected type, and they were unable to do it with the geared type. For instance, take the plant down in Beverley; they start on a boat when she comes in, and they never stop until the boat is discharged, and that usually takes from 18 to 20 hours on the type of coal that they handle. These direct-acting engines were put in for that purpose, as they had the geared type previously to building their new plant, and the men could not stand to work night and day."

He further testified to an effort being made to increase the size of geared engines, but the vibration and repairs were such they were taken out. Referring to the lesser vibration on direct connected engines he testified:

"Of course the direct connected engine is run very much slower than the geared. That is one reason. Another reason, I think, is that because one engine is mounted upon the other—they are part of each other. For instance, if the large engine started and any vibration or sway started, the minute the trolley engine starts up this is all broken up and stops almost instantly."

He adds his opinion that if the trolley engine was mounted on a separate frame from the hoisting engine and had its individual fastenings to the floor of the tower, this would not accomplish the same purpose as when the two engines were mounted on the same base. The testimony of the superintendent of the Suffolk Coal Company of Boston is:

"Q. How severe was the vibration caused by the separately mounted geared engines? A. The vibration caused from the separately mounted general engines was so great that it was practically impossible to keep the engines fastened to the floor as well as the levers and the connections. The tools and other articles about the tower had to be fastened or hung up, or they would travel all about the tower. The operators of the engines were constantly complaining of lame arms, shoulders, backs, and necks. In some cases men refused to operate the engines until a barge was discharged. Q. What expedients did you employ in trying to keep the engines fastened to the floor? A. I added heavy timbers to the framework under the floor, to which

I fastened the engines by means of extra straps and bolts. Q. What effect did this vibration and shake have on the matter of breakdowns and repairs? A. It had the effect of breaking many parts of the engine and throwing other parts out of adjustment. In one case it broke the frame of the trolley engine. Q. What other parts would break under the vibration? A. The crank shafts, slides, piston rods, wrist pins. Q. Was your work of unloading interrupted by these breakdowns? A. Yes. Q. How often? A. It would depend on the length of the time required to discharge a barge. On a barge of small capacity we might have no breakdowns. On the larger barges, and when we had two or more, with no interval between to make repairs, we would have several delays. Q. How does the performance of the combined trolley and hoist engines which you now have compare with the performance of the separately mounted geared engines as regards breakdowns? A. The breakdowns have been entirely eliminated. Q. Has any delay been caused by breakdowns with the combined type of engine? A. None. Q. How does the repair expense and maintenance cost of the combined type of engine compare with that which you have experienced with the separately mounted engines? A. Up to the present time the repair expense has been practically nothing—75 cents. The cost of maintenance up to the present time is very slight. Q. What was the nature of the repair you refer to as having cost 75 cents? A. Replacing of a wire guard on one drum, which was broken by a loose strand of wire on one of the falls; that was not a working part of the engine. Q. Was this the fault of the engine? A. No. Q. What was the approximate cost per year of the repairs and maintenance in the case of the geared engines, as nearly as you can give it? A. Approximately $150 for repairs and parts made by machine shops, and about $500 a year for engineers' time when not hoisting coal in overhauling and making minor repairs. Q. How much, if anything, would you lose in premiums due to the breakdowns of the separately mounted geared engines and consequent delay in unloading vessels? A. About 30 per cent. of possible earnings. Q. How much would that amount to in dollars for each vessel unloaded? A. In the case of a barge on which we should earn three days' or $60 premium without working overtime, we usually earned two days' or $40 premium."

The superintendent of the Metropolitan Street Railway Company of New York testified:

"Q. What trouble did you experience with the first set of engines of the separately mounted type? A. Worn gears, renewing gears due to worn gears, disalignment of the engine, cracking of bed plate, shearing of holding-down bolts, serious vibration of the structure of the tower, disalignment of the tower, causing rivets and bolts to be sheared off, cracking cement floor which engine was bedded to, being necessary to regrout at different times. Q. What was the performance of the separately mounted engines as regard vibration or shake? A. Causing serious vibration, cracking bed plate, disalignment of engine, shearing bolts and rivets, cracking cement floor which engine was bolted to, causing regrouting. Q. How badly was the tower thrown out of alignment? A. So that the windows could not be raised or lowered. Q. How did the performance of the combined type of direct-acting engines compare with that of the first set of engines as regards the troubles you have just described? A. Practically passed away; in other words, we had no further trouble to speak of, outside of a general overhauling which any engine would demand at a stated time. Q. What did you observe was the physical effects on the men of operating the separately mounted geared engines? A. It was impossible to hold men in that particular line of work for any length of time, for they would report sick and finally would quit. * * * Q. From your experience with the two types of engines, would you be willing to employ the separately mounted geared type for a coal tower, provided the combined direct-acting type were available, and, if so, under what conditions? A. I would not install the separate type of engine, owing to the fact that the new type of engine decreased the cost of maintenance, and also decreased the cost of operation and decreased the vibration. Q. Would it have been practicable to have continued the business of the Metropolitan Street Railway power house with the separately mounted geared type of engines? A. It would not."

A foreman engineer of the New York Edison Company testified:

"If a man operates the geared machine 9 hours he has got as much work as he wants to do that day. A direct-acting machine may be operated 16 hours, and a man isn't as tired as he would be with a geared engine for 9 hours."

The foregoing, together with other evidence that might be quoted, sufficiently shows the difficulties in the old art and how effectually they were overcome by the engine of the patentee. These objections were recognized, but no one succeeded in overcoming them. The limitations of available space and the locations of the engines aloft made the question very different from the mere enlargement of a stationary engine located on a solid foundation to stop vibration. The device of the patentee was ingenious, original, and surprisingly effective. By uniting the two engines as he did the patentee saved space, while at the same time he utilized the combined bulk of both engines to insure the stability of each. This permitted direct coupling, with its resultant lower speed. At the same time the unitary foundation of the two engines served to neutralize the vibration of both engines and to make the resultant vibration not the sum of the aggregated co-operating vibrations of the two engines, but the difference between counteracting, opposing vibrations of the two. In other words in the complainant's device the vibration of one engine served to modify, counteract, and minimize the vibration of the other. This seemingly contradictory fact, namely, that the resultant of the vibration of two running engines when unified on one foundation, is rather the difference between, than the aggregate of, their individual potential of vibration, is established by the proofs. The experiment made by the witness Hains tended to show this also. He had two direct-acting engines mounted separately, and subsequently unified them. Operated at the same speed there was a very marked lessening in vibration as shown by the card tests when the same engines were mounted as a unit compared with their vibration when mounted separately. Where the engines were separately remounted he testified, "The vibration was so great that when I stood upon the platform I was practically unable to hold my footing." When they were unified he says, "I was not inconvenienced at all in holding my footing as I was with the other arrangement." This counteracting is testified to in a homely but convincing way by an engineer foreman as a thing he cannot explain, but nevertheless observed as a fact, as follows:

"Q. You have testified that one 'counteracts the other,' referring to the trolley and hoisting engine in answer to question 35. Please explain what you meant by this. A. I mean when you start your hoisting engine running, it causes vibration in the power; then start your trolley engine running—one counteracts the other and does away with a great deal of vibration in the tower. Q. Why does not the addition of the vibration produced by the operation of the trolley engine increase the vibration which had been started by the operation of the hoisting engine? A. I don't know; she don't act that way."

The court below, in substance, held that Norris' device was a mere aggregation and not a combination, and that in such aggregation each of the elements acted in the same way they did when sep-

arate. Herein, as it seems to us, the court fell into error. The invention of Norris does not lie in the tower, the hoisting appliances, the trolley, booms, or bucket. All of these perform the same functions they did before. His inventive disclosure lies in the engines, the motive power, which operates these extraneous, and from a patent standpoint, irrelevant features. The pertinent question in the issue of whether his device was an aggregation or a combination therefore is whether the two separate, individual engines of the prior art operate to perform the same separate individual function in Norris' device. If they did, if Norris has simply placed them in a different location, if he has simply made a larger type of engines and put them in more convenient relative position, and if in such position each engine continues to do the same thing, fulfill the same function and bring about the same result each did in its former relation, then the court was right in holding as it did that:

"Comparing the operation of a set of direct-acting engines located side by side, or in tandem, I discover no difference nor the accomplishment of any new useful results. It must be conceded that by mounting the small engine upon the larger, some space is economized, but this does not affect the functions of the structures or their effectiveness."

[3] We have already quoted at length the evidence of the marked effectiveness of the new device over the old. In the first place it has made possible very substantially quicker dispatch; it has substituted the hoisting of five buckets a minute for three; it has obviated breakdowns due to vibration; has made possible the use of larger vessels in the coal-carrying trade; and has reduced coal freights from 5 to 10 cents per ton. Nor are these features—great as they are—all that is useful in this device. For apart from all mechanical and operative benefits, the very important capacity it has in lessening the strain and tension of a very trying field of labor not only enhances its value in the regard of this court (Mott Iron Works v. Standard Sanitary Mfg. Co., 159 Fed. 135, 86 C. C. A. 325), but tends to show its highly useful operative character. Indeed, the uncontradicted evidence of the marked difference in labor conditions in the operation of the two devices in itself stamps them as operating in a wholly different way.

A study of the testimony in this case satisfies us that the difference in operating principle between Norris' device and former methods and its increase in motive efficiency consisted: First, in the substitution of direct for geared engines; and, second, in making such substitution possible by coupling the hoist and trolley engines in a unitary structure. That a direct-acting engine could be run at lower speed and with less vibration was a mechanical commonplace well known in the art, and that such direct-acting engines were adapted to both hoisting and trolley service was equally clear. But in the face of such knowledge the art continued its use of geared engines. Its reasons for so doing are manifest. Direct engines had to be heavier than geared ones, and when it came to increasing the already objectionable wear and tear of vibration by placing materially heavier engines in a high tower, the objection was so obvious that no such substitution was made. The art still went on using geared engines.

In the light of accomplishment it would seem a simple solution to substitute direct for geared engines, and to place them in tandem, the trolley within the legs of the hoist engine. But the answer to this is why, if it was so simple, did no one do it, and why, if it was so simple, did the Patent Office dignify such a simple mechanical step with the prima facies of invention involved in the grant of this patent? It is also noticeable that the exhibits of the defendant of alleged pertinent references comprise 25 American and 7 English patents addressed to the hoisting, dredging, and conveying art. This shows that the field was one in which inventive effort was active, but in the coal-hoisting art ineffective. And reflection shows the problem was not then so simple as now appears. In the first place the necessary location of the engines made the problem wholly different from that of merely increasing the size of engines located on the ground. In a way the difference was as marked as between marine and land engines. The change from geared to direct engines meant very substantial heavier weight, which added to the destructive effects of continuous vibration in a high tower. To load a high tower with the heavy additional weight of two direct engines was apparently prohibitive. So also the necessity for added floor space in the tower house presented another obstacle. For it is apparent that while additional floor space can be added to the breadth of the tower house floor, yet there was not the same latitude of expansion in its depth. In that respect the testimony is:

"Q. Is it more important to save space lengthwise the wharf or crosswise the wharf in economizing in space in the tower? A. Crosswise the wharf. Q. Why? A. For the reason that a wharf must be constructed to accommodate the barge, regardless of expense and attendant wharf privileges. The barge, in other words, determines the length usually of the wharf; the width of the wharf is controlled by the tower arrangement. The more narrow we can make our tower, the less we need make the width of our wharf, and consequently the high-priced wharf privileges are economized. Q. When you refer to the narrower you can make your tower you mean the narrower transversely to the wharf? A. Yes; that is it."

In that respect it is justly contended by counsel:

"For example, it will readily be seen that, with a trackway or wharfage 500 feet long, an increase in the width of the tower will not at all affect the pier or wharfage construction or shore privileges required. An increase of but one foot in the length of the tower, however, i. e., transverse the wharf, means an additional 500 square feet of wharfage, or perhaps expensive pier construction. Or, if the privilege of widening the wharf on the waterside cannot be had, it must be extended on the landside with so much added expense for the land and curtailment of a corresponding amount of adjacent storage facilities (Hains, p. 398, Rec. vol. 2), the equivalent perhaps of many thousand tons of coal."

In the face of these seemingly prohibitory limitations the patentee evolved his device which permitted him to do several things: First, he was able to get the added weight which enabled him to change his geared trolley engine into a direct trolley engine without such added weight being objectionable. Second, he was able to get the added weight which enabled him to change his geared hoisting engine into a direct-hoisting engine without such added weight being objectionable. Third,

he made possible the placing of these two heavy direct engines in tandem position, and thus carried his rapid-traveling ropes in direct lines to his sheaves and located all the machinery in the center line of the tower. This was all accomplished by locating the trolley engine within the legs of the hoisting engine and making both engines integral parts of a single base. This novel construction effected novel results. In the first place the direct action of his engines enabled them to run at a lower speed. Secondly, their lower speed caused less vibration, and their heavier structure correspondingly absorbed and minimized such vibration as was caused. Thirdly, the unifying of the engines on a common base gave to each engine the stability both of its own weight and of its fellow. Back of each was the weight of both. And, lastly, because of the union on a common base the vibration of the two engines when both were operated tended to absorb, counteract, or neutralize the vibration originated by the other. The trolley engine no longer operates separately and alone, but by its new conjoint relation to the hoisting engine it availed itself of its weight, and was thus enabled to dispense with its bearing, lower its speed, reduce its vibration, and at the same time use the vibration of its fellow to counteract its own. In a like way the separate hoisting engine of the old art was changed by its joinder to the trolley engine. The action of each modified and was essential to the utilization and operation of the other. To our mind, the interdependent action of the two constituted a marked example of a genuine co-operative union. Added to these operative relations we have striking commercial gains in five buckets being lifted instead of three, and the humane result in labor already referred to. In view of these facts and of other advantages testified to in the proofs, we are constrained to regard the device as novel, useful, and inventive. Indeed, to this case may be applied what was said in this circuit in Standard Co. v. Burdett-Rowntree Co. (D. C.) 196 Fed. 46, affirmed in 197 Fed. 743, 117 C. C. A. 206:

"It must be conceded that in the last analysis the patent does not do much more than move signals from one place to another without changing their function, but in doing this a real contribution has been made to the art, and a contribution, I think, of considerable value. By the grouping and arrangement that are said to be merely aggregation, it seems plain that an intimately related whole has in fact been evolved, in which each part has been made more effective to accomplish the common object, and in which this increased efficiency is due to the new relation of each part to the others. The total result is certainly greatly improved in the several particulars already referred to; and, while it is not a tangible product that has been improved, the new method of operation produces a clearly perceptible advance in the art. Elevators with one-point control arrangement of signals and motors are operated more rapidly, more easily, more safely, and more efficiently, and this greatly improved operation seems to be a new and beneficial result produced by a new combination and arrangement of known elements within the meaning of the language used in Loom Co. v. Higgins, 105 U. S. 580 [26 L. Ed. 1177]."

[4] We have not overlooked the fact that there was no mention in the patent of the lessening of vibration which now appears to be the most striking advantage of the patent. But we do not think the failure to disclose all the merits of a device should now serve to defeat it. Very often subsequent use shows that claimed advantages did not

materialize, and in the same way use sometimes brings to light unsuspected merits in a device. In either case the presence or absence of asserted advantages is of evidential weight in securing the patent. The gist of a disclosure is that it be so full as will enable those versed in the art to thereafter use the device, and where such use, practice, mechanism, formula, etc., are fully disclosed, the requirements of the law are satisfied, without claiming every advantage such device may have. If subsequent use discloses unsuspected additional benefits the patentee is the gainer during the life of the patent, and the public when it expires. It will also be noted that while this patentee only specifically stated two alleged advantages, viz.—"by this arrangement of engine I economize room in the tower and, what is more important, am enabled to place all the levers of the engine mechanism within easy reach of a single operator," he also adds:

"I have found from practice that a duplex engine constructed as above * * * has many advantages over the ordinary construction in which two entirely separated engines are situated at different parts of the tower."

After full consideration we are of opinion the court erred in not holding the patent valid. Its decree will therefore be reversed, and the case remanded, with instructions to enter a decree adjudging its validity and infringement.

SHERMAN, CLAY & CO. v. SEARCHLIGHT HORN CO.

(Circuit Court of Appeals, Ninth Circuit. August 9, 1915.)

No. 2519.

1. ACTION ⊂⊃69—RESTRAINING INFRINGEMENT SUIT—SUIT AGAINST SEVERAL DEALERS—JOINT OR INDEPENDENT TORT-FEASORS.

In a suit by the owner of a patent for a horn for phonographs, not a manufacturer of the patented article, to enjoin infringement and for an accounting by a dealer in horns manufactured under the patent selling to retailers and itself purchasing from a vendor purchasing from unknown manufacturers, the defendant was not entitled to a stay of the suit on the grounds that complainant, after its commencement, began a suit to enjoin defendant's vendor from infringement and for an accounting, that otherwise the present suit and other similar suits against purchasers from the same vendor would result in irreparable injury to such vendor, and that the recovery and satisfaction of judgment against such vendor would operate to release the article from the patent monopoly and leave defendant free to deal therein, since all dealers in such patented article without license from the patentee are tort-feasors who may be enjoined from dealing in such article, and since there may be as many causes of action and as many recoveries as there are joint tort-feasors, but only one satisfaction; and since the right to sue independent tort-feasors separately and prosecute to recovery and satisfaction in each case is also clear.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 744–751; Dec. Dig. ⊂⊃69.]

2. PATENTS ⊂⊃312—SUIT FOR INFRINGEMENT—BURDEN OF PROOF.

In a suit by the owner of the patent to enjoin its infringement by a dealer purchasing from one purchasing from unknown manufacturers, the burden is on the dealer to show that he is dealing with an article un-

der license from the patentee, or in articles from which the patent monopoly has been released or removed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊂=312.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit in equity by the Searchlight Horn Company against Sherman, Clay & Co. to enjoin infringement of letters patent, No. 771,441, for a horn for phonographs or similar machines granted to Peter C. Nielsen, October 4, 1904, with answer and petition by defendant to enjoin further prosecution of the suit, and for a stay. Petition denied, and stay refused, and defendant appeals. Affirmed.

See, also, 214 Fed. 86.

N. A. Acker, of San Francisco, Cal., and Hector T. Fenton and Frederick A. Blount, both of Philadelphia, Pa., for appellant.

John H. Miller, of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a suit by appellee, the Searchlight Horn Company, against Sherman, Clay & Co., to enjoin the infringement of a patent, and for an accounting for profits realized and damages sustained by reason of the infringement. The complainant is the owner of the patent, and Sherman, Clay & Co. is a dealer in phonographic horns manufactured under the patent, and is selling them to retailers, who sell to users. Sherman, Clay & Co. purchases the horns from the Victor Talking Machine Company, of New Jersey. The Victor Company purchases from certain unknown manufacturers. The complainant is not now a manufacturer of the patented contrivance. Previous to the institution of this suit, complainant sued Sherman, Clay & Co. at law to recover damages for the infringement, and was successful, and in the present suit a preliminary injunction was granted. Both the judgment in the law action and the preliminary injunction in the present suit have been affirmed by this court. The damages sought in the present case are such as the complainant has sustained, since the commencement of the law action, by the continuation of Sherman, Clay & Co. to sell the manufactured article notwithstanding the judgment. Sherman, Clay & Co. answers that it is a purchaser of the horns from the Victor Talking Machine Company, of New Jersey, in good faith, and petitions the court to enjoin further prosecution of the suit, and for a stay thereof, on the ground that the complainant has, subsequent to the commencement of the present suit, instituted a suit against the Victor Talking Machine Company, in the District Court of the United States for the District of New Jersey, to enjoin the Victor Company from infringement and for an accounting, and for damages sustained by reason of the infringement. It is further alleged by the petitioner that, if the Searchlight Horn Company be not restrained from the

further prosecution of the present suit and from bringing other suits of a like nature against purchasers from the Victor Company, irreparable injury will result by the loss to the Victor Company of its customers who, on account of the harassment, annoyance, and expense occasioned by the acts of complainant, will fall away from the Victor Company, and will cease to patronize it in the purchase of any and all machinery and accessories of every kind and nature incident to the talking machine business, and outside of and wholly foreign to the phonographic horns in question, the said Victor Company being a manufacturer and seller of talking machines and accessories thereto, and many other machines and apparatus in line therewith, which have nothing to do with and are wholly foreign to the phonographic horns of the alleged patent in suit; and, further, that it is the purpose of the complainant in bringing such suits to harass and annoy the customers of the Victor Company and the Victor Company itself. The district court denied the petition and refused a stay, and from the order and decree rendered in that respect the defendant appeals.

[1] There is but one question to be determined on this appeal, and that is whether the defendant is entitled to a stay of the proceedings in the present suit until the determination of the suit in New Jersey. The contention of appellant is that, it having purchased from the Victor Company, a recovery against the latter for damages for infringement in disposing of horns manufactured under the infringed patent would operate to release the devices dealt in from the patent monopoly, and henceforth appellant would be at liberty to deal therein as though the patent right had never attached. The proposition includes, not only a recovery against the Victor Company, but a satisfaction of the judgment, and comprises, of course, only such horns as Sherman, Clay & Co. may have purchased from the Victor Company, and for which the latter company shall have discharged damages for infringement in selling the patented article.

The case of Stebler v. Riverside Heights Orange Growers' Ass'n, 214 Fed. 550, 131 C. C. A. 96, decided by this court, is relied upon as supporting the contention. That was a case where a manufacturer of the patented device was sued by the owner of the patent, who was also a manufacturer, both by way of injunction and for an accounting for profits derived from sales and damages arising from infringement. The owner also sued 27 users of the patented device, who had purchased from the alleged infringer. Under the peculiar circumstances of the controversy, the seller being engaged in the sale of other commodities aside from the infringed article, and being amply able to respond in damages covering the entire amount sustainable, it was declared that the owner of the patent should be enjoined from further prosecution of the suits against the users, and from bringing any other suits against users who had purchased from the infringing seller, until the rendition of the judgment upon the master's report on the accounting. This upon the ground that a recovery against the seller would cover all the damages that the holder of the patent would be entitled to recover against either the seller or the user, and that therefore such recovery would operate to release the article from the monopoly of the patent in the hands of the user. That was a

case of a manufacturer who owned the patent against another manufacturer who infringed the patent both in manufacturing and selling. This is a case where the owner of the patent, who is not a manufacturer, is suing a seller for infringement and for an accounting. Whether the difference in the situation of the parties would entail a difference in the measure of damages, and likewise the amount of the recovery, we are not at this time called upon to decide. But, if it be conceded that the recovery would be the same in either case, and that a recovery against a prior seller would operate as a release of the device from the monopoly in the hands of a subsequent dealer in the same articles as previously sold, it must also be conceded that the owner has the lawful right to sue any dealer who is making merchandise of his patented articles. All dealers in such articles without license from the patentee are alike tort-feasors, and all are alike amenable to damages until the patentee is compensated for the damages sustained, and all may alike be enjoined from so dealing in such articles. There may be as many causes of action as there are joint tort-feasors, and as many recoveries, but there can be only one satisfaction. 21 Enc. Pleading and Practice, 806; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129. The principle was applied in Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768, a case for infringement of a patent. If the tort-feasors are independent, not joint, then the right to sue them separately, and prosecute to recovery and even satisfaction in each case, is equally clear. So that, upon either hypothesis, whether the Victor Company and Sherman, Clay & Co. are joint or independent tort-feasors, the plaintiff has the legal right to pursue either severally to a recovery. Then, if satisfaction be had in one case, it will be time enough to determine whether the infringed articles dealt in are released from the patented monopoly.

[2] It follows, therefore, that, in the present stage of the causes, the defendant in neither cause has a legal or equitable right to have the other cause stayed pending further prosecution. We think it can make no difference if some of the dealers are harassed and annoyed by suits against other dealers where the suits are all against dealers who are prima facie in equal wrong, and the burden is upon the dealer to show that he or it is dealing with an article under license from the patentee, or in articles from which the patent monopoly has been released or removed.

This disposes of the controversy. The decree of the district court denying the injunction prayed should be affirmed, and it is so ordered.

PACIFIC PHONOGRAPH CO. v. SEARCHLIGHT HORN CO.

(Circuit Court of Appeals, Ninth Circuit. August 9, 1915.)

No. 2518.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit in equity by the Searchlight Horn Company against the Pacific Phonograph Company for infringement of letters patent, No. 771,441, for a horn for phonographs or similar machines, granted to Peter C. Nielsen October 4,

1904, in which defendant petitioned to enjoin further prosecution of the suit. Petition denied, and defendant appeals. Affirmed.

See, also, 214 Fed. 257.

N. A. Acker and D. Hadsell, both of San Francisco, Cal., and J. Edgar Bull, of New York City, for appellant.

John H. Miller, of San Francisco, Cal., for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This case is akin to that of Sherman, Clay & Co. v. Searchlight Horn Co., 225 Fed. 497, — C. C. A. —, just decided. The appellant purchased from Thomas A. Edison, Incorporated. The latter company has also been sued by appellee in New Jersey. Neither company is a manufacturer of the infringing devices. The appellant petitioned for an injunction, the same as the defendant in the Sherman, Clay & Co. Case, making like allegations as to the seller being annoyed, harassed, etc., and the district court denied the injunction. The causes being of the same nature, the decision in the Sherman, Clay & Co. Case is decisive of this.

Affirmed.

WENDE v. HORINE.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915. Rehearing Denied May 25, 1915.)

No. 2067.

PATENTS ⊂=76—PATENTABILITY—PRIOR USE OR SALE—"ON SALE."

An offer to sell a new device, made to a prospective purchaser after the experimental stage has been passed, the invention reduced to practice, and the apparatus manufactured in its perfected form, is a placing "on sale" within the statute, and a valid patent for the device cannot be granted on an application filed more than two years thereafter.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92, 98; Dec. Dig. ⊂=76.

For other definitions, see Words and Phrases, First and Second Series, On Sale.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by Frank J. Wende against Melville F. Horine. Decree for defendant, and complainant appeals. Affirmed.

See, also, 191 Fed. 620.

Charles C. Bulkley and George E. Waldo, both of Chicago, Ill., for appellant.

John L. Jackson, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. Applications for letters patent for improvements in a manifolding apparatus were filed by appellee on July 3, 1897, and by appellant nearly a year and a half later, on December 21, 1898. The specific commercial demand that called forth the efforts of the parties was that of the Union Stock Yards at Chicago for

simultaneous fac simile scale records and certificates by some carbon copy process.

Interference proceedings were instituted between the parties. In support of his claim of priority, Wende relied upon two sets of exhibits. One set, however, was rejected, on the ground that, while it may have had features in common with Horine's exhibit, it did not show one element of the specific claims in issue. Wende's contention for a construction of the claims and the issue broad enough to make the second set of exhibits admissible was rejected. Priority was awarded to Horine on a construction found to have been reduced to practice not later than November 25, 1896. No appeal was taken from the decision of the Commissioner.

Thereupon Horine filed additional and broader claims, omitting therein the one element, the construction of which had caused the rejection of Wende's second set of exhibits, and was awarded a patent covering both the claims involved in the interference and the broader claims. Wende then amended his application, adopted the broader claims in Horine's patent, and succeeded in having a second interference proceeding instituted. Horine's motion to dissolve this proceeding on the ground of estoppel was overruled both by the primary examiner and the Commissioner; the latter, too, reversed the action of the former, who had granted the motion only because in his judgment no prima facie showing of priority had been made by Wende.

In this second interference Wende was successful in the Patent Office in establishing the priority of the second set of exhibits, which had not been received in evidence in the former proceeding, over Horine's original exhibit, on which the latter again relied; but, on appeal, the Court of Appeals for the District of Columbia reversed the Commissioner of Patents, on the ground that the broader claims of the second interference differed from the specific claims of the first interference in scope alone, and not generically, and that therefore the Commissioner's final unappealed decision in the first interference was res adjudicata of the issues involved in the second, and that, notwithstanding the rejection in the first interference proceeding of the second set of exhibits, and irrespective of whether such action was proper or erroneous, the priority, as against Horine, of the conception and reduction to practice therein of the broader claims could not be inquired into.

Wende thereupon filed his bill in equity under section 4915 of the Revised Statutes (Comp. St. 1913, § 9460) to secure a judicial declaration of priority of the claims involved in the second interference proceeding and an adjudication that he is entitled to receive a patent for his invention specified therein. This bill was dismissed in the District Court on the ground of identity of the issues in the two proceedings and estoppel to sue under section 4915, because of a failure to appeal from the decision of the Commissioner in the first interference proceeding.

In addition to res adjudicata and estoppel, several other defenses were made in the District Court, and are urged, on this appeal, in sup-

port of the decree. The conclusion which we have reached, that the invention was on sale more than two years before Wende's application was filed, and that he cannot, therefore, under any circumstances, obtain letters patent thereon, renders it unnecessary for us to express any opinion either on the defenses of res adjudicata and estoppel or on the merits of the respective contentions to priority.

While there is a strong controversy as to the ultimate conclusion, there is practically none as to the evidentiary facts from which it must be determined whether or not Horine's original exhibit, completed not later than November 25, 1896, and concededly embodying the invention covered by the claims now in question, was on sale prior to December 21, 1896. This apparatus, completed and delivered to Horine on November 25, 1896, was not in any sense a mere model or an experimental construction, but, as testified to, it was a "full-sized, complete, operative apparatus." And the demonstrations which he subsequently made were not, as in Elizabeth v. Paving Co., 97 U. S. 126, 24 L. Ed. 1000, for the purpose of experimenting, of determining whether or not it would operate practically and commercially, but solely for the purpose of showing its advantages and selling it to a prospective purchaser. No changes were in fact made in it, and the identical apparatus was subsequently installed and used.

Wende and Horine were making every endeavor to secure the adoption of their respective apparatus by the Union Stock Yards Company. On November 30, 1896, Horine took his perfected apparatus to the office of J. C. Denison, secretary of the Stock Yards Company, with whom both parties had been conferring for months, and to whom each of them had showed his work during the experimental stages, and demonstrated its operation before him and others. On December 12, 1896, Horine appeared at a meeting of the Live Stock Exchange committee with General Manager Sherman and other officials of the Stock Yards Company, to make further demonstrations. The committee then and there recommended its adoption, and Sherman instructed Denison to ascertain the cost of the necessary materials, as well as the compensation to be paid Horine. Denison on the same day requested Horine to submit a written proposition, and on December 16th wrote to him:

"It is now Wednesday afternoon, and the last time I saw you you positively agreed to give me figures as to what you would charge us for your new scale ticket device on Monday."

After telling him of Wende's device, and the effort to secure its adoption, he continues:

"My object is * * * to impress upon you the necessity of being here to-morrow and have the matter amicably settled."

The letter was signed "J. C. Denison, Secretary," and was inclosed in an envelope of "J. C. Denison, Secretary and Treasurer of the Union Stock Yards & Transit Company of Chicago." On December 17, 1896, Horine delivered to Denison a letter addressed to the Stock Yards Company, from which we quote the following passages:

"My proposition hereinafter made is intended to enable your company to use at all your live stock scales my new method of producing simultaneous

scale records and certificates. * * * Now, all I ask from your company as a reward for my ingenuity and persistence in your behalf and that of the general trade here, as part compensation for my labor, time, and expenses in perfecting the new system and its necessary apparatus, and in preparing the way for its introduction into this market, for my further services in directing and supervising the preparation of the required books and blanks for its practical adoption at all your scales on or about January 1, 1897, including the testing and selection of carbon sheets therefor, and for the use of all necessary mechanical apparatus for the purpose, which I agree to furnish and keep in repair at my own expense, including all necessary instruction to the weighmasters for using the same, * * * is $1,000 per year for three years, beginning January 1, 1897, payable quarterly in advance, with no increase, but a probable decrease, thereafter. This amounts to but a few cents per day for each scale."

In this letter he also pointed out the many advantages of his invention. On December 19th he delivered another letter to Denison, also addressed to the Stock Yards Company, in which he said:

"My proposition to your company under date of December 17, 1896, is intended to and does, but only in general terms, offer to your company, among other considerations, what is herein more specifically set forth, viz.: The right under my first patent already granted (U. S. patent No. 556,009, issued March 10, 1896), and under my forthcoming second patent, to manufacture or have manufactured at your own expense, as proposed by your secretary (but under my personal supervision and direction, as already stated), the necessary books and blanks which I designed and patented, according to the forms described and illustrated in my said first patent and forthcoming second patent, or any modifications of the same which your company may desire; also the further right, under my said U. S. patent No. 556,009 and forthcoming second patent, to use at all your live stock scales in this market all necessary mechanical apparatus of my invention, which I agree to have manufactured and to furnish at my own expense and to keep in repair, a full supply of the same to be provided by me (including a sufficient number of the certificate plates or scale ticket holders complete for each scale, so that no weighmaster need stop during any one day to reload the same with the certificate blanks before the day's business is over), together with the accessories belonging thereto (consisting of a stiletto and appropriate clip and filing board with detachable device for holding a second or reference record for each scale), and all necessary instruction to the weighmasters for using the same. You will therefore attach this letter to the written proposition already delivered you, the same to be read and considered as part of it."

It is clear that Denison, as secretary and treasurer of the Stock Yards Company, was acting for it in this correspondence and in these negotiations, irrespective of whether he had power or was expected to make the final contract. If Horine's letter amounted to an offer to sell the apparatus, then clearly these letters, standing alone, put it "on sale" within the meaning of the statute to the only immediate prospective customer just as effectively as a distributed price list puts an article on sale to the general public.

That Horine, when he delivered the letters of December 17th and 19th, which were clearly in reply to Denison's letter of the 16th, requested the latter to submit them to Mr. Sherman, the general manager, to place them in his hands for consideration, and that Denison, who was friendly to Wende, failed to do this, does not in any way lessen their effect as a placing of the apparatus on sale. Denison was not a mere messenger for Horine; he was the proper recipient on behalf of the Stock Yards of such offers, both because of his posi-

tion and because of the express verbal authority given to him by Sherman on December 12th.

The offer to the Stock Yards Company was complete at the latest when Denison, as secretary, received the letters; the date at which he caused the substance of their contents to be communicated verbally to Sherman is immaterial, and, of course, the delay of over nine months before Horine's proposition, modified in some respects, was finally accepted, can have no bearing on the case.

The statute does not require a "sale," but only a placing "on sale," prior to two years before the application. Under this language a completed sale, either with or without delivery, is not demanded; an offer to sell, made to a prospective purchaser after the experimental stage has been passed, the invention reduced to practice, and the apparatus manufactured in its perfected form, is a placing on sale within the statute. Covert v. Covert (C. C.) 106 Fed. 183; Dittgen v. Racine Co. (C. C.) 181 Fed. 394. We do not share the doubt expressed on this point in McCreery Eng. Co. v. Massachusetts Fan Co., 195 Fed. 498, 502, 115 C. C. A. 408.

Decree affirmed.

UNITED STATES v. VARIOUS TUGS AND SCOWS.

(District Court, S. D. New York. April 12, 1915.)

1. NAVIGABLE WATERS ⊜14—REFUSE—DUMPING IN HARBOR.

Act June 29, 1888, c. 496, 25 Stat. 209, as amended by Act Aug. 18, 1894, c. 299, 28 Stat. 360, forbidding the dumping of refuse in the tidal waters of the harbor of New York within the limits prescribed by the supervisor of the harbor, is valid, both under the police power and under the admiralty jurisdiction, even though the limits prescribed by the supervisor are beyond a marine league from the shore; and a permit to dump not less than four miles east southeast of Scotland Light excludes, by implication, dumping within New York Harbor inside of that point, and thus defines the precise limits within which such scows or boats may be discharged.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 31–42; Dec. Dig. ⊜14.]

2. NAVIGABLE WATERS ⊜14—DUMPING IN HARBOR—CRIMINAL PROSECUTION—PENALTY.

Under Act June 29, 1888, c. 496, § 1, 25 Stat. 209, and section 3, as amended by Act Aug. 18, 1894, c. 299, 28 Stat. 360 (Comp. St. 1913, §§ 9933, 9935), forbidding the dumping of refuse in the tidal waters of the harbor of New York within the limits prescribed by the supervisor of the harbor, and providing that any deviation from the dumping place specified in the permit shall be a misdemeanor, and that the owner and master of any scows or boats dumping in any place other than that specified in the permit shall be liable to punishment as provided in section 1, and that the owner and master of any tug towing such scows or boats shall be liable to equal punishment with the owner and master of the scows or boats, all parties concerned are liable, though there is but one wrongful act and but one penalty in amount is to be imposed.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 31–42; Dec. Dig. ⊜14.

3. STATUTES ⊂⊃241—CONSTRUCTION—PENAL STATUTE.
A penal statute is to be construed strictly, especially where a liability is imposed upon persons who may be in no way at fault.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322, 323; Dec. Dig. ⊂⊃241.]

4. NAVIGABLE WATERS ⊂⊃14—DUMPING IN HARBOR—CRIMINAL PROSECUTION —FEDERAL STATUTE.
Under Act June 29, 1888, c. 496, 25 Stat. 209, as amended by Act Aug. 18, 1894, c. 299, 28 Stat. 360, making it a criminal offense to dump refuse in the tidal waters of New York Harbor within prescribed limits, section 4 (Comp. St. 1913, § 9937) of which provides that any boat used or employed in violating the act shall be liable to the penalties imposed thereby and may be proceeded against by libel, where one of the boats is innocent the other may, under the ordinary admiralty procedure, be held primarily liable; and a vessel whose owner and master are neither at fault may be subject to the penalty.
[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 31–42; Dec. Dig. ⊂⊃14.]

5. NAVIGABLE WATERS ⊂⊃14—DUMPING REFUSE IN HARBOR—CRIMINAL PROSECUTION—PENALTIES—"DEFECTIVE MACHINERY."
In a prosecution under Act June 29, 1888, c. 496, 25 Stat. 209, as amended by Act Aug. 18, 1894, c. 299, 28 Stat. 360, against various tugs and scows for dumping refuse in the tidal waters of the harbor of New York within the limits prescribed by the supervisor of the harbor, a breeze, gradually increasing to a gale, was not sufficiently sudden to excuse the master of the tug and the master of the scows from not getting to safe anchorage before the necessity of dumping to save the scowman's life on account of the heavy seas, and the negligence, though not gross, was inexcusable, and subjected the tug and the scow to a single minimum penalty; and "defective machinery," declared to be no excuse, means machinery unsuited for the purpose or out of repair, and does not refer to a sudden breaking down of properly installed and inspected machinery, so that the dumping of a recently overhauled scow because the pawl suddenly broke would not be penalized; and where a scow was deliberately or through gross carelessness dumped within the limits, all the vessels were liable to a single penalty of $500; and where a scow was not given opportunity by the tug to dump, a single penalty would be imposed primarily on the tug; and where a scow was dumped because the scowman feared swamping, though the dumping was not due to any unavoidable situation, a minimum single penalty would be imposed payable primarily by the tug; and where a scow was dumped while in some peril of swamping, without intentional wrongdoing, a single minimum penalty would be imposed upon the scow; and where a dumping was due to too heavy a load, without intentional misconduct, a single minimum penalty was payable by the scow; and where a dumping was occasioned by the sudden breaking of one of the bridle chains on the day the scow had been inspected, it would not be penalized.
[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 31–42; Dec. Dig. ⊂⊃14.]
For other definitions, see Words and Phrases, First and Second Series, Defective Machinery.]

In Admiralty. Proceedings by the United States against various tugs and scows. Penalties imposed against part of the libelees, and libels against others dismissed.

AUGUSTUS N. HAND, District Judge. These are proceedings in admiralty to recover penalties against various tugs and scows for dumping "in the tidal waters of the harbor of New York or its adja-

cent or tributary waters" within the limits prescribed by the supervisor of the harbor.

[1] I have no doubt that the act of Congress forbidding such dumping is lawful both under the so-called "police power" and also under the admiralty jurisdiction even though the limits prescribed by the supervisor of the harbor are beyond a marine league from the shore. Any other interpretation of the national power would render the government impotent to protect the harbors and adjacent channels and waters, which it dredges at great expense, from dumping by the vessels, which are only enabled safely to navigate by reason of this governmental aid. Whether maritime jurisdiction as between nations extends beyond a marine league from the shore is not material for the present purpose.

Judge Hough in the case of United States v. Newark Meadows Improvement Co. (C. C.) 173 Fed. 426, held that the place where the dumping actually occurred was within the federal district of New Jersey, and accordingly quashed the indictment, but made the following observations on the nature of the jurisdiction in case proceedings should be brought in admiralty:

"This conclusion does not lessen or interfere with the national jurisdiction in admiralty. Admiralty causes may be promoted wherever the res or respondent is found and seized or served. A remedy in admiralty might have been given for the offense of illegal dumping; but this proceeding has no relation to admiralty. It is strictly criminal, and the place where the crime was committed governs jurisdiction."

In The Bombay (D. C.) 46 Fed. at page 666, Judge Benedict explained the nature of the proceeding as follows:

"The intention of the statute seems to me to be 'that the vessel is to be considered and treated as itself violating the statute,' * * * when the vessel is the instrument by means of which the violation of the statute is accomplished. Such legislation is not infrequent. It conforms to that feature of the maritime law which makes the ship liable for collision caused by the act of a seaman done, it may be, in violation of orders; liable to forfeiture for goods smuggled by means of her; liable for negligent navigating by a pilot compulsorily in charge of her. If that be the intent of the statute, I do not see why this case is not within it."

The act which forbids dumping provides that the owner or master of every towboat shall apply for and obtain from the supervisor of the harbor a permit defining the precise limits within which the discharge of such scows or boats may be made. I can see no reason to contend, in any of the cases under consideration, that the supervisor did not precisely prescribe the limits within which the scows should dump. In The Sadie (C. C.) 41 Fed. 396, Judge Lacombe held that a similar permit to those granted in the cases under consideration sufficiently specified the prohibited area. It seems to me that a permit to dump not less than four miles east southeast of Scotland Light ship excludes by implication dumping within New York Harbor and its adjacent or tributary waters inside of that point, and thus defines the precise limits. See U. S. v. Romard (C. C.) 89 Fed. 156.

[2, 3] The most difficult question to determine is whether the act intended to impose more than a single penalty. In Marsh v. Shute,

1 Denio (N. Y.) 230, and Palmer v. Conly, 4 Denio (N. Y.) 374, the New York courts held under circumstances analogous to the present that but one penalty should be imposed. Section 1 provides that dumping within the prescribed limits is forbidden "and every such act is made a misdemeanor." Section 3, as amended, reads as follows:

"And any deviation from such dumping or discharging place specified in such permit shall be a misdemeanor, and the owner and master, or person acting in the capacity of master, of any scows or boats dumping or discharging such forbidden matter in any place other than that specified in such permit shall be liable to punishment therefor as provided in section one * * * and the owner and master, or person acting in the capacity of master, of any tug or towboat towing such scows or boats shall be liable to equal punishment with the owner and master, or person acting in the capacity of master, of the scows or boats."

It is, of couse, true that a penal statute is to be construed strictly, especially as a liability is here imposed upon persons who may be in no way in fault. While I think the act is a valid exercise of the police power in furtherance of the public safety and welfare, I am disposed to construe it strictly, in view of the general canon of construction alluded to, and particularly because of the language quoted, which defines any deviation from the discharging place as "*a* misdemeanor," and every act of depositing material "*a* misdemeanor." While all parties concerned are liable, I think it is properly urged that there is but one wrongful act, and but one penalty to be imposed as prescribed by the statute. Any other construction would frequently lead to a grotesque result. If, for example, there should be several tugs with different owners and masters, the wrongful discharge of his load by a single scowman would cause the amount of the penalty to be determined by the accidental number of owners and masters of tugs rather than by the gravity of the offense of the culpable scowman. The Bombay (D. C.) 46 Fed. 666, fixed the penalty upon the basis of a single offense at $250.

[4] Section 4 provides that any boat used or employed in violating any provision of the foregoing act shall be liable to the penalties imposed thereby, and may be proceeded against summarily by way of libel. I agree with Judge Mayer, who has recently delivered an opinion in another case, that under these circumstances where one of the boats is innocent, the other one may, under the ordinary admiralty procedure, be held primarily liable.

It is urged by numerous claimants in the several cases that a vessel whose owner and master are neither at fault cannot be subject to a penalty. The Circuit Court of Appeals in Jaycox v. U. S., 107 Fed. at page 940, 47 C. C. A. 85, discussed this very matter, and held to the contrary. The following language of Judge Wallace is directly in point:

"It is urged in behalf of Jaycox, as well as in behalf of the other defendants, that the statute is beyond the constitutional power of Congress if it is to be construed as making a person who is innocent of criminal intent criminally liable for the act of another. We are aware of no authority supporting the proposition that the presence of a criminal intent is an essential element of a statutory offense. * * *

"The statute does not make any person criminally liable for an act committed without his participation. The participation of the master of the

towboat and the masters of the scows is found in the circumstance that they are assisting in the general undertaking in the course of which the forbidden act is done. Neither one of them is under any obligation to engage in such an enterprise, and, if he chooses to engage in it, he does so at the peril of incurring criminal responsibility if it is not pursued lawfully; and no principle of natural justice is violated by a statute which makes him responsible for the conduct of his coadjutor. The statute, in effect, says to the masters of the vessels, 'If you wish to assist in dumping refuse, you must do so at the risk of criminal responsibility for the acts of your associates as well as for your own.' The statute is a severe one, but this does not militate against its validity. Its stringency may be necessary to compel all those who engage in dumping refuse within the waters specified to see to it beyond peradventure that the regulations of the statute are complied with."

[5] With the foregoing general rules for guidance, I shall, therefore, proceed to dispose of the cases before me.

Steam Tug J. Rich Steers and Scows Delaware and J. J. No. 2.

H. Snowden Marshall, U. S. Atty., and John Hunter, Asst. U. S. Atty., both of New York City.

Charles Thaddeus Terry, of New York City, for claimant.

In this case the wind increased so that the scowman testified that he had to lighten two of the pockets in his scow by dumping, to save his life, on account of the heavy seas. This was done near the Scotland Light, some three miles inside the dumping grounds. The wind was blowing about 40 miles per hour. I do not hold that a sudden storm would be no excuse, and I should in fact regard dumping under such circumstances an unavoidable accident, but here a breeze, gradually increasing to a gale, was not sufficiently sudden to excuse the master of the tug and the master of the scows from getting to some safe anchorage before the danger arose and such a serious act as dumping the load became necessary. I do not think the negligence was gross, but the act, on the other hand, was not excusable. Under the circumstances I will impose a single minimum penalty of $250 upon the tug and scows.

Tug J. R. Steers and Scow No. 8.

H. Snowden Marshall, U. S. Atty., and Earl B. Barnes, Asst. U. S. Atty., both of New York City.

Charles Thaddeus Terry, of New York City, for claimant.

Here, though the scow had been recently overhauled and also inspected immediately before going out, the scow dumped because the pawl suddenly broke. Defective machinery is, by the terms of the statute, no excuse. I think, however, that defective machinery means machinery unsuited for the purpose or out of repair, and does not refer to a sudden breaking down of properly installed and inspected machinery. In this case, therefore, the libel should be dismissed.

Bouker No. 2 & Scows 72 H, 73 H. & 75 H.

H. Snowden Marshall, U. S. Atty., and Earl B. Barnes, Asst. U. S. Atty., both of New York City.

Foley & Martin, of New York City, for claimant.

I think in this case the scow either deliberately or by gross carelessness dumped short of the dumping grounds, and I shall impose a single penalty of $500 upon all the vessels.

Tug Princess and Scow Juno.

H. Snowden Marshall, U. S. Atty., and Harold Harper, Asst. U. S. Atty., both of New York City.

Foley & Martin, of New York City, for tug.

Alexander & Ash, of New York City, for scow.

The scow was not given opportunity by the tug to dump. The tug turned back hurriedly and the scow pockets leaked after it had passed beyond the dumping limits. As the carelessness does not seem to have been gross, I impose a single penalty of $250, to be paid primarily by the tug.

Tug Bismarck and Scow Montreal.

H. Snowden Marshall, U. S. Atty., and Earl B. Barnes, Asst. U. S. Atty., both of New York City.

Foley & Martin, of New York City, for claimant.

The scow appears to have dumped, according to statements of the parties, because the scowman feared swamping in a heavy swell. I am not satisfied that the dumping was due to any unavoidable situation, but the conduct was not seriously inexcusable, and I therefore impose a minimum single penalty of $250, to be paid primarily by the scow.

Tug Hazelton and Scow No. L. C. 1.

H. Snowden Marshall, U. S. Atty., and Harold Harper, Asst. U. S. Atty., both of New York City.

Foley & Martin, of New York City, for tug Hazelton.

Alexander J. Lindsay, of New York City, for claimant owner of scow.

In this case it is probable that the hatch came off and rendered the scow in some peril of swamping if the load was not lightened, and, as the scowman is dead and the owner is therefore deprived of his testimony, I shall impose the minimum single penalty of $250, as there was evidently no intentional wrongdoing. I do not think any competent evidence was adduced showing an unavoidable accident. This penalty should be paid by the scow.

Tug Bismarck and Scow No. 9.

H. Snowden Marshall, U. S. Atty., and Harold Harper, Asst. U. S. Atty., both of New York City.

Foley & Martin and Charles Thaddeus Terry, all of New York City, for claimants.

The dumping by the scow in this case was due to too heavy a load, but there was no intentional misconduct or gross negligence. I will therefore impose the minimum single penalty of $250, to be paid primarily by the scow.

Tug Princess and Scow Guiding Star.

H. Snowden Marshall, U. S. Atty., and Harold Harper, Asst. U. S. Atty., both of New York City.

Foley & Martin and Harrington, Bigham & Englar, all of New York City, for claimants.

At the trial I dismissed the libel in the case of tug Princess and scow Guiding Star because the scow had been overhauled the month before the accident and inspected that day. The dumping was occasioned apparently by the sudden breaking of one of the bridle chains, and I deemed the accident unavoidable.

My decision involves no intimation that these misdemeanors are to be construed as a joint act, and constitutes only a finding that but one penalty in amount shall be imposed. It may be imposed, however, either in admiralty or in a criminal proceeding upon the statutory offenders, as the court deems best. This construction enables the court to impose, in cases of slight negligence, a total penalty of but $250 against all parties, as was done in The Bombay (D. C.) 46 Fed. 666.

I may add to the foregoing that I have, in some cases, imposed a somewhat smaller penalty than I should do hereafter because the enforcement of the statute, except in cases of gross misconduct, has not been strict. I have therefore desired to give the owners of tugs and dumping scows some warning before imposing as severe penalties as may be looked for in the future.

In re McNAUGHT.

(District Court, D. Massachusetts. December 22, 1903.)

No. 6075.

BANKRUPTCY ⊂⇒136—SUMMARY IMPRISONMENT—CONTEMPT.

Bankrupt, being without means in his possession or control, may not be punished by summary imprisonment for contempt, because not paying over money to the trustee, as directed by the referee, though he may have committed one of the offenses mentioned in Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 (Comp. St. 1913, § 9613).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂⇒136.]

In Bankruptcy. In the matter of William W. McNaught, bankrupt. Bankrupt discharged from custody.

Arthur E. Burr, of Boston, Mass., for trustee.

Merritt & Merritt, of Boston, Mass., for bankrupt.

LOWELL, District Judge. The bankrupt has been held in jail pursuant to the order of committal made November 19th. Frequent representations have been made to the court during the past month that he is without means, and has not in hand or in his disposition any appre-

ciable part of the sum of money which the referee directed him to pay over to the trustee. In order to clear up the matter, if possible, the bankrupt's counsel, at my suggestion, offered as a witness the bankrupt's brother, who had been employed by him as a clerk up to the time of bankruptcy, and who has since carried on the same business, employing the bankrupt as clerk. If any considerable sum of money had been concealed, it seemed inevitable that this witness should know about it. If, on the other hand, notwithstanding his false testimony and the false entries in his books, the bankrupt was without means, his brother's testimony might be expected to make this fact clear. Unfortunately the brother's testimony was like the bankrupt's, though the bankrupt's counsel, both in public and in private, besought him to tell the truth. He also appeared either to have destroyed his books or to have omitted keeping any. Notwithstanding these circumstances, I have yet become satisfied, after much investigation and several conferences with the referee, that the bankrupt is now without means in his possession or control. Indeed, I am inclined to think that he did not conceal any considerable sum of money from the trustee. His incorrigible habit of lying has led the court, quite naturally, but erroneously, as I think, to believe that he had something important to conceal. The facts above stated put his discharge out of the question, and indicate that he has committed one of the offenses mentioned in section 29, Bankr. Act; but it is beyond the power of this court to punish those offenses by summary imprisonment for contempt. That he has been held for about a month is due solely to his own conduct, but that conduct does not justify further imprisonment, however it may be dealt with by proceedings strictly criminal. The value of the business transferred to the bankrupt's brother may doubtless be realized by the trustee, subject to the rights of the bankrupt's nephew, whatever these may be. The bankrupt will be discharged from custody without prejudice to the institution of further proceedings, if further evidence be discovered that he holds property concealed from the estate.

ERIE R. CO. v. SCHMIDT.

(Circuit Court of Appeals, Third Circuit. September 7, 1915.)

No. 1938.

1. COURTS ⟸347 — PLEADINGS — AMENDMENTS — STATUTORY PROVISIONS — STATE AND FEDERAL STATUTES.

Allowance of amendments to pleadings is governed by Rev. St. § 954 (Comp. St. 1913, § 1591), authorizing amendments, and not by state practice act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⟸347.

Federal courts following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hill, 27 C. C. A. 392.]

2. APPEAL AND ERROR ⟸1041—ALLOWANCE OF AMENDMENTS—HARMLESS ERROR.

Where the trial of an action for the death of a person struck by a train proceeded without objection on the theory that the decedent was at the time of the accident a traveler on the highway, though the statement originally filed alleged that decedent was at that time a passenger, the allowance of an amendment to the statement to conform to the proof was not prejudicial to the railroad company, prepared to meet the question of negligent failure to give statutory signals to decedent as a traveler, relied on as a basis for recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. ⟸1041.]

3. APPEAL AND ERROR ⟸1002—CONFLICTING EVIDENCE—QUESTION FOR JURY —VERDICT.

A verdict that a railroad company operated a train killing a pedestrian without giving the statutory signals, sustained by the testimony of four witnesses that they did not hear the statutory signals, though in such a position that the jury might reasonably believe that the signals would not have escaped notice, if given, but opposed to much testimony, is conclusive on the court on appeal, unable to say that the trial judge would have been justified in directing the jury to disregard the testimony of the four witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⟸1002.]

4. RAILROADS ⟸350—INJURIES TO PEDESTRIAN ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a pedestrian, struck by a train, was guilty of contributory negligence, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⟸350.]

5. RAILROADS ⟸330—INJURIES TO PEDESTRIAN ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Under P. L. N. J. 1909, p. 137, providing that, where any railroad installs any safety gates at a street crossing, or places at the crossing a flagman, any person approaching the crossing may assume that the safety gate will be duly operated, or that the flagman will guard the crossing, and that the failure of a pedestrian, injured by a train, to stop, look, and listen before passing, shall not bar an action, where safety gates were down because of the presence of a standing train, from which a passenger alighted, the passenger, on leaving the place and crossing the tracks at a public crossing, could assume that the flagman would properly guard him against another train, and that fact must be considered in determining the issue of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1071–1074; Dec. Dig. ⟸330.]

In Error to the District Court of the United States for the District of New Jersey; Thomas G. Haight, Judge.

Action by Blandina Schmidt, administratrix of Lucy Schmidt, deceased, against the Erie Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

George S. Hobart, of Jersey City, N. J., for plaintiff in error.

Alexander Simpson, of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges

McPHERSON, Circuit Judge. The plaintiff is the mother and administratrix of Lucy Schmidt, and recovered damages in the District Court for the death of her daughter—a young girl about 16 years old—who was killed on September 4, 1912, by an express train of the Erie Railroad Company on a grade crossing in the borough of Rutherford. The deceased had returned to Rutherford from Jersey City upon a local train, that arrived about half past 5 o'clock in the afternoon. After alighting at the station on the south side of the tracks, she walked westwardly upon the platform until she reached the intersection of Park street with the right of way; at this point she left the premises of the railroad, continued her progress westwardly at least to the middle of the street, then turned northwardly, crossed three tracks, and was struck and instantly killed upon the fourth and last. For the immediate purpose, no other facts need be taken into account; those just stated will make the railroad's first position understood, namely, that the trial judge should not have permitted the plaintiff to amend her statement of claim after all the evidence had been heard.

[1, 2] The ruling was made under the following circumstances: As originally filed, the statement alleged that the deceased was still a passenger at the time of her death; the company's answer disclaimed any knowledge of the subject, and in this state of the pleadings the case went to trial and all the evidence on both sides was taken. The court then ruled that the deceased had lost her status as a passenger at the time of her death, and had become a traveler on the public highway; whereupon the plaintiff asked and obtained leave to make the appropriate amendment, and the defendant duly excepted to the ruling. The amendment was not made until December, 1914, and as the New Jersey statute requires an action for death by negligence to be "commenced within 24 calendar months after the death of such deceased person," [1] the railroad company argued then, and argues now, that the amendment improperly introduced a new cause of action after the statute of limitations had run. We see no error in the allowance of the amendment, but in so holding we give no weight to section 24 of the New Jersey Practice Act of 1912 (P. L. p. 382), which empowers the court "upon terms, [to] permit before or at the trial the statement of a new or different cause of action in the complaint or counterclaim." In our opinion, the amendment was properly allowed under section 954 of the Revised Statutes (Comp. St. 1913, § 1591), which authorizes a federal court to allow either

[1] 2 Comp. St. 1910, p. 1908, § 8.

party to amend at any time "any defect in the process or pleadings upon such conditions as it shall in its discretion and by its rules prescribe." No such allowance should be held erroneous by an appellate court, unless material harm has thereby been done to the opposite party; and in the case now before us the defendant was not prejudiced in the slightest degree, for not only was no further evidence offered, but the notes of testimony show also that the trial had in fact proceeded without objection solely on the theory that the deceased was a traveler on the highway, so that the amendment merely made the record conform to the issue that had actually been contested from first to last. Moreover, the railroad's counsel expressly disclaimed being surprised by the amendment, saying:

"I am perfectly prepared to meet, at this or any other time, the question of the statutory signals to the plaintiff's intestate, as a traveler on the highway."

Under these circumstances, it is unnecessary to decide the formal question, whether the amendment did, or did not, introduce a new cause of action. Upon this question the plaintiff contends that the wrongful act on which the suit is based is the negligence of the defendant in failing to give such signals, either by bell or whistle, as are required by section 35 of the New Jersey act of 1903 (P. L. p. 663); contending, further, that this failure and nothing else was always relied on as the foundation of the claim, thus making immaterial the question whether the deceased suffered death as a passenger or as a traveler on the highway. For the reasons already given, we do not pass upon this contention; the railroad suffered no harm whatever by the amendment, and is in no position to press a purely formal objection.

[3] The next question that needs consideration is whether the evidence of the defendant's negligence should have been submitted to the jury. We need not say that a federal court of appeal does not decide which party has made out the stronger case on the facts. If the evidence for a plaintiff is such that the trial judge is bound to submit it, the verdict is binding in this forum. The remedy against a verdict that does not accord with the weight of the evidence is to move the court below for a new trial, but for some reason no such motion was made in the present case; the defendant chose to rely on its writ of error, and inter alia on the assignment that binding instructions should have been given against the plaintiff. We have read all the testimony with care, and we find that four witnesses testified that they did not hear the statutory signals, each of these witnesses being in such a position that the jury might reasonably believe the signals would not have escaped notice if they had been given. Danskin v. Railroad, 83 N. J. Law, 522, 83 Atl. 1006. It is true that much opposing testimony was offered, but the jury must have believed the four witnesses referred to, and we are unable to say that the trial judge would have been justified in telling the jury to disregard their testimony altogether.

[4] The remaining question has to do with deceased's contributory negligence, and especially with the New Jersey act of 1909 (P. L. p. 137) in its bearing on this subject. Other facts should now be

noticed: The deceased had been a stenographer and bookkeeper in a lawyer's office for nearly three months before her death, and during this period had been accustomed to ride on the same local train that carried her to Rutherford on September 4. She was a bright, intelligent girl, with good sight and hearing. The express train that struck her usually passed the station before the local train came in, but on the day in question it was a few minutes behind its schedule time. There are four tracks at Rutherford, numbered 3, 4, 1, 2, from north to south. The local train arrived on No. 1, and stopped in such a position that the engine occupied at least half of the Park street crossing, which is about 110 feet wide. Safety gates were down on both sides of the crossing, and on the north side a watchman was also on duty. When the deceased left the station platform and stepped upon the stones and planks of the crossing she was inside the gates on the south side, and the standing train prevented her from seeing any danger that might be approaching on tracks 3 or 4. She was familiar with the crossing, which had been in use by the public for 20 years at least, and the jury might reasonably infer that she would not be expecting the express train, since its schedule time would carry it past the station before the local train came in. The engine of her train was exhausting steam and was thus making a certain amount of noise. When she had passed around the front of the engine, she was only 17½ feet from the first, or south, rail of No. 3 track. The view eastward to her right was unobstructed for more than a mile; in front of her some people were crossing, while the flagman's attention seems to have been engaged in restraining others who were trying to cross in the opposite direction from East Rutherford toward the south, or station, side. At all events, he did not see her; he had signaled the express to come on, and the train passed over the crossing at 20 or 25 miles an hour. How soon the deceased saw the rapidly approaching train after she had walked past the standing engine is in doubt, but of course she must have seen it very soon; the distance was short, and several witnesses testified that she hesitated, or seemed bewildered, then started to run very fast, but failed to get across in time. It must be remembered that the verdict has established the fact that the express did not give the necessary signals, so that she was suddenly confronted by a dangerous situation, brought about by the defendant's negligence.

[5] Under these circumstances we cannot say that her contributory negligence was so clearly established as to require the trial judge to decide the question as a matter of law; but as his instructions on this subject were influenced by the New Jersey statute we are obliged to consider the applicability of that act. It is chapter 96 of 1909, and reads as follows:

"An act with reference to the degree of care necessary to be used by travelers over railroad crossings protected by flagmen or safety appliances or both.

"Be it enacted by the Senate and General Assembly of the State of New Jersey:

"1. Wherever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such crossing a flagman any person or persons approaching any such crossing so protected

as aforesaid, shall, during such hours as posted notice at such crossings shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription 'out of order' be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of [the] failure of the person injured or killed to stop, look and listen before passing over said crossing."

This statute has not been construed by the New Jersey courts, and its full meaning may not be entirely free from doubt; but so far as the facts of the present case require us to declare its meaning we think the proper construction is as follows: A railroad company may protect a crossing by a safety device, or by a flagman, or by both these means. If the device is not in order, due notice to that effect must be given; in the absence of such notice, an approaching traveler may assume that the device is in order and will be duly and properly operated. If a flagman is on duty, the traveler may assume that such employé will give sufficient warning of danger. And, if the traveler be nevertheless injured or killed, no action brought for such injury or death shall be defeated by the mere fact that the traveler did not stop, look, and listen. The safety gates play no part in the present controversy; admittedly they were in order and were down, but the fact that they were down did not necessarily mean that a train was approaching on track No. 3; the position of the gates might as properly be referred to the presence of the standing engine on track No. 1. For this reason the learned judge properly confined his instructions to the evidence concerning the flagman, and in effect he submitted to the jury the question whether upon all the evidence the deceased had herself been negligent, and he permitted them to take into account the assumption that the statute allowed her to make from the presence of the flagman. He told the jury distinctly that if the flagman did his duty the statute was not to be considered.

We find no error either in the fact, or in the manner, of such submission. In our opinion, the railroad is mistaken in supposing that the act compels the trial judge to submit to the jury every case of injury or death at a protected grade crossing in New Jersey. The evidence may establish contributory negligence so clearly that the judge would be bound to give the jury binding instructions in favor of the railroad. The act does no more than declare as a rule of evidence that in certain situations the mere fact that the deceased did not stop, look, and listen shall not of itself defeat recovery; but it does not attempt to lay down a rule that every grade crossing case where contributory negligence is alleged must be submitted to a jury. For example: A situation may easily be supposed where the warning of a flagman might be seen and recklessly disregarded, and in such a case the duty of the judge has not been changed by the statute. The Legislature has done nothing more than exercise its conceded power to regulate procedure; it simply provides that a plaintiff is not to be defeated unless more than a specified minimum of evidence be present.

This of course would bind the state courts, and we see no reason why the federal courts in New Jersey should not conform to the same procedure.

In the present case we think the facts recounted above justified the court in submitting to the jury the question of the deceased's contributory negligence, and as already stated we see no error in the manner of submission.

The judgment is affirmed.

REESE v. PHILADELPHIA & R. RY. CO.

(Circuit Court of Appeals, Third Circuit. August 2, 1915.)

No. 1958.

MASTER AND SERVANT ⊂⊃113—INJURY TO SERVANT—LIABILITY—SAFE PLACE TO WORK.

A railroad company, locating its tracks in a street in conformity with plans approved by the city, is not bound to anticipate that a fireman will lean out in a position of unusual danger while the engine is rounding a curve near which a car may temporarily be standing, and it is not negligent for failing to construct its tracks in such a manner as to guard against the death of the fireman, though the clearance between the tracks was about two feet less than the standard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224–227; Dec. Dig. ⊂⊃113.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. W. Thompson, Judge.

Action by Catherine C. Reese, administratrix, against the Philadelphia & Reading Railway Company. There was a judgment of nonsuit, and plaintiff brings error. Affirmed.

George Demming, of Philadelphia, Pa., for plaintiff in error.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The plaintiff's husband was a fireman in the defendant's service, and was killed on the night of November 18, 1912, while his engine was engaged in shifting cars on Front street in the city of Philadelphia. The suit is brought under the Federal Employers' Liability Act, and no question is raised about the applicability of that statute. The trial judge entered a nonsuit and refused afterwards to take it off, this refusal being the final judgment under the Pennsylvania practice to which a writ of error lies. The only question before us is whether the undisputed evidence permits the inference that the company was negligent in failing to provide the deceased with a safe place to work.

The engine on which Reese was the fireman was shifting cars from one point to another, and while engaged in this duty was obliged to enter sidings or switch tracks. In so doing it was compelled to pass around curves, and in all these movements it necessarily approached

any car that might be standing on an adjacent track. The particular negligence charged is that the defendant "negligently and improperly constructed and maintained said track upon which said deceased's engine and tender was running, and the adjoining track, * * * in too close proximity to each other." It appeared that the clearance between the tracks was about two feet less than the standard, but it also appeared that the sidings had been located under proper municipal authority, and had been in use for 15 years. The two straight tracks had been put down at some earlier period, and although there was no specific testimony on the point they also had evidently been located by authority of the city; for it was testified that the general method of procedure is for councils to pass an ordinance providing for such use of a city street, and then for the board of highway supervisors to examine and approve working plans that conform to the ordinance. Front street is near the Delaware river, and the sidings branch off from the main tracks and lead, not only to the wharfs, but also to the freight sheds and warehouses along either side of the street. The photographs in evidence as well as the testimony make it plain that the street is not of unusual width, and that the position of the tracks must have been influenced, if not determined, by considering the necessities and the convenience of vehicles and other traffic on a busy commercial highway.

The deceased was familiar with the situation, having worked regularly in the yard for about 2 months, and irregularly for some time before. On the night in question he undertook to get some drinking water from the tank of the locomotive for his own use, and incidentally for the use of the engineer. While doing this, he leaned out beyond the tender, and as he had chosen to draw the water while the engine was moving about 5 miles an hour, and moreover while it was moving around one of the curves where the clearance was least, his body came in contact with a car on the adjoining track, and received the injuries that caused his death. No question of contributory negligence is involved, but the nonsuit was properly entered if the evidence failed to prove the negligence of the company as charged in the foregoing quotation from the statement of claim.

In our opinion, the railroad company was not obliged in reason to anticipate his action at the place and under the circumstances in question, and therefore did not fail in its duty to provide the deceased with a reasonably safe place to work. The facts resemble so closely the situation in Railroad Co. v. Newell (C. C. A. 3d Cir.) 196 Fed. 866, 116 C. C. A. 428, that we need add little to the following extract from Judge Gray's opinion:

"Railroading is at best a somewhat dangerous employment, and requires and bespeaks reasonable prudence and care on the part of those employed in its conduct. Undoubtedly there are, in the general course of its business, specific places and situations in which employés are required to work, and there is a clear legal duty imposed upon the railroad company to keep these places safe for that purpose. The question, therefore, that arises in the case before us is, Was the space between the edge of the freight platform and the body of a freight car a place within which the plaintiff was required to work, and therefore to be kept reasonably safe for that purpose by the defendant? We think not. On the contrary, it was a place from which em-

ployés were excluded by the obvious situation. The freight platform was made for the convenience of loading goods onto cars and receiving goods from cars while standing on the siding. The platform, therefore, was a place upon which servants of the defendant were required to work, and which it was the duty of the defendant to make reasonably safe for that purpose. If such platform had been insecurely built, was not of sufficient width or dimensions to allow one to work thereon without danger, or, perchance, built so far from the siding as to allow one to slip between the platform and the cars, it might well be said that it was an unsafe place in which to work, for which the defendant would be liable. But it is not as to the platform as a place to work upon that the allegation of unsafety is made, but as to the space between the side of a freight car and the edge of a platform, in which no employé was required to work. Clearly the railroad company was not obliged, in considering the dimensions of that space, to provide for the safety of one who voluntarily placed himself therein.

"It was not only the right but the duty of the railroad company to provide freight stations and platforms for the convenient loading and unloading of cars. It concerns the public service with which a railroad company is charged. There is nothing to show that this platform, in its location or construction, was not built with due consideration and care, not only for the business to be accommodated, but, for the safety of those required to work upon it. Not only so, expert evidence was offered (and, as we think, mistakenly rejected by the court) to show that in the railroad business of the country there was a certain standardization as to the construction of such platforms in regard to their height and distance from the tracks, from which loading and unloading was to be conducted and to which the structure in question conformed. There is no evidence, however, to show that the plaintiff, or any other employé, was required to run along between these cars while they were moving, much less that he should do so while passing the freight platform in question, and incur the dangers of so doing. This platform was not a concealed object, or one difficult of observation, and the plaintiff unquestionably was familiar with its existence and location during the whole period of his long service. Not only was the space between the car and the platform obviously not a place in which the plaintiff or any other employé was required to work, in the manner in which he alleges he was working, or in any other manner, but there is no evidence that at any other time such work was required to be done in that space. There was nothing, therefore, in the situation which could suggest to the railroad company in constructing the platform in question, that it was encroaching upon or in any way affecting the safety of a place in which its workmen were expected to work. It provided a platform, the safety of which, as a place whereon its employés were required to work, it was its duty to protect. To hold that this space between the platform and the car was a place to which the obligation of the employer, to furnish a safe place in which to work, applied, would be to impose upon a railroad a liability of like kind as to every place or situation which could be called dangerous to those who placed themselves within its dangers, under circumstances however casual or unforeseen. Such places cannot be made safe as against accidental or unforeseen happenings. The operative requirements of a railroad prevent their being made so in the respect demanded by the plaintiff.

"Manifestly the numerous cases cited on behalf of the plaintiff, to show liability on the part of a railroad company, where structures of any kind are placed so near the tracks upon which trains are run as to endanger those operating said trains, have no application to the present case. The place where those operating the trains—the engineers, firemen, conductors and brakemen—are required to work is, of course, in and upon the train itself, and there can be no doubt as to the duty of their employer not to expose them unreasonably to dangers while operating the train on which they are employed."

We are unable to assent to the proposition that the railroad company was bound to foresee that one of its firemen might lean out in a

position of unusual danger while the engine was rounding a curve near which a car might temporarily be standing, and was therefore bound to construct its tracks in such a manner as to guard against an event so remote and so unlikely to occur. Moreover, the location of the tracks had the approval of the city, and while this may not be decisive it negatives at least the suggestion that their position was merely due to the railroad's own convenience.

The judgment is affirmed.

UNITED STATES v. FOOSHEE et al.

(Circuit Court of Appeals, Eighth Circuit. June 14, 1915.)

No. 4382.

INDIANS ⊜15—ALIENATION OF LANDS—VALIDITY.

Act April 26, 1906, c. 1876, § 22, 34 Stat. 145, provides that conveyances of land by the heirs of deceased Indians of the Choctaw and certain other tribes shall be subject to the approval of the Secretary of the Interior. F., an enrolled Choctaw Indian, devised land patented to him to D., who was an heir of F. and would have taken by descent an interest in the land had F. died intestate, but it did not appear that she was the only heir of F. *Held*, that a conveyance by D. without the approval of the Secretary of the Interior was valid, since, while an heir will take by descent rather than devise where the same estate that he would take by descent is devised to him, it did not appear that D. would have taken by descent the entire interest in the land given her by the will.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. ⊜15.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States against George A. Fooshee and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Archibald Bonds, of Muskogee, Okl. (D. H. Linebaugh and W. P. Z. German, both of Muskogee, Okl., on the brief), for appellant.

S. W. Hayes, of Oklahoma City, Okl. (George A. Fooshee and D. D. Brunson, both of Coalgate, Okl., and E. C. Motter and J. B. Furry, both of Muskogee, Okl., on the brief), for appellees.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

ADAMS, Circuit Judge. This suit was instituted by the United States in its capacity as guardian and trustee for the Choctaw Indians against George A. Fooshee and D. D. Brunson to cancel a certain conveyance made without the approval of the Secretary of the Interior to them by one Silvy Bond, a full-blood Choctaw Indian, of the following tract of land, to wit: The S. ½ of N. W. ¼ of N. E. ¼; S. ½ of N. E. ¼ of section 32, township 2 N., range 9 E.; and E. ½ of S. E. ¼ of section 1, township 2 N., range 9 E.

The facts of the case are these: John Frazier was a full-blood Choctaw Indian duly enrolled as such. On October 27, 1906, patents

were duly issued conveying to him the land in question. He died prior to April 8, 1907. At the time of his death he was over the age of 21 years. He left neither father, mother, wife, nor children surviving him. On January 17, 1907, he made his last will and testament, whereby he devised and bequeathed all of his property of every kind and description to his aunt Silvy Bond. Silvy Bond was a full-blood Choctaw Indian and duly enrolled on the rolls of that tribe. After the death of John Frazier, his will was duly probated. Defendants claim that by virtue of the will and its probate Silvy Bond became upon the death of John Frazier the owner of the entire legal and equitable title in and to the real estate in question. On April 15, 1907, Silvy Bond by warranty deed duly executed and acknowledged conveyed the land to the defendants George A. Fooshee and D. D. Brunson.

The foregoing are the facts as they appear in the bill and answer, and the cause was submitted to the District Court on the pleadings together with the following facts which were agreed to, namely:

"That the will of John Frazier and the order probating it are regular and valid; that Silvy Bond was an heir of John Frazier and would have taken by descent an interest in this land had John Frazier died intestate."

The court below dismissed the bill holding on the pleadings and agreed facts that Silvy Bond, as devisee under the will of John Frazier, had the power to alienate the land by her conveyance made on April 15, 1907, without the approval of the Secretary of the Interior.

From that decree the government appeals.

Under the Act of April 26, 1906 (34 Stat. 137), John Frazier had the capacity to devise his property by will, and the government in its brief states the proposition of law upon which it relies as follows:

"Where a will devises to the heir at law precisely the same estate that he would take by descent, his title by descent will have preference to his title by devise and the beneficiary will take by descent and not by devise."

This is undoubtedly the law. 4 Kent, Com. *506; Davidson v. Koehler, 76 Ind. 398; Ellis v. Page, 7 Cush. (Mass.) 161, and cases cited. The contention of the government is that Silvy Bond took by descent the same estate as was devised to her by the terms of the will; that the will therefore was inoperative, and her only title was by descent, as the heir of John Frazier; and that, as a result, her conveyance to the defendants without the approval of the Secretary of the Interior was by virtue of the Act of April 26, 1906, § 22 (34 Stat. 137), void. Is this correct? Does it appear that Silvy Bond would have taken precisely the same estate by descent from John Frazier as she secured by the will? The record discloses that upon the hearing of the case below it was agreed that Silvy Bond was an heir of John Frazier and would have taken by descent an interest in this land had John Frazier died intestate. There is no showing as to how many other heirs John Frazier left, and as a necessary result there is no showing that Silvy Bond would have taken by descent the entire interest in the land in controversy which is what she did secure by the will. She was therefore not brought within the rule in-

voked by the government's counsel, and the conveyance by her to the defendants Fooshee and Brunson was valid.

The decree of the District Court dismissing the bill as to these defendants is therefore affirmed.

KATZENMEYER v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. May 20, 1915.)

No. 2116.

INDIANS ⊂=34—SALE OF LIQUOR—STATUTES—CONSTITUTIONALITY.

It was within the power of Congress to enact Act Jan. 30, 1897, c. 109, 29 Stat. 506 (Comp. St. 1913, § 4137), making it an offense to sell liquor to any Indian, a ward of the government under charge of any Indian superintendent or agent, since federal guardianship is in full force as to both the persons and property of Indians living in tribal relations, though they may be citizens.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 60; Dec. Dig. ⊂=34.]

In Error to the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

George Katzenmeyer was convicted of selling liquor to Indians who were wards of the government and under the charge of an Indian agent of the United States, and he brings error. Affirmed.

Guy D. Goff, of Milwaukee, Wis., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. Plaintiff in error was convicted of selling liquor to Indians then and there wards of the government and under the charge of an Indian agent of the United States. The sole question presented on the writ of error is whether Act Jan. 30, 1897, c. 109, 29 Stat. 506, making it a penal offense to sell liquor "to any Indian, a ward of the government under charge of any Indian superintendent or agent" is within the constitutional power of Congress to enact.

Reliance is placed primarily upon the Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The court, on habeas corpus, discharged Heff on the ground that, while Congress alone could determine when the federal guardianship over an Indian should cease, if and when it had completely emancipated him, so that, as to his personal status, the tribal relation was at an end and he had become a full-fledged citizen of the United States, the state alone, under its police power, could regulate the liquor traffic as to such an Indian, whether as vendor or as vendee.

That this principle is inapplicable to the regulation of such traffic in Indian reservations and the so-called Indian country is held in numerous cases. Johnson v. Gearlds, 234 U. S. 422, 34 Sup. Ct. 794, 53 L. Ed. 1383, and cases cited therein.

Federal guardianship is in full force, both as to property rights and personal status, at least as long as the tribal relation continues, except in so far as Congress has relinquished it. That there is no incompatibility between citizenship of and guardianship over an Indian is well settled. United States v. Noble, 237 U. S. 74, 35 Sup. Ct. 532, 59 L. Ed. ——, and cases cited.

The persons to whom the liquor was sold by the plaintiff in error were concededly Indians of mixed blood, who had voluntarily enrolled themselves as members of a tribe which was in charge of an Indian agent. How and when they had become citizens of the United States is immaterial. By their own voluntary act, consented to by the tribe, they had assumed the status of tribal Indians. Whether they thereby lost their citizenship, it is unnecessary to determine. As members of the tribe, whether citizens or not, they were subject to regulation and control by the federal government, and as to them the act of 1897 was valid and applicable. Mosier v. United States, 198 Fed. 54, 117 C. C. A. 162. As the court says in Perrin v. United States, 232 U. S. 478, 482, 34 Sup. Ct. 387, 389 (58 L. Ed. 691):

"The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a state, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' and in part from the recognized relation of tribal Indians to the federal government."

Judgment affirmed.

D. C. WISE COAL CO. et al. v. SMALL.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.)

No. 4222.

BANKRUPTCY ⇐164—PREFERENCES—ACTS CONSTITUTING.

Payments to creditors by a debtor, adjudged a bankrupt because the payments were acts of bankruptcy, are voidable preferences, where the creditors or their agents had reasonable cause to believe that the payments would effect a preference, and where a sale by the debtor of property and distribution of the proceeds to the creditors was in pursuance of a plan to pay the creditors who were residents, regardless of the rights of nonresident creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⇐164.]

Appeal from the District Court of the United States for the Western District of Missouri; William H. Pope, Judge.

Action by Fred O. Small, trustee in bankruptcy of the Premier Lead & Zinc Company, against the D. C. Wise Coal Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Allen McReynolds, of Carthage, Mo., and Frank L. Forlow, of Webb City, Mo., for appellants.

Hiram W. Currey and George V. Farris, both of Webb City, Mo., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

CARLAND, Circuit Judge. This is an appeal from a decree of the District Court which adjudged that certain payments made to appellants by the Premier Lead & Zinc Company through a sale of property were voidable preferences. The case was referred to a special master, who made a report in favor of appellants. This report was not confirmed by the District Court, but vacated, and a decree entered as above stated.

The Zinc Company was adjudged a bankrupt for the reason that these same payments were acts of bankruptcy under subdivision 2, section 3, of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 546 [Comp. St. 1913, § 9587]), so that the ruling of the District Court in this case was in harmony therewith so far as the Zinc Company is concerned. The important question in this proceeding was as to whether the appellants, or their agents, acting for them, had reasonable cause to believe that the payments would effect a preference. One cannot read the evidence without becoming convinced that appellants, or their agents, had reasonable cause to believe that the payments would effect a preference. It clearly appears from the evidence that the sale of the property and distribution of the proceeds was in pursuance of a plan to pay the local Missouri creditors, regardless of nonresident creditors.

After reading the evidence we have concluded that the District Court was right, and the judgment is therefore affirmed.

UNITED PUMP & POWER CO. et al. v. PFAU MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915. Rehearing Denied May 25, 1915.)

No. 2160.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PNEUMATIC PUMP.

The Perry patent, No. 933,200, for a pneumatic pump, claim 25, *held* not anticipated, valid, and infringed, and claim 27 not infringed.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

Suit in equity by the United Pump & Power Company and Thomas O. Perry against the Pfau Manufacturing Company. Decree for defendant, and complainants appeal. Reversed.

This appeal is from a decree on final hearing of the issues, whereby the appellants' bill for infringement of United States letters patent No. 933,200 is dismissed for want of equity.

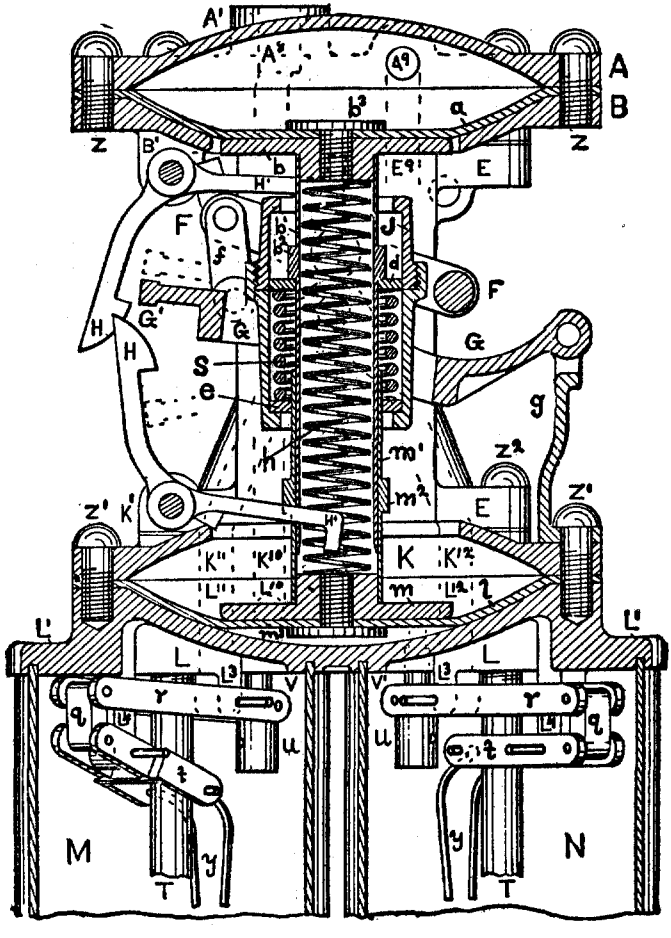
The appellants are joined in the bill, as licensee and patentee, and the patent is entitled "Pneumatic Pump or Apparatus for Raising Water by Means

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of Compressed Air." In the specifications the object of the invention is thus stated:

"My invention relates to improvements in pneumatic pumps in which air under tension is made to act directly against the water to be elevated, expelling it from a pair of closed chambers which require to be alternately filled and emptied; and the objects of my improvements are: First, to provide positive and efficient means for automatically operating an air valve which controls the alternate admission and escape of air to and from the pair of closed water chambers; second, to effect a complete emptying and refilling of each water chamber without waste of air or undue diminution of the chamber capacity due to premature action of the air valve in either direction; third, to obtain abundance of power for operating the automatic air valve without excessive enlargement of the pump, thereby saving the cost in material and making it feasible to operate the pump in restricted spaces."

In figure 5 of the patent drawings the structure of the device is shown as follows:



Description thereof is well summarized in the brief for appellants, to wit:

"The pump consists of two water chambers, *M* and *N* (figures 5 and 8), which are placed side by side and closed at the top by a cap, *L*, common to both, and at the bottom by means of a base, *R*. The base comprises a hollow cast-

ing, the interior of which communicates with each chamber through an annular opening, R', and also with the water inlet, Q. Water passages connect the chambers through the openings, R^2 adapted to be closed by upwardly opening check valves, X, said openings being in communication with a water delivery pipe, O. The water inlets are covered by ring valves, U, adapted to be opened by the water under submergence pressure.

"The head, L', has secured thereto a suitable framework for the support of an air motor, consisting of double diaphragms, l, a, secured in suitable concave chambers. These diaphragms are connected by means of telescoping tubes, m', b', having therein a 'restoration spring,' h.

"Midway between the diaphragms, fulcrumed on a standard, g (figure 5), is an auxiliary lever, G, made in the form of a ring arranged to inclose a cylindrical cage, J, with which it is pivotally connected upon opposite sides. The cage surrounds the tubes, b', m', and has, at each end, narrow internal flanges between which and the tubes there is an annular space. Two washers, d, e, fitting loosely within the cage and around the tubes, are adapted to be normally thrust apart against the interior flanges at each end of the cage by means of a coiled spring, S. Shoulders b^2, m^2, on the tubes are adapted to engage the washers. Links, f connect the auxiliary lever, G, with arms projecting at right angles from the axis of a rock shaft, F, which is pivoted in standards, E and I, figures 1 and 5, and bent around the cage, J. One end of the rock shaft is passed through a bore in the part, E, and is provided with a tongue which enters a socket, D^5, in a valve, D, as clearly shown in figures 2 and 4, the valve, D, being provided with suitable ports and inclosed in an air tight casing, C, in communication with an air pipe, i, by which air under pressure is supplied from a tank or other source of supply, to said casing. Ducts, E^{11}, E^{12}, connect the valve chamber with the water chambers, M and N, respectively, said ducts communicating with ports in the valve as the latter is oscillated by the rock shaft, to permit the live air, under compression, to pass from the casing, C, alternately to one or the other of said chambers, and to escape from the companion chamber through a suitable exhaust port in the valve. Small floats, W, one in each chamber (figures 7 and 8) are in operative connection with vent valves, u', u', one of which is in communication through suitable ducts with a port in the valve and the upper side of the diaphragm, a, and the other with another port in said valve and the under side of the diaphragm, l. Both diaphragm chambers are arranged to alternately exhaust through said valve.

"Assuming the pump to be submerged and the water chambers filled, the admission of compressed air to the valve chamber will result as follows:

"In the position shown in figures 1 and 2, the valve, D, permits compressed air to enter the chamber, M, thereby expelling the water until the chamber is nearly empty, when the float, W, descends, thereby opening the vent valve, u', which results in the admission of compresed air above the diaphragm, a, thus forcing down the disk, b, tilting the rock shaft and reversing the valve, D. With each water chamber discharge the motor is shifted and, through it, the valve is reversed.

"Pivoted between the two diaphragm chambers at B' and K', respectively, are latches, H, figures 5 and 6, each in the form of an elbow lever. The inner end of the horizontal arm of the lower one is bent downward, as shown at H', figure 5, to be engaged by a disk, m, above the diaphragm, l, as the latter is lifted and the corresponding arm of the upper latch is arranged to be engaged in like manner by a similar disk, b, beneath the upper diaphragm. A tongue, G', upon the end of the lever, G, is adapted to be alternately engaged by a tooth upon one or the other of the latches, and rigidly held thereby until released by the action of the motor—the parts being so adjusted that the motor spring, S, is first compressed to a predetermined extent, so that when the release occurs to allow the valve to be shifted by the action of the rock-shaft, enough power will be restored in the spring, and kept there by the follow-up action of the motor, to cause the valve to be moved to its full limit. The movement thus resulting will cause the tongue, G', to so act upon the companion latch as to become engaged, temporarily held, and released thereby upon the reverse action of the motor.

"It will thus be seen that while the motor itself is connected with and

adapted to move the valve, there is interposed between them a resilient connection which is acted upon by the motor, while the valve is rigidly held against movement until the spring is released to insure the full movement of the valve. While the motor spring and latches may not often be needed in continuous pumping, under faucet control their presence becomes vital to successful action."

The claims of invention are 37 in number, and the original charges of infringement were directed to claims 18, 19, 25, 27, and 34, but all have been eliminated from consideration except claims 25 and 27, reading as follows:

"25. In a pneumatic pump, the combination with a source of compressed air, two water chambers having inlet and outlet valves for water, and a reversible air valve adapted to alternately let air into and out of said water chambers, of a motive spring adapted to actuate said air valve by recoil from either end after compression, and a motor adapted to compress opposite ends alternately and release said motive spring, substantially as herein set forth."

"27. In a pneumatic pump, the combination with a source of compressed air, two water chambers having inlet and outlet valves for water, and a reversible air valve adapted to alternately let air into and out of said water chambers, of a motive spring adapted to actuate said air valve by recoil after compression, a motor for compressing said motive spring and reversing said air valve, a retarding device adapted to arrest and release said air valve during the reversal action of said motor, and means whereby the motor may positively effect a partial reversal of said air valve independently of the recoil of said motive spring, substantially as herein set forth."

The opinion filed below predicates the decree on two conclusions: (1) That claim 25 is invalid for anticipation by Atkinson's British patent (of 1893) in evidence; and (2) that claim 27 is not infringed by the defendant's device. No other issues are presented in the arguments of counsel, except that it is contended on behalf of the appellee that claim 25 is not infringed by its structure, even if such claim be upheld as valid.

Charles A. Brown and David H. Fletcher, both of Chicago, Ill., for appellants.

F. E. Dennett, of Milwaukee, Wis., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The specifications of the Perry patent in suit (No. 933,200) disclose and clearly describe a combination of unitary means in a pneumatic pump, whereby water is drawn from the well or other source of supply and delivered directly to faucets for use, thus dispensing with the pre-existing requirement of a tank or reservoir for storage of the supply. Its means were so provided and arranged that the flow of fresh water was entirely governed by the opening and closing of the faucet, thereby starting or stopping the operation of the pump. The efficiency and usefulness of the device are settled facts in the record; and the undisputed evidence establishes the further important fact that no prior pump had appeared in the extensive art of pumping devices which accomplished or was adapted to perform such operation and function, for domestic or analogous uses. Thus the presumption of patentability arising from the patent grant is well fortified by proof of meritorious invention in its "new and useful pneumatic pump" as an entirety. We do not understand this view of the device to be controverted, either in the opinion of the trial court upon which the appellants' bill for infringement was dismissed, or in the arguments of counsel in support of the decree.

The appellee's pneumatic pump accomplishes identical operations and result, both in direct pumping of water from the well to the faucets and complete faucet control for starting and stopping the flow for use, and its combination of means therein is plainly analogous to those united in the Perry device. It appears, however, that its structure differs in details from that of the patent in so far as to escape infringement of all claims embraced in the grant, aside from claims 25 and 27 in controversy, so that the various other claims do not require consideration, and the validity or scope of claims 25 and 27 are the issues presented on this appeal.

The rulings of the trial court were, in substance: (1) That claim 25 is invalid for anticipation by Atkinson's British patent (No. 9801), issued April 15, 1893; and (2) that two of the elements specified in claim 27 are not contained in appellee's structure, "and for that reason infringement is avoided." In the argument for appellee it is contended, not only that both of these rulings are well founded, but that claim 25 is not infringed, if its validity be assumed. We believe the ruling against the validity of claim 25 must be predicated entirely on the theory that the claim was too broad on reference to the Atkinson British patent, and not that it was met thereby in the strict sense of anticipation in the patent law. But whatever may have been the view adopted as to the force of the Atkinson patent, it is obvious that both issues of validity and scope of these claims must hinge on the interpretation of that patent and other prior patents relied upon for support of the decree. The undoubted premises for that inquiry (as above indicated) are: (a) That the gist of the Perry invention resides in its unitary means for drawing fresh water from its source to the faucet, together with complete faucet control of the pumping operation; and (b) that neither of the prior patents shows anticipation thereof for like operation and result. Upon claims 25 and 27, however, the tests to be applied to the prior patent (or patents) are sufficiency of disclosure therein in one and the other of these aspects: (1) To bar the claims of invention allowed in the combination of means embraced in claim 25; or, if not so barred, (2) to limit both claims to the particular elements specified, without benefit of mechanical equivalents. In reference to both claims, their embodiment of an operative combination is undoubted.

1. Claim 25 of the Perry patent reads:

"In a pneumatic pump, the combination with a source of compressed air, two water chambers having inlet and outlet valves for water, and a reversible air valve adapted to alternately let air into and out of said water chambers, of a motive spring adapted to actuate said air valve by recoil from either end after compression, and a motor adapted to compress opposite ends alternately and release said motive spring, substantially as herein set forth."

Atkinson's British patent of 1893 describes a pump having "special advantages for pumping thick fluids" and "for raising water from deep wells, mines," etc. Its structure is specified and shown in drawings, and stated in claim 1 as—

"having duplex chambers alternately filled and discharged by the suction and compression of the same body of air, the employment of any automatic valve

operated by the suction of the air compresser, so as to be suddenly and completely reversed in the manner described."

Both Atkinson and Perry devices are pneumatic pumps, employing various means in their respective combinations which are common to that type, and their resemblances therein are due, as we believe, to that feature, and do not establish identity of conceptions. Atkinson's pumping action is continuous in conformity with his object, while the Perry pump has a different conception, for faucet delivery and control, with means adapted to that end neither present in the Atkinson pump, nor adapted to its purpose. For distinctions in structure we believe the following mentions to be sufficient: Atkinson's device provides for operation through compressed air applied to the cylinders and suction applied to the motor, and is incapable of utilizing the benefits of compressed air for both purposes, while that of Perry has means for applying compressed air to cylinders and motor, and thus obtains a new and needful benefit for his object. The motors differ substantially in structure and operation. Atkinson has neither the "motive spring" of claim 25 "adapted to actuate" the air valve, nor its co-operating means for valve operation. Other differences in co-operative means likewise appear, which are material for their respective conceptions, and we are impressed with no feature of the Atkinson disclosure authorizing the ruling of its anticipation of claim 25, nor do we understand it to involve or advance the conception embraced in that claim. Therefore its validity is upheld.

The further contention of noninfringement of claim 25 rests on two propositions, in substance: (a) That the patentee is limited by the Atkinson disclosure to his "specific element of a reversible air-valve" and "the doctrine of mechanical equivalents cannot be invoked" in his favor "to include other forms of valve mechanism"; and (b) that the appellee escapes infringement through its use of a different form of reversible air-valve, namely, of the well-known "poppet type." We believe the foregoing definitions of the Perry invention render these twofold propositions untenable, and that it is sufficient to remark that both forms constitute the "reversible air valve adapted to alternately let air into and out of said water chambers," and the appellee's plurality of form (incident to its adoption of the "poppet type") cannot serve for escape from infringement. We are impressed with no view of the other prior patents in evidence which calls for discussion.

2. Claim 27 supplements claim 25 with the further elements:

"A retarding device adapted to arrest and release said air-valve during the reversal action of said motor, and means whereby the motor may positively effect a partial reversal of said air-valve independently of the recoil of said motive spring."

For definitions of these additional elements in the patent specifications and drawings, and applicability thereof to the appellee's structure, the contentions of appellants' counsel in the argument are not in accord with the testimony of their expert witness (Mr. Redfield) in respect thereof, and whatever may have been their meaning in the claim, we are not satisfied of certainty therein for support of the charge of infringement.

Means must be clearly described in the specifications to be made the subject-matter of a claim, and the above-mentioned references to functions of these additional elements, respectively, are insufficient, as we believe, for their identification with elements employed in the appellee's structure, so that infringement of claim 27 is not established.

The decree of the District Court therefore is reversed, with direction to enter a decree upholding the validity of claim 25, infringement thereof by the defendant, and for relief accordingly under the bill.

JACKSON SKIRT & NOVELTY CO. v. ROSENBAUM et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2626.

1. PATENTS ⟸328—AGGREGATION OF OLD ELEMENTS—SKIRT.
The Smith & Malnight patent, No. 750,234, for a skirt, covers an assemblage of old elements from the garment-making art, largely acting independently of each other, and not in combination, to produce a new unitary result, and is void for lack of patentable invention.

2. PATENTS ⟸80—EVIDENCE OF INVENTION—GENERAL USE.
It is only when the patentability of a device is doubtful that a showing of general use may turn the scale.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 102, 103; Dec. Dig. ⟸80.]

Appeal from the District Court of the United States for the Western District of Michigan; Arthur C. Denison and Clarence W. Sessions, Judges.

Suit in equity by the Jackson Skirt & Novelty Company against Louis Rosenbaum, Goddie Rosenbaum, and Edwin F. Rosenbaum, jointly and severally and as copartners under the name of the Henrietta Skirt Company, and the Samuel Rosenbaum & Sons Company. Decree for defendants, and complainants appeal. Affirmed.

See, also, 190 Fed. 197.

W. H. C. Clarke, of New York City, for appellant.

F. L. Chappell, of Kalamazoo, Mich., for appellees.

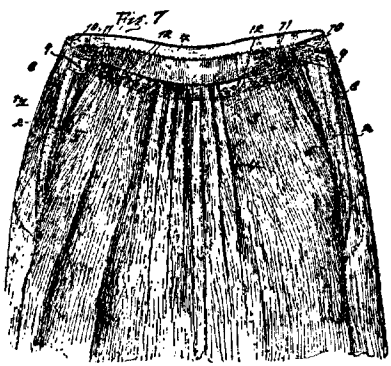
Before WARRINGTON and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

SANFORD, District Judge. This is a bill in equity brought by the appellant, The Jackson Skirt and Novelty Company, against the appellees, Louis Rosenbaum and others, for the alleged infringement of letters patent No. 750,234, on skirts, issued to the appellant, on January 19, 1904, as the assignee of the alleged inventors, W. T. Smith and J. V. Malnight. Among the defenses relied on were the invalidity of the patent for want of invention, and non-infringement. After final hearing on the pleadings and proof, the court below entered a decree dismissing the bill of complaint, with costs; from which the plaintiff has appealed to this court.

[1] The specification of the plaintiff's patent states:

"The object is to prevent [provide] a skirt having its back width constructed in such manner as to give the desired fullness at the rear without bunching or wrinkling, whereby the same shall readily conform itself to the figure of the wearer and shall be readily yieldable to the different motions of the body without any binding or drawing action. A further object is to obviate the presentation of a placket at the rear which will be liable to open and thus expose the under garments of the wearer. * * * A further object is * * * so to associate the fastening means with the waistband of the garment as to cause the same when the garment is on the wearer to be entirely shielded from view. With these and other objects in view * * * the same consists in the novel construction and combination of parts of an underskirt, as will be hereinafter fully described as claimed."

Figure 7 of the drawings showing the manner of constructing the rear part of a skirt in accordance with the invention claimed, in which the fastening device is of the "hook and eye" style, is here reproduced.



The structure embodied in the patent is thus described in the specification:

"Referring to the drawings, *1* designates the upper portion of the body of a skirt, the same being provided at its side portions with two plackets, *2* the same extending from the waist to a point at or slightly below the crest of the hips. The back width (designated generally *3*) may be constructed of a single piece of material or of two widths, as shown, is integral with the skirt, and is plaited, as at *4*, to give the desired fullness at the rear to cause it closely and neatly to hug the form of the wearer, thus to prevent bulging or wrinkling of the skirt, which in tight-fitting outer garments would be objectionable. To the edges of the 'back width' * * * are secured side wings *5* which extend from the waist slightly below the bottoms of the plackets and are approximately triangular in shape, with the bases at the bottom of the plackets, so that under all movements of the body of the wearer the plackets will be positively closed, as the base portions of the side wings will extend inward such distance as to be prevented from working out of the plackets under any condition of use. The side flaps *6* formed by the plackets, are designed to be folded in over the side wings, and over a portion of the back width on both sides of the garment, thus further preventing the plackets from opening. The waistband 7 is a multi-ply structure * * * the outer ply of which is formed by the material of the skirt and the inner plies, by a thickness of the material of the skirt folded upon itself and associated with a separate strip *8*, to which the hooks *9* and eyes *10* of the side flaps * * * are secured, the hooks *11* and eyes *12* of the back width being secured to the outer ply of its waistband. By this arrangement when the hooks and eyes of the respective members of the waistband are in interlocked engagement they will be entirely shielded from view and will thus not only assist in giving a finished appearance to the garment, but by the manner in which they are housed the presentation of obstructions which will tend to wear away a garment secured around the waistband of the skirt will be prevented."

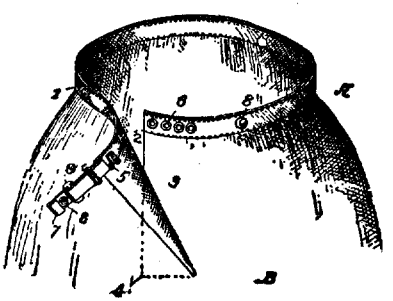
The patent contains only one claim, as follows:

"A skirt provided with a plaited back width and with a placket adjacent to each edge thereof, free approximately triangular wings at the edges of the back width and projecting laterally beyond the lines of the plackets, the

bases of the wings being disposed downward, side flaps foldable over the wings and lying in contact therewith, a waistband carried partly by the back width and partly by the flaps, and spaced fastening means disposed between the back width and the side flaps."

Judge Sessions, who heard the case below, was of opinion, upon the proof, that the patent is a "mere aggregation of old elements, assembled in an old way, and for the most part acting independently of each other, rather than a combination of co-acting elements which involve patentable invention," and, in other words, "the product of the skill of the dressmaker or tailor and not the conception of the inventor"; and further, that, even if it be assumed that it is a patentable combination, still the claim of the patent is so extremely limited in form that a slight variation therefrom will avoid infringement, and that infringement had not been shown in any of the three models of skirts manufactured by the defendants.

It clearly appears from the many prior patents offered in evidence by the defendants, that the six elements entering into the combination of mechanical features claimed by the patent, namely, the plaited back width, the adjacent side plackets, the free projecting wings, the side flaps folded thereon, the waist band carried by the back width and flaps, and the spaced fastening means disposed between them, are each old in the prior garment making art, being separately disclosed therein in forms which are either the same as those in which they appear in the plaintiff's patent or closely analogous thereto. Thus, for example, the McGraw patent, No. 643,775, on improvements in skirts, shows a skirt formed with a waist band and placket, with an extension piece underlying the flap of the placket whose lower edge is described as preferably disconnected from the body of the skirt the greater portion of its length, closely corresponding to the free triangular wings in the plaintiff's patent projecting from the edges of the back width beyond the lines of the placket; and also a waist band carried partly by the skirt and partly by the flap over the placket, with adjustable fastening devices disposed between them, as shown in the figure which is here reproduced.



The appellant's contention, however, is that the six mechanical features called for by its patent have therein a special and peculiar relation to each other, which is essential to the adjustment of the skirt to large and small figures, without destroying the fit, and are so combined as to act and react on each other for the purpose of producing the desired result, thus constituting a true combination of mutually co-acting parts; and that, when so combined, they serve to secure several advantages, which are thus recapitulated in the appellant's brief: (1) holding the skirt in place; (2) causing it to conform to the figure and yield readily to the different motions of the wearer; (3) adapting

it to be adjusted to different sized figures; (4) providing registry between the plackets of the under and outer skirts; (5) concealing the fastening devices; (6) preventing the fastening devices from coming in contact with the garments; and (7) adapting it to be employed in connection with all changing styles and fashions.

Clearly, however, as appears both from the structure of the patent itself and the several advantages thus enumerated, the effect of its several mechanical features is not to secure one new unitary result or advantage by the reaction of their several functions, but rather to secure, through these several mechanical features, acting largely independently of each other, various results and advantages, relating in the main, to entirely separate and independent matters, and resulting from the assemblage of these various mechanical features in one structure in the form of an aggregation rather than a combination. Thus, without analyzing in detail the function of these several mechanical features, it may be said, by way of illustration, that the free wings projecting from the back width under the flaps of the plackets obviously have no function in either holding the skirt in place, causing it to conform to the motions of the body, adjusting it to differently sized figures, concealing the fastening devices, or preventing wear and tear therefrom, but relate, at the most to the prevention of exposure through the placket openings and to the fit and appearance of the flaps over the placket openings; in other words, that these free wings underlying the flaps do not in any manner co-act with the other mechanical features of the plaintiff's structure in producing the other results and advantages which they independently obtain.

Since, therefore, the assemblage in this patent of the old elements from the garment-making art does not produce a new unitary organization due to the joint and co-operating action of the old elements, but constitutes, in its essential features, a mere aggregation of old elements, in which, in the main, each performs its own appropriate function in substantially the old way, the result must, under the well established rule, be held to constitute a mere aggregation of elements and not a patentable combination. Reckendorfer v. Faber, 92 U. S. 347, 357, 23 L. Ed. 719; Richards v. Elevator Co., 158 U. S. 299, 302, 15 Sup. Ct. 831, 39 L. Ed. 191; National Tube Co. v. Aiken (6th Cir.) 163 Fed. 254, 260, 91 C. C. A. 114; Sheffield Car Co. v. D'Arcy (6th Cir.) 194 Fed. 686, 693, 116 C. C. A. 322; Autosales Gum Co. v. Caille Co. (6th Cir.) 224 Fed. 473, — C. C. A. —, and cases therein cited. And we therefore entirely concur in the conclusion of the court below that the plaintiff's structure, when considered in view of the prior art, involved merely the mechanical skill of a dressmaker or tailor in assembling the old elements which it contains for the production of an aggregate rather than a combined effect, and did not disclose patentable invention.

[2] Furthermore, while stress has been laid upon the commercial success of the plaintiff's skirt, much of this success is appartently due to business enterprise and advertising. But however this may be, we do not think the question of patentability doubtful; and it is well settled that it is only when the patentability of the device is doubt-

ful that a showing of its general use may turn the scale. Standard Caster Co. v. Socket Co. (6th Cir.) 113 Fed. 162, 166, 51 C. C. A. 109; Cincinnati Traction Co. v. Pope (6th Cir.) 210 Fed. 443, 449, 127 C. C. A. 175.

Being, therefore, of opinion, for the reasons above stated, that the plaintiff's patent is invalid for want of patentable invention, we deem it unnecessary to consider the alternative question of infringement ruled on by the court below or the other matters of defense relied on by the appellees.

A decree will accordingly be entered affirming the decree below and dismissing the appeal, with costs.

VICTOR TALKING MACH. CO. v. STRAUS et al.

(Circuit Court of Appeals, Second Circuit. July 17, 1915.)

No. 287.

PATENTS ⊂=213—INFRINGEMENT—LICENSES.

Where an owner of patents on talking machines and records licensed dealers or distributors to dispose of machines in accordance with specified conditions as to use and price, a member of the public, and not a distributor or dealer, who paid the price for a license to use a machine on the specified conditions could give the license to any other member of the public for any consideration or as a gift, provided he had not violated any of the conditions, but turned over the machine, with the license label affixed thereto unaltered, so that his assignee might be advised of the conditions under which the use of the machine was licensed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 315-320; Dec. Dig. ⊂=213.

Sublicenses and assignments of licenses for use or sale of patents, see note to National Phonograph Co. v. Schlegel, 64 C. C. A. 596.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on an appeal from a decree entered by the District Court of the United States for the Southern District of New York dismissing the plaintiff's bill. 222 Fed. 524.

The Victor Talking Machine Company is a corporation organized and existing under the laws of the state of New York.

The defendants are each and all of them citizens of the state of New York, and constitute a copartnership under the trade-name of R. H. Macy & Co., and carry on business in the city of New York. The Victor Talking Machine Company claims to be the sole owner of letters patent of the United States No. 947,227 issued to it January 25, 1910, as assignee of John C. English, and of certain other patents relating to talking machines and records and which are not here specified.

The defendants were impleaded in the court below in an action in equity charging them with infringement of a number of patents (some of which have been adjudicated) owned by the plaintiff corporation for its well-known sound-reproducing machines and sound records adapted to be used therewith. The infringement charged was not the usual one of a making and selling, for the machines and records which came into the possession of defendants, and which they sold and offered for sale, are genuine machines and sound records, of plaintiff's manufacture, but for an inhibited sale and violative use of such

machines and records, in excess of the license grant; each specific machine and sound record being licensed for use only, by a specific and nonassignable license attached thereto, and also limited under certain conditions and restrictions as to such use, and by the same license grant the licensee obtained a conditional title only to the physical thing embodying the patented invention and to which the patent license appertained.

The defendants, without pleading to the merits by answer, filed their motion, under new equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), to dismiss the bill, assigning as one of the grounds, in the nature of a demurrer, that the bill did not set forth any cause of action in equity; the defendant contending argumentatively in support of this ground of demurrer, that the license contract was in fact and in law an unlimited and unconditional sale, under which the patented machines and sound records had, in fact and in law, passed out of the monopoly, and hence that defendants had a valid and unlimited title thereto to do as they pleased with them.

Frederick A. Blount and Hector T. Fenton, both of New York City, for appellant.

Wise & Seligsberg, of New York City (Edmond E. Wise, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Many questions are presented which need not be now discussed, because there is lacking in the complaint an allegation which seems to us essential to complainant's prayer for relief.

Whether the various documents evidence a lease of each machine for a stated period, with privilege to the lessee at the end of such period to take full title provided he has complied with the conditions of the lease, as to use solely of complainant's needles, records, etc., or whether it be a conditional sale need not be decided. It seems clear that if the license to use one of these machines on the named conditions has passed from complainant through its distributors or dealers to one of the public, who has paid the full list price for the same, the person who has thus acquired license to use in accordance with the specified conditions may assign such license to any other member of the public, who by such assignment will himself obtain the right to use in accordance with the specified conditions. We are not satisfied that there is any obligation on the part of any one member of the public who thus assigns his lease, or whatever it may be, to another member of the public, to exact any particular sum from the latter as a consideration for the transfer. We do not see why he may not give the lease to whomever he pleases for no consideration at all, as a free gift, provided he has not himself violated any of the conditions, and turns the machine over with the license label or other company marks affixed to the machine intact and unaltered, so that his assignee may be fully advised of the conditions under which use of the machine is licensed.

It is manifest from the complaint that defendants' firm is not a "distributor," nor is it one of the 7,000 licensed "dealers" referred to therein. Therefore defendant is one member of the public, and if it has paid the $200, or whatever may be the list price of any particular instrument now in its possession, it could not be enjoined, assuming

all complainant's contentions as to the effect of the documents set forth are correct, from parting with possession to another member of the public upon the original conditions as to use. From the brief and argument we infer that injunctive relief is sought upon the theory that defendants' firm has obtained possession of some of complainant's machines by paying less than the list price and is proposing to dispose of the same for less than such price. But the complaint contains no allegation which specifically charges that defendant has any machine in its possession for which it did not pay the full list price. In the absence of such allegation, the whole theory of complainant as to the status of a member of the public who has obtained possession of a machine from a distributor or licensed dealer, without paying therefor the full list price, becomes academic.

The decree is affirmed, but with instructions to allow complainant to amend its bill, if it be so advised

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DENTON et al. v. FULDA.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 262.

1. PATENTS ⊂=328—INVENTION—DESIGN.
The Denton & Denton design patent, No. 39,413, covering broadly a design for a locket or pendant, consisting of a butterfly with folded wings mounted on a background, *held* void for lack of invention.

2. PATENTS ⊂=328—INVENTION—JEWELRY.
The Denton & Denton patents, No. 889,845, for the art of simulating rare and precious stones, and No. 897,274, for a butterfly jewel, *held* not void on their face for lack of invention.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a decree of the District Court for the Southern District of New York dismissing on motion, the new equivalent for a demurrer, the bill of complaint, which alleges the infringement of three letters patent granted to the complainants. The defendant contends that the three patents are void upon their face for lack of patentable novelty and invention. The earliest patent, No. 889,845, is for the art of simulating rare, precious, and other stones. Patent No. 39,413 is for a design for a locket, pendant or similar article, consisting of a butterfly centrally mounted in a field or background, with wings in an upfolded or closed position. Patent No. 897,274 is for a so-called butterfly jewel.

William E. Warland, of New York City (A. V. Cushman and Meyers, Cushman & Rea, all of New York City, of counsel) for appellants.

Hans v. Briesen and Fritz Ziegler, Jr., both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

COXE, Circuit Judge. [1] We are inclined to the opinion that the design patent cannot be sustained for the reason that the claim covers broadly a design for locket or pendant of a butterfly with upfolded wings. There is nothing novel about a butterfly with folded wings, or wings in any other condition or position. It does not involve invention, therefore, to paste a drawing or painting of the natural wings of such an insect upon a pendant. To hold otherwise will permit those who select a different design for a pendant, such, for instance, as a shell, a flower, or a bird, to obtain a patent in each instance. Nothing patentably novel is produced by placing such objects in new environments. As to the design patent the decree is affirmed.

[2] The other patents present an entirely different situation. It is unnecessary and unwise at this time to attempt an exhaustive discussion of the question of patentability as this should follow the production of the proof. It is sufficient now if we indicate our reasons for thinking that the patent, for simulating rare and precious stones and the patent for a butterfly jewel should not have been held invalid upon demurrer. Patent No. 897,274 for a butterfly jewel may best be taken to illustrate our views as it is confined to three simple drawings and very clearly describes and shows the invention. The patentee says:

"The present invention relates to improvements in fine arts and has to do with the utilization of the brilliantly colored wings of insects, such as the butterfly and moth. The invention contemplates the use of regular, geometrical panels or sections of these wings in such manner as that a highly decorative and ornamental effect is produced, and one which simulates closely jeweled effects such as are attained by the use of real jewels in decorative art. * * * In order to secure the best results in practicing the invention it is essential that the identity of the wing be destroyed and that the wing section be so mounted as to heighten the jewel effect, and these results are attained by cutting from the wing a section, preferably of regular outline, and so mounting it as to give a smooth solid appearance to the naturally thin and fragile substance, so that, viewed from any point, an appearance of depth, color, and solidity is produced. * * *"

The drawings show a brooch or locket made by a method described in the patent which produces a jewel-like effect of a butterfly such as might be painted by a miniature artist of the highest skill. The second claim will serve to illustrate the invention sufficiently for the present purpose:

"2. As a new article of manufacture, imitation jewel comprising a frame having a glazed front of concavo-convex form, a section of a butterfly's wing beneath said front to form a background, a natural butterfly interposed between said wing section and said front, a yielding filler beneath said wing section, and a rigid backing to crowd said wing section against and about said interposed butterfly and force them into complete and intimate contact with said front throughout their exposed areas."

Here is a combination of—(1) A glazed front of concavo-convex form; (2) a section of a butterfly's wing beneath the said front; (3) a natural butterfly imposed between the wing section and the glass; (4) a yielding filler beneath the wing section, and (5) a rigid backing to crowd said wing section against said interposed butterfly. The result of this combination is a brooch of great beauty, preserving the original

colors of the butterfly more perfectly than could be done by the most skillful artist. Specimens of the jewelry thus produced were exhibited at the argument and presented marvelously beautiful effects, the colors changing in brilliancy and intensity as the lockets are held in different lights. Thus grey is transformed into a changing lilac, blue and white is changed into green and white, and dark purple and buff into blue and buff. All these color effects change rapidly as the light strikes the jewel from different angles.

There is nothing of which we may take judicial knowledge which defeats or seriously limits the claims in question. If there be such structures, the burden is on the defendant to produce them. In Beer v. Walbridge, 100 Fed. 465, 40 C. C. A. 496, this court went further than we are required to go in the case at bar, in holding that only in the plainest cases should a patent be held invalid on demurrer. The patented fabric in the Beer-Walbridge Case was a holder for flat irons and similar articles composed of a sheet of asbestos and a backing of canvas secured to the asbestos by sewing. The court said:

"We are of the opinion that the case is one where evidence of the prior art and of the commercial value of the patented article may be persuasive that the patent is valid, and that the question is too doubtful to be decided upon the face of the patent."

We think that as to the two patents, other than No. 39,413, the question, to state the situation in the most conservative manner, is too doubtful to be determined on demurrer and that the decree should be affirmed as to the design patent and reversed as to the other two patents without costs, the defendant to have leave to answer within 20 days from the date of filing of this opinion unless the time be further extended by the District Court.

GENERAL BAKELITE CO. v. NIKOLAS.

(District Court, E. D. New York. June 12, 1915.)

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—VARNISHES.

The Baekeland patents, No. 954,666, No. 1,018,385, and No. 1,037,719, each for a varnish, comprising a condensation product of phenol and formaldehyde and a solvent although based on prior patents to the same patentee for such condensation product and the process of producing the same, are for new products, not anticipated, and valid; also, *held* infringed.

2. PATENTS ⊜250—INFRINGEMENT—CHEMICAL PRODUCT.

It is no defense to a charge of infringement of a patent for a product produced by chemical process to assert ignorance of the reactions which take place, and then to claim the right to combine substances, which, on analysis, are shown to cause the reactions of the process leading to the patented product and to obtain that product itself by methods shown to be those of the patent, even though never before understood until testified to upon the trial.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 390, 392, 393; Dec. Dig. ⊜250.]

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. WORDS AND PHRASES—"PYROXYLIN."
"Pyroxylin" is nitrocellulose or gun cotton.

4. WORDS AND PHRASES—"REACTIVE FILM."
A "reactive" film is one in which a chemical change or reaction occurs upon spreading the film and subjecting it to heat, light, air, motion, or electricity, but without the addition of any chemical substance.

In Equity. Suit by the General Bakelite Company against George J. Nikolas, trading as George J. Nikolas & Co. On final hearing. Decree for complainant.

See, also, 207 Fed. 111.

Charles Neave, of New York City (Byrnes, Townsend & Brickenstein, of Washington, D. C., of counsel), for plaintiff.

Pennie, Davis & Goldsborough, of New York City (William R. Rummler and Willard M. McEwen, both of Chicago, Ill., of counsel), for defendant.

CHATFIELD, District Judge. [1] The present action charges infringement of three patents, Nos. 954,666, issued April 12, 1910, upon an application filed November 22, 1909; 1,018,385, issued February 20, 1912, upon an application filed March 14, 1911; and 1,037,719, issued September 3, 1912, upon an application also filed March 14, 1911. In each case Leo H. Baekeland is patentee and has conveyed the patent (as well as others procured by him and referred to in the testimony) to the plaintiff in this action.

The application for the first patent was made as a division of a prior application filed October 15, 1907, and upon which patent 942,809 was granted, December 7, 1909.

The patentee is a citizen of the United States, born in Belgium and educated in various European countries. The testimony shows his wide training and experience, as well as the academic honors and scientific degrees obtained by him in Holland, Belgium, England, France, Germany and the United States. He has testified as an expert as well as patentee, and his qualifications are thus brought into consideration.

The testimony shows commercially successful accomplishments, as well as scientific investigation by the patentee in this country, and his appearance and testimony upon the witness stand have plainly shown mental capacity, scientific knowledge, and deductive ability which would accord with and be expected as the necessary foundation for such investigations and experimental operations as those involved in practicing or advancing the art and processes set forth in the patents as to which the present litigation has arisen.

The defendant is a practical manufacturer of varnishes in the city of Chicago, who disclaims knowledge of chemistry as a science, and who testified that, in the mixture and treatment of chemicals during the manufacture of varnish, he judged the reaction and formed all his conclusions from experience and appearances, without regard to the nature of the reaction taking place.

The plaintiff alleges infringement by the sale upon the open market of certain varnishes known as bedstead filter or gold lacquer or satin A. P. lacquer, of which admitted samples have been produced by the defendant during the course of the trial.

At the outset of the case, considerable point was made of the issue of infringement, by reason of the fact that the sample produced by the plaintiff, and obtained from a store used by the defendant as an agency in Brooklyn, was claimed by the defendant to be different in appearance from anything manufactured by him. The sample was therefore disavowed by the defendant as his product. The difference in appearance was never satisfactorily explained, but the chemical analysis of the contents and the analyses of the samples produced by the defendant were such that no issue as to the actual resemblance of the defendant's commercial product and the article described by the patents exists.

The defendant, however, contends that he does not do or use anything in the manufacture of his varnish which would be an infringement of the plaintiff's patents, and, in fact, denies the use of materials which the plaintiff, from analysis of the product, contends must be employed by him. This issue will be discussed in connection with the patents of the prior art, and we will take up at once the patents in suit and the patentee's work in connection therewith.

It appears from the record that the patentee was investigating the properties of what are known as condensation products of phenol (carbolic acid) and formaldehyde. He was seeking a commercial substitute for natural gum camphor, to be used in the manufacture of celluloid, and this led him to investigation of the condensation products above referred to, which are frequently called resins, in that they form a gum of more or less natural resinous appearance, when washed or dried after removal from the solution remaining after the reaction by which they have been formed.

It will be seen, from examination of the prior art, that such condensation products were comparatively well known by the year 1907, when a commercial demand for certain substances, in the manufacture of varnishes or coatings for metallic surfaces like chandeliers or bedsteads, and for electric devices, like insulating tubes, made the production of the articles entering into their composition commercially profitable.

The patentee tells us that as early as 1871 Prof. Baeyer and his pupils had described certain reactions between the phenols and the aldehydes. In the course of his investigations, he found a particular condensation product of phenol (generally in the form of carbolic acid) and formaldehyde, which resembled gum shellac. At this time gum shellac was selling for 50 cents a pound, and the patentee took up the investigation of the gum in question. The production was not uniform either in quantity or quality, and sometimes the condensation resulted in a bulgy, spongy mass, with which nothing could be done. After experiments enabled the patentee to produce substantially uniform results. He called the condensation product obtained "novolak," and began to make it in large quantities. The color of the novolak varies from light to dark brown. It is soluble in alcohol, and is fusible. If dis-

solved and used as a lacquer, it sets and dries like a vegetable gum varnish by evaporation of the solvent, but no change in the composition of the varnish coating takes place. Thus, like gum varnish, it can be re-dissolved or re-fused (that is, melted, not destroyed, by combustion), and turns red upon exposure to the air. Heating the product called novolak for several days did not change its quality of constant solubility, and the substance therefore would directly compete with the varnishes or lacquers made from a vegetable gum.

The patentee found that the soluble product was, in his opinion, that described in the De Laire (Belgian) patent 192,590, (French) 361,-539, and (British) 15,517 of 1905; and the Blumer patents, 12,880 of 1902 (British), 172,877 (German), and 6,823 of 1903 (British).

Sometimes, during the course of the reaction, a hard, insoluble substance resulted, which resisted all of the solvents that were tried thereon. Nothing but a destructive acid (like fuming nitric or sulphuric acid) seemed to have any effect, and the patentee, thinking that this product was of no practical value by itself, sought to find a method of effecting a synthesis of the substances entering into the condensation product and the fibers of soft wood. At this time he became acquainted with the work of a chemist named Kleeberg, who had produced a substance which he considered worthless and with which he could do nothing.

The Story patent (English) 8,875 of 1905, and the Luft patent (United States) 735,278, of 1903, as well as Blumer and De Laire, all started with the same raw materials and obtained different products. But all these products fell into two classes: (1) The novolak or permanently soluble and fusible condensation products; or (2) the insoluble products, in which class one phase of the Story patent, the product found by Kleeberg and that of the patentee, seemed to belong.

The patentee then continued his experiments in making the infusible product, and learned that with pure phenol, which was obtainable in crystallized form, the hard insoluble product could not be obtained, except after long heating at high temperature, while with a commercial carbolic acid results varied, but usually a soluble and fusible product resulted, or a reddish colored film was produced, after long heating. The patentee testifies that in these experiments he was using an equal volume of phenol and formalin with hydrochloric acid as a condensing agent. Washing the product with water and melting indicated the formation of the substance which the patentee calls novolak, unless the experiment resulted in the infusible substance resembling that obtained by Kleeberg.

The patentee then took 100 parts of phenol, 100 parts of formaldehyde, and a small amount of hydrochloric acid, which he heated in a sealed tube and obtained a clear, hard stick which proved to be totally insoluble and infusible. Upon repetition he was able to confirm the experiment and undertook to find a reason therefor. He found that, in the De Laire and Blumer methods, the product of the condensation when washed caused the removal of half the formaldehyde, as well as a part of the phenol. This having different proportions, they reached different results than the insoluble product of the plaintiff, who went on

to try the Story patent, with 95 per cent. commercial carbolic acid and formalin, in the proportions indicated by Story, and with no base, heating at 80 degrees. Long drying of the gum in a mold gave an insoluble product. In large volumes the Story process, with an excess of phenol, gave a soluble condensation product, although in very small quantities, or in a test tube or on a watch glass, at 80 degrees, with long drying, the insoluble product was generally obtained. Upon using a higher temperature, the substance (if in large quantity) itself produced heat and left a bloated, spongy residue. In small quantity, in a test tube, an insoluble reddish film was produced with the high temperature. When a solvent was used, a hard (but not insoluble) varnish would be made.

The patentee considering that commercial carbolic acid was composed mainly of cresols instead of phenol (hydroxybenzol) while pyridin was also present, and that there might be small quantities of base, undertook experiments by which, with the addition of a small amount of ammonia, the infusible product was obtained. He thus obtained a lighter colored film.

The patentee then tried caustic soda in small quantity, expecting, as in the Manasse patent, 526,786, and the Lederer patent, 563,975, to obtain only fusible products or oxybenzyl alcohol; but he obtained the infusible product even at a less temperature than at 80 degrees, and he from this worked out the proportion of base which ultimately resulted in claim 2 of the first patent in suit. The claims of this patent are as follows:

"1. A varnish containing a volatile organic solvent and a condensation product of a phenolic body and formaldehyde, said condensation product characterized by its capability of transformation under the action of heat into an insoluble and infusible body, and by the presence therein of a base condensing agent.

"2. A varnish containing a volatile organic solvent and a condensation product of a phenolic body and formaldehyde, said condensation product characterized by its capability of transformation under the action of heat into an insoluble and infusible body, and by the presence therein of a base condensing agent in proportions not exceeding one-fifth of the equimolecular proportion of phenolic body employed."

A number of addresses or printed articles setting forth, from time to time, the progress of the patentee in his investigations, have been put in evidence and used by the defendant, who calls attention to certain conclusions, modified in some ways by the conclusions stated in subsequent articles, as evidence that the patentee did not have any complete understanding of his claimed invention at the time of filing the application, in which the actual invention subsequently set forth in the claims of the patents as issued were described. This question can best be considered in connection with the patent applications themselves and with the amendment or suggestion of new claims presenting the ideas which the defendant now charges were not known or appreciated by the patentee as patentable parts of his original invention. But the file wrapper of patent 942,809 shows that as early as March 17, 1908, amendments were suggested showing the use of a base in the small proportions finally described as in claim 2 of the first patent in suit.

It appears from the record that upon the 13th day of July, 1907,

the patentee filed an application for a method of making insoluble products of phenol and formaldehyde, and patent 942,699 was granted upon December 7, 1909. This shows the use of heat and pressure with catalytic or condensing agents consisting of acid or metallic salts. This patent refers to application 358,156, filed February 18, 1907.

But in the meantime an application, upon the 18th of April, 1908, 383,864, for indurated product and method of preparing same, was divided and a separate patent issued, under No. 942,699, for the method, and on December 7, 1909, under No. 942,852, for the product. These also employed heat and pressure.

On October 15, 1907, the patentee filed an application, 397,560, for a condensation product and method of making same. This was not disposed of and fees paid until a renewal upon the 17th day of September, 1909, which resulted in patent 942,809, also issued December 7, 1909, for the product and method. This application was divided, by direction of the Patent Office, on the 22d of November, 1909, by which the first patent in this suit, or the so-called "Varnish" patent, was issued, under No. 954,666, on the 12th of April, 1910. These patents show the use of a base in small quantities and require heat or heat and pressure to form the condensation product.

Earlier than any of these applications, however, and on the 18th of February, 1907, the patentee filed an application for a method of indurating fibrous and cellular material, upon which he ultimately procured the issuance of patent 949,671, upon the 15th of February, 1910. This calls for heat, pressure, and acid salts.

There were also issued upon the 7th of December, 1909, two other patents, 942,808, for condensation product and method of making same, for which application had been filed October 26, 1907, and patent 942,700, for condensation product of phenol and formaldehyde and method of making same, upon an application filed December 4, 1907. These likewise called for the use of heat, pressure, and acid salts.

The patentee had also obtained patent 939,966, upon the 16th of November, 1909, for method of molding articles; patent 941,605, upon the 30th of November, 1909, for a packing material; and patent 957,137, upon the 3d of May, 1910, for a container for food products. Another application, made upon the 30th of April, 1909, and renewed upon the 21st of December, 1911, was not issued until March 5, 1912, under No. 1,019,408, for wood finishing, while patent 982,230 was issued upon the 24th of January, 1911, for a coated object and method of making the same, upon application which had been filed upon the 22d of November, 1909.

Finally, upon the 14th of March, 1911, two applications were filed for different varnishes or lacquers upon one of which a patent was issued, upon the 20th of February, 1912, under No. 1,018,385, which is the second patent in this suit, and the other under No. 1,037,719, upon the 3d of September, 1912, which is the third patent in this suit.

The defendant points out that the application for patent 949,671, which was filed on February 18, 1907, sets forth two method claims for impregnating fibrous material with a phenolic body and an alde-

hyde, and causing reaction within the fibrous material so as to yield an indurating gum or resin. In the specification the applicant refers to the reaction of ordinary phenol and formaldehyde and states that the reaction can be accelerated by the application of heat and by the presence of so-called condensing agents, as, for instance, minerals or organic acids, salts, and the like. He also states that a gum or product soluble in alcohol will be obtained if the formaldehyde be not used in excess of the molecular proportion. If the formaldehyde be in such larger proportion or in excess, a very hard and insoluble condensation product results.

The application for patent 942,699 was filed on July 13, 1907, and originally contained claims 1, 2, 3, and 9, for methods of forming a product by the reaction of a phenolic body and an aldehyde, while claims 7 and 8 cover the product produced by this method. Claims 4, 5, and 6 have to do with the process of indurating fibrous material. Claim 8 is based upon the combination, after hardening, of a fibrous material with a resinous body obtained by the reaction of a phenol and an aldehyde. This claim again sets forth that the product is characterized by its insolubility in alcohol, acetone, and like solvents and by its resistance to heat, moisture, and alkaline and acid reagents.

The specification of this latter application refers to the application just mentioned (serial No. 358,156, of February 18, 1907) which described as an accelerating or condensing agent acid or acid salts, and states that the earlier application claimed a method which would yield an insoluble indurating condensation product (gum or resin).

The inventor, on July 13, 1907, stated that he had discovered a greatly improved product by separating the bulk of the water produced during the reaction before final hardening. He says:

"If a mixture of phenol or its homologues and formaldehydes be heated, alone or in the presence of catalytic or condensing agents, the formaldehyde being present in about the molecular proportion required * * * approximately equal volumes of commercial phenol and commercial formaldehyde," these bodies will react, etc.

He then describes the treatment to obtain further reactions, and finally directs heating of the condensation product, by which it will be transformed into a hard, gummy, or resinous body, "unaffected by moisture, insoluble in alcohol and acetone, and resistant to acids, alkalies, and almost all ordinary reagents." He states:

"This product is found to be suitable for many purposes, and may be employed either alone or in admixture with other solid," etc.

In combining the condensation product in this manner, the desirable materials are mixed with the same before submitting it to the final hardening operation below described. This final hardening operation is to press it in a mold at a temperature of from 110 to 140 degrees C. for the production of hard objects similar to rubber, ivory, etc., while for treating wood the inventor says that the surface only may be treated, or that the entire body of the wood may be subjected to the treatment set forth in the earlier application (February 18, 1907) and the material thereafter submitted to heat; some condensing agent being added if desired. He specifies heating in a closed vessel and under

pressure, to turn the condensation product, whether alone or compounded, into an insoluble "resin" (later amended to read "body"). He specifies that cresol and its homologues may be used in place of ordinary phenol, and that a small proportion of mineral or organic acid, or salt favoring condensation, may be added. By a subsequent amendment he inserted the words "or agent" before the words "favoring condensation," but specified that the proportion of this condensing agent was in all cases to be so small as to avoid such energetic reaction as would not permit the intermediate oily, viscous, or semiplastic condensation product to be obtained.

The Patent Office required separation between the claims relating to the condensation product and method of producing same and the claims relating to the wood indurating product or method of production thereof, and the inventor limited that application to three claims relating to the method of obtaining the hard product by the application of heat and pressure from the condensation product of phenol and formaldehyde.

In so doing, upon the 17th of March, 1908, the inventor stated that widely differing products might be obtained from the action of phenols on aldehydes. Some of these might be liquids, others solids, some crystalline, and others amorphous masses of a resinous appearance. "These resinous products may again be divided into those which are fusible and soluble in alcohol or similar solvents, and those which are infusible and insoluble" under like conditions.

He refers to the De Laire (French) patent 361,539, and the Blumer (English) patent 12,880 of 1902, as illustrations of the fusible and soluble product, while he refers to the experiment by Kleeberg, described in 1891, as instance of an insoluble and infusible condensation product.

He also refers to Luft (United States) patent 735,278, (German) patent 140,552, (English) patent 10,218 of 1902, who uses an acid condensation agent and adds to the plastic condensation product such substances as camphor, rubber, glycerine, or alcohol, and then submits the product to slow drying or evaporation, at a temperature of 50 degrees C. He states that Story, in his (English) patent 8,875 of 1905, accomplishes the same result by using an excess of phenol. The phenol acts as a solvent, the excess separating upon boiling, and, if "poured in suitable molds" and "dried at temperatures below 100 degrees C. (about 80 degrees C.)," the excess of phenol will be expelled and an infusible product obtained.

He states that the above-mentioned processes are compelled to resort to relatively low temperatures and are slow processes, varying from a day to several weeks or months, while for objects of large size the drying is irregular, etc.

The inventor states that his own process by the application of heat and pressure yields a superior product in a shorter time and claims invention for his method. These claims were rejected upon the Luft and Story patents, in connection with others, and were amended by emphasizing the combined action of heat and pressure as a distinction from all the references cited. An example of the claims rejected is illustrative of the inventor's disclosure, i. e.:

"The method of producing a hard, compact, insoluble, and infusible condensation product of phenol and formaldehyde, which consists in reacting upon phenol with formaldehyde under the combined action of heat and pressure."

Certain correspondence was had as to the original disclosure of the use of pressure, and the claims were again amended to meet that objection, on October 8, 1909. In this form the patent was granted upon a request presented on November 4, 1909, in which the specification and claims were rewritten. Claim 1 is as follows:

"The method of producing a hard, compact, insoluble, and infusible condensation product of phenols and formaldehyde, which consists in reacting upon a phenolic body with formaldehyde, and then converting the product into a hard, insoluble, and infusible body by the combined action of heat and pressure."

And claim 5 shows the step in the method by which a "metallic salt" is added to cause "separation."

The balance of the claims (originally 4, 5, 6, and 8) resulted in patent 942,852, also granted upon December 7, 1909, which presents nothing further, affecting the issues in this suit or the means by which the patentee disposed of the references to Luft and Story, other than the matters which have been discussed in connection with the claims relating to the first part of the application.

We thus come to the application 397,560, of patent 942,809, which was filed upon the 15th of October, 1907; that is, in the same year in which the applications just discussed were filed. In this the inventor claims improvements in the condensation product and method of making same from formaldehyde and phenol, by setting forth an improved method and an improvement in the product resulting from the use of that method. He states that these condensation products have received industrial application in the making of varnish, resinous products, and plastic compounds. He states that the completion of the product by heating phenol and formaldehyde without the aid of condensing agents requires some 8 hours when commercial phenol and formaldehyde are used, and that 48 hours constant boiling are required with crystallized phenol. He also states that acids or salts cause a stormy reaction and produce products containing undesirable impurities effecting a darkening color with age or the presence of alkalies in the ultimate product. He states that, by the addition of "proper proportions" of an organic or inorganic base, the reaction may be facilitated and the product rendered far superior. He states that the base may be added at any time up to the conclusion of the heating process, and that alkalies are used in such relatively small proportions that their presence does not interfere and that they need not be eliminated by washing or neutralizing. He mentions ammonia, caustic alkalies or their carbonates, anilin or pyridin, or the hydrates of barium, strontium, or calcium, as well as all derivatives of the type of $N H_3$ having basic properties.

The original specifications set forth that the additions of ammonia or caustic soda, in as small a proportion as one-half per cent. of the weight of phenol, show a decided influence. In most cases it is desirable to use somewhat larger proportions, rarely attaining however

10 per cent. of the phenol by weight. The inventor describes the addition of this base to pure or commercial phenol (carbolic acid) and formaldehyde, and the completion of the reaction by heating in a closed vessel or one with a return condenser, thus producing either an oily liquid or more or less viscous, elastic, or semisolid product, which is "soluble in alcohol, acetone and similar solvents, and in conjunction with these forms varnishes of excellent quality." Upon application of heat the varnish is rendered insoluble, and substantially inert to acid and alkaline reagents after drying.

The inventor furnishes examples specifying the use of 50 parts of phenol by weight, 30 to 70 parts of commercial formaldehyde by weight, and in one instance aqueous ammonia 1 to 10 parts by weight, in another, anilin 1 to 7 parts by weight, and in a third, commercial sodium or potassium hydroxide .5 to 6 parts by weight.

He then refers to previous methods (apparently known in the art) of dissolving phenol in substantially molecular proportions with caustic alkali so as to form a phenolate. Reaction of this product is caused with formaldehyde and the product neutralized by acid, leaving a solid soluble in alcohol and in caustic potash (De Laire). He states that he differs from this in not employing the large proportion of alkali, thus avoiding the necessity of neutralizing but yet giving a product capable of solution, molding, and which will be turned by the application of heat into a solid mass insoluble in the ordinary solvents.

His claims as first presented were exceedingly broad, as, for instance, proposed claim 1:

"The method which consists in reacting on a phenolic body with formaldehyde in presence of a base serving as a condensing agent."

The Patent Office immediately rejected, upon the 9th of December, 1907, on the (French) patent 361,539, of June 8, 1905. This is the so-called De Laire patent, and the inventor, upon the 17th of March, 1908, began to limit his claims to correspond with the statements of his specifications, by inserting in claim 1 the words, "the proportion of base being insufficient for the transformation of the phenolic body into phenolate." He explains that his original specifications made it clear that the De Laire patent was understood and that it was intended to distinguish his invention therefrom.

The Patent Office thereupon allowed the patent upon the 25th day of May, 1908, but upon the same day the case was withdrawn from issue, and a further amendment, not affecting the merits, was asked upon the 17th of September, 1909. A further definite statement of the amount of base was inserted in the claims by substituting the words, "less than one-fifth of the amount of," in the place of the words "the phenolic."

This amendment was rejected on September 27, 1909, on the (German) patent to Henschke, 157,553, which was explained by the inventor upon the 7th of October, to cover a product in the form of aqueous liquid, soluble in water, capable of liberating formaldehyde, having disinfecting properties, in fact being an alkaline derivative of saliretin.

It also appeared at this time that claims 9 and 10 specifically related to a varnish rather than a mere condensation product, and the other claims were allowed on December 7, 1909. Then by division of this application, on a petition filed November 22, 1909, under No. 529,378, but upon the same disclosures in the specifications, the original claims 9 and 10 were allowed on April 12, 1910, for a varnish, No. 954,666 (the first patent in suit). These claims had been again rejected on Henschke (supra). A third claim was also rejected on Luft (British) 10,218 of 1902, and Grognot (French) 906,219 of 1908.

The inventor repeated his explanation as to the Henschke patent and amplified it by stating that Henschke removes the free base by acidification and thus obtains a precipitate free from base and soluble in alcohol, acetone, alkali, ammonia, etc. The final product of Henschke is either an antiseptic powder, or a substance liberating formaldehyde available as a disinfectant.

All that the Henschke patent really shows with respect to the issue in this action is that the reaction between phenol and formaldehyde will be effected by the presence of a base in certain specified amounts which differ in quantity from the amounts used by Manasse, Lederer, Kleeberg, and others.

The Patent Office quickly recognized the distinction claimed by Baekeland, and, as the examiner seemed to have no question that a product such as that described in the application could be patented, the claims were then allowed and the first patent in suit issued, describing a substance or product, possessing alleged new and useful qualities, and available generally for the purposes which have been covered by the term "varnish." This condensation product was formed with heat alone at relatively low temperatures. The expert witnesses in this case have defined a "varnish" as:

"A liquid adapted to be spread in a uniform layer on a surface and which will there set to produce a hard, permanent, nonporous, protective, continuous, adherent, and coherent layer or film."

This film should also be smooth, shiny, transparent (unless made a medium for adding coloring material), and made from materials obtainable at such prices and in such quantities as would allow the manufacturer to put the product upon the market, to meet the needs of the trade in price and convenience of supply. Ordinary varnishes were said to be divided between those made from vegetable gum and those made from pyroxylin. But neither of these classes included the reactive varnish films.

[3] "Pyroxylin," which is nitrocellulose or gun cotton, if dissolved and spread as a varnish film, is subject only to the evaporation of the solvent, a physical or nonreactive change. Vegetable gums undergo no change other than the evaporation of the water when spread in a varnish.

[4] A "reactive film" is one in which a chemical change or reaction occurs upon spreading the film and subjecting it to heat, light, air, motion, or electricity, but without the addition of some other chemical substance. The plaintiff's product when subjected to heat,

after having been spread in the form of a varnish film, expels water and gaseous products, and the stage of insolubility and infusibility is not reached until the chemical reaction just referred to has taken place.

In vegetable or pyroxylin varnishes, mere heating or drying will leave a product capable of re-solution as many times as the process is repeated. The use of such varnishes in commercial practice, where excellence of product and quickness of hardening entered into the desirability of the article, led the inventor to construct an oven or drying apparatus, by which the requisite amount of heat, or heat under pressure, could be used so as to shorten the drying or reacting stage, and to consider the then known requisites and limitations or difficulties which necessarily had to be taken into account in attempting to use any varnish or article successfully for commercial purposes. The formation and forcible expulsion of water during the reaction and under the influence of heat was theoretically sufficient to remove from the varnished surface moisture that might interfere with the dialectric or insulating quality of the varnish film in coating or covering surfaces of electrical conductors or nonconductors. In practice, it developed that some of the water generated was retained and not physically expelled from the surface of the varnish, under the influence of sufficient heat to remove the solvent and complete the reaction producing the insoluble and infusible product.

The idea of a double solvent was well known in the arts as well as in chemistry. The patentee, after experimenting with different solvents, and observing the reactions and effects connected with their use, found that by employing a double solvent for the solution of the product, described in the first patent in suit, in which double solvent, one of the bodies possessed the characteristics of amyl alcohol, toluene, or xylene (having boiling points above that of water), and the other body such as wood alcohol, ethyl alcohol, or acetone (having boiling points below that of water) would produce a varnish compound in which the reaction set in motion by the application of heat, would expel substantially all of the water before the boiling point of the amyl alcohol, toluene, or xylene was reached. As these last-named bodies were practically immiscible with water, and were volatile when heated at atmospheric pressures, the application of the double solvent can be readily understood. This product was also free (under the reaction caused by heat) from the tendency of the alcohols to absorb moisture and thus to produce a white or inferior coating when subjected to damp weather, and by this method the tendency of free phenol and free cresol to absorb water was also eliminated by the certainty with which such water was expelled, until a point was reached where the free cresol and free phenol would be (if not already counteracted) volatilized or driven off by the heat.

The second patent is, again, a product patent as distinguished from a method or process patent. In the Patent Office the Story (British) patent 8,875, of 1905, was cited as disclosing the addition of certain fatty oils to a condensation product of phenols and formaldehyde. But in Story the presence of an excess of uncombined phenol, with the

consequent difficulty when heating the substance containing the fatty oils described, caused by their tendency to decompose before they become volatile, and before the excess phenol would be removed, together with the fact that Story uses the fatty oils to make the mass opaque, satisfied the only objection presented, and the Patent Office allowed the patent as a new composition of matter. This patent has six claims, of which 2 and 5 are typical and are as follows:

"2. As a new composition of matter, a varnish comprising a condensation product of phenols and formaldehyde and a solvent therefor, said solvent containing amyl alcohol and a readily volatile organic liquid."

"5. As a new composition of matter, a varnish comprising a condensation product of phenols and formaldehyde and a solvent therefor, said solvent containing a readily volatile organic liquid, and another organic liquid which is immiscible with water but miscible with said solvent, which is volatilizable without decomposition when heated at atmospheric pressures, and of which the boiling point exceeds that of water."

These claims are those alleged to be infringed.

But in a short time the difficulties shown in electrical insulations from the tendency of alcohols to absorb moisture, the desirability of using benzol as a solvent when an excess amount of phenol or cresol might remain, and from the further fact that the condensation product after the reaction caused by the application of heat was insoluble in benzol (or in moderate amounts of alcohol unless a large excess of phenol was present), led the inventor to use, as one solvent, benzol or other cyclic hydrocarbon (easily obtainable from petroleum, such as petroleum ether, toluol, xylol, etc.), and, for the other solvent, any liquid oxygen compound of the aliphatic series, such as methyl or ethyl alcohol, amyl alcohol, acetone, amyl acetate, epichlorhydrin, etc. If a large amount of alcohol was used as a solvent, reprecipitation was likely, but benzol prevented this result.

While this method of using a double solvent was particularly directed to the production of the solution, i. e., a varnish from which the uncombined phenol had been expelled, it could also be advantageously used in any case where the excess of the phenol was not great enough to render the final or condensation product freely soluble in benzol or alcohol alone.

This application in the Patent Office brought forth the statement that the solvents mentioned are "common in the art," and the Smith (German) patent 112,685 was cited as disclosing a mixture of benzol and ether as a solvent; but this was explained by showing, from the translation referred to in the Smith patent, that a permanently fusible substance was under description, made from aldehyde or acetaldehyde (not formaldehyde) in presence of hydrochloric acid. The patent was then immediately issued, containing claims for the product as a new composition of matter. Claims 1, 2, and 3 are alleged to be infringed, and are as follows:

"1. As a new composition of matter, a varnish comprising a condensation product of phenols and formaldehyde, transformable by heat into an infusible body and a solvent therefor, said solvent containing a liquid oxygen-compound of the aliphatic series, and a hydrocarbon.

"2. As a new composition of matter, a varnish comprising a condensation product of phenols and formaldehyde, transformable by heat into an infusible

body and a solvent therefor, said solvent containing a liquid oxygen-compound of the aliphatic series, and a cyclic hydrocarbon.

"3. As a new composition of matter, a varnish comprising a condensation product of phenols and formaldehyde, transformable by heat into an infusible body and a solvent therefor, said solvent containing a liquid oxygen-compound of the aliphatic series, and a hydrocarbon of the benzol series."

It may thus be seen that Dr. Baekeland, in patent 942,699, secured claims for a product produced by the method set forth in the application filed July 13, 1907, and in the first patent in suit obtained claims for a varnish composed of substances, one of which was the product shown in patent 942,700 and patent 942,809, but limited by the amount of base remaining in the final product that is persisting into or after the application of heat. The substances entering into the reaction are the basis of estimating the result, rather than the quantity present and expelled or accounted for in some other way; but these excess quantities not entering into the reaction must be considered, as for instance the excess of phenol in the novolak products and the excess of formaldehyde in Henschke.

As has been mentioned in the reference to the file wrappers above, the general proposition, that a varnish could be made by the use of condensation products, was well known and disclosed in substantially each of the patents which have been described.

It was plainly old in the art to make pyroxylin varnishes and varnishes of phenolic condensation products. But each of these varnishes, and each condensation product, had individual characteristics, and the patents in suit involve differences in the chemical process or processes of manufacture by which the particular product, claimed in the patent as novel, is to be produced.

The defendant claims that this product, to be used in the making of varnish, was nothing more than the resin which the patentee had sought to patent for use as a varnish, and he urges therefore that the varnish patents themselves are invalid, citing Underwood v. Gerber, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710.

He attacks further claim 1, because the patentee is said to have acquiesced in the rejection by the Patent Office of this claim when first presented.

The application for patent 942,809, which was a renewal of application 397,560, contained the claim filed upon the 15th of October, 1907, for a varnish, and the defense claims that the rejection of the varnish claims in the condensation product patent was acquiesced in by Baekeland, and that he therefore could not divide the application and restate the claim.

Examination of the file wrapper shows that this rejection was merely because of the incompatibility, under the rules of the Patent Office, of a claim for a varnish in the same patent with a claim for the condensation product with which the varnish is to be made, or a claim for the method of making that product.

Claim 2 is said to be invalid, in that the specifications as originally presented, and even as finally contained in the allowed patent, do not show the rule of proportion set forth in the language "not exceeding

one-fifth of the equal molecular proportion of phenol body employed." During the trial much testimony was devoted to an explanation of the meaning of "equal molecular proportion" and computation of the amount of ingredients set forth in the various patents discussed in the record.

Inasmuch as there is no dispute as to the real meaning of the phrase, or as to the molecular weight of the ingredients, or as to the quantity represented by one-fifth of the phenolic body expressed in terms of molecular weight, and so long as there is no dispute as to the percentage of the whole article represented thereby, we need only look to the specifications in order to find if the language of this claim corresponds to a proposition explained in the specifications.

The patentee, when referring to the use of base, and speaking of ammonia or caustic soda as an illustration, says that so small a proportion of the base as one-half per cent. of the weight of phenol, that is $^1/_{200}$ by weight, and in other cases an increased amount rarely reaching 10 per cent. by weight of the phenol, is sufficient. This base is, however, to be calculated from that which actually remains as such in the product or the varnish, and the definite proportion contained in the claim was inserted therein after the Patent Office compelled the patentee to limit his claim of invention (but not the statement of his original experimentation or his present conclusion) to matters which the Patent Office considered new over the De Laire, Story, and Luft patents.

Under these circumstances, the court cannot see why the claims should be invalid because at the time of filing the application the patentee did not sufficiently limit the language in his claims so as to avoid interference with other patents which, however, did not disclose the precise matter ultimately proving to be that intended to be claimed as invention by the applicant, and which had been in his mind from the time of his application. Thus the small amount of base which Dr. Baekeland finds would universally produce the result desired was not disclosed by any of the prior patents, up to the time the application by Baekeland was filed.

Subsequently a certificate of addition to the Story (French) patent was filed upon the 29th day of September, 1908, and therefrom the defendant suggests that Baekeland learned how to state the claim which he had previously been trying to formulate. But the question of patentability could not rest upon literary plagiarism even if that were shown, and the testimony in the case would indicate rather that the Story addition was an attempt to secure the French rights for the same variation from the original Story patent as were being claimed by Baekeland in the United States, even if there were reason to suppose that Baekeland had seen this addition to the Story (French) patent, which was not published until February 25, 1909.

This would not prove that Story was entitled to claim the invention over that claimed by Baekeland, and, if Baekeland's invention was in fact the same as that described in the Story addition, then Baekeland would be entitled, on application to the Patent Office, to

have the claim issued even in substantially the same language as that described by Story.

The defendant does not show that Story was the inventor rather than Baekeland; he merely suggests that Story's patent solicitor produced a statement of the claim in such a form that Baekeland could see at once that, stated in the same way, his invention was made valid over the prior art and would meet with the approval of the Patent Office.

But, as a matter of fact, the defense does not even make out its accusation of plagiarism, as there is nothing to show that Dr. Baekeland had the Story addition before him or called to his knowledge prior to the time when he realized the way in which to make a definite statement of what he claimed as novel in his patent over the Story or De Laire patents themselves.

The defense to the second and third patents is substantially the same as that to the first, but with the added proposition that double solvents were old in the art and that the particular double solvents claimed in the third patent were in fact but a variety of those shown in the second.

As to the last proposition which is urged (that benzol or toluol with amyl alcohol would be one of the possible components referred to in the second patent, when it suggests the use of a solvent, immiscible with water and having a boiling point higher than that of water, with one of the easily volatile solvents at lower temperatures), the defendant's claim is that thereby the patentee attempts double patenting or extension of the time of protection beyond that shown by the second patent. But even though the third patent should be held to cover nothing more than one of the components disclosed by the second patent, and if the third patent should therefore be void for anything more than the period protected by the second, the defendant herein would still be an infringer of the second patent and liable.

As a matter of fact, however, the third patent is not invalid in this sense. The second patent does not teach nor show the combination of a hydrocarbon with a solvent of the aliphatic series, having the qualities of and volatilizing at the temperatures described. The testimony of the expert varnish makers in the case shows that the use of these two particular solvents would be not only an accident, but substantially improbable except as a casual experiment, and the precise nature of the product covered by the third patent is shown therein to be adapted for a particular use, and would seem to be a patentable improvement over the combination described in patent No. 2.

We come back, therefore, to the main defenses based upon the prior art.

The defendant attempted to show noninfringement upon his own testimony that he added no base to the commercial carbolic acid and the commercial formaldehyde solution which he employs in making his varnish. But analyses by both the defendant's and plaintiff's experts showed the presence of ammonia by what is called the Kjeldahl method, which shows the quantity of nitrogen and accounts for

any ammonia that may have been present as a part of this nitrogenous body.

By another analysis, the plaintiff's expert, whose results compared generally closely to similar analyses by the defendant's expert, found free ammonia amounting to $^{13}/_{100}$ per cent. of the solid residue. The defendant's expert failed to take into account the combination of ammonia and formaldehyde to form hexamethylenetetramine, a nonvolatile base from which ammonia would not be driven off by boiling with caustic soda.

The analyses further showed that the defendant's products contained pure phenol and ammonia, and the testimony of the case shows definitely that ammonia is not found in commercial carbolic acid. But orthocresol, metacresol, and paracresol, as well as pyridin, are found in commercial carbolic acid. Pyridin shows by the Nessler test no trace of ammonia, and yet would give by the Kjeldahl test evidence of the presence of nitrogen. Likewise by the Kjeldahl method, ammonia would be found and be calculated as nitrogen.

Commercial carbolic acid is mostly cresol, with possibly a small amount of true phenol. As true phenol or hydroxybenzol reacts more easily with formaldehyde than does paracresol or orthocresol, the fact that free phenol is found in the defendant's varnish, and that no cresols were found, would indicate that the defendant's varnish was made from phenol rather than commercial carbolic acid, and that the ammonia present must have been in some form added as a base.

While the defendant has testified to certain purchases of commercial carbolic acid, and also certain purchases of crystalline phenol, he has not testified to the use of any material which would satisfactorily account for the product shown by analysis, and it must be held that he is either making a product which infringes the plaintiff's patent, and has not disclosed the methods of so doing, or that he has added some material of which he does not know the contents himself, but which contains products that do infringe the patent.

[2] It is no defense to a charge of infringement of a patent for a product produced by some chemical process, to assert ignorance of the reactions which take place, and thus to claim the right to combine substances which on analysis are shown to cause the reactions of the process leading to the patented product, and to obtain that product itself by methods shown to be those of the patent, even though never before understood until testified to upon the trial.

If a person should attempt to excuse infringement of a patent calling for the use of iron or steel in the making of a device, by suggesting that he did not know what iron or steel was, and that he merely used a hard metallic substance which he purchased from a certain manufacturer and which did the work, it can be seen where such a doctrine would lead.

The defendant also contends that the amount of base shown by the defendant's chemist is much less than the smallest amount stated in the plaintiff's patent to be sufficient to meet the discovery therein contained. But the plaintiff's expert finds ammonia approximating

18/100 per cent. of the solid residue which is within the quantity referred to in the specification.

Much of the discussion raised by the defendant with reference to the validity of the patent, both from the standpoint of the disclosures in the plaintiff's former applications and patents and also in following up the suggestions of the patents of the prior art, arises from the nature of the claims and of the invention.

It will, of course, be assumed that no chemical reaction can be patented as such. A natural product, such as ordinary salt (Na Cl), could not be made the basis of a patent, nor could a discovery of the chemical reactions by which salt was formed in nature, from sodium and chlorine, be patented as a process. But if artificial salt, as a chemical substance, could be distinguished from natural salt, and if some one discovered a way to make artificial salt, he could patent the method or process, if it were novel. Provided he was the first one to produce the substance, he could patent the product as something useful in commerce or in the arts.

So it is conceivable that some gum or natural substance like shellac or amber might be found, composed of phenol, formaldehyde, and a base, and transformed by heat into an insoluble and infusible substance. If such a product had been known prior to the plaintiff's patents, the plaintiff could have obtained no patent, if his product was identical and indistinguishable from the natural substance; but he would have been limited to a patent for a process.

But at a time when the only product of phenol and formaldehyde, known and described with understanding and definiteness, was a permanently fusible and permanently soluble gum, the discovery of a method of rendering this product insoluble and infusible was patentable, and provided the product could be certainly identified and distinguished from the former and known products, it could be patented as well as a combination of such substance in certain relations or proportions.

If the use of an excess of formaldehyde was overcome by the use of a large amount of base, and the base in turn removed by precipitation into an acid salt, and if the product was not identifiable or was not available for any known purpose, no patent could be issued for the process (which would be mere chemical reactions) nor for the product (see Reychler and Kleeberg), and certainly the combination of that product with some other substances to form a useful article like a varnish, is inconceivable.

The patents in suit are based upon the earlier patents of Baekeland for a method of producing the phenolic gum and also his patents for the condensation product produced by the patented method. But when he attempts to make a varnish which consists of a combination based upon and making use of the patentable method of preparing the condensation product, and also upon the patentable substance itself he has a new substance which is itself patentable. As in the case of a patentable mechanical device, this consists of more than a mere aggregation of parts.

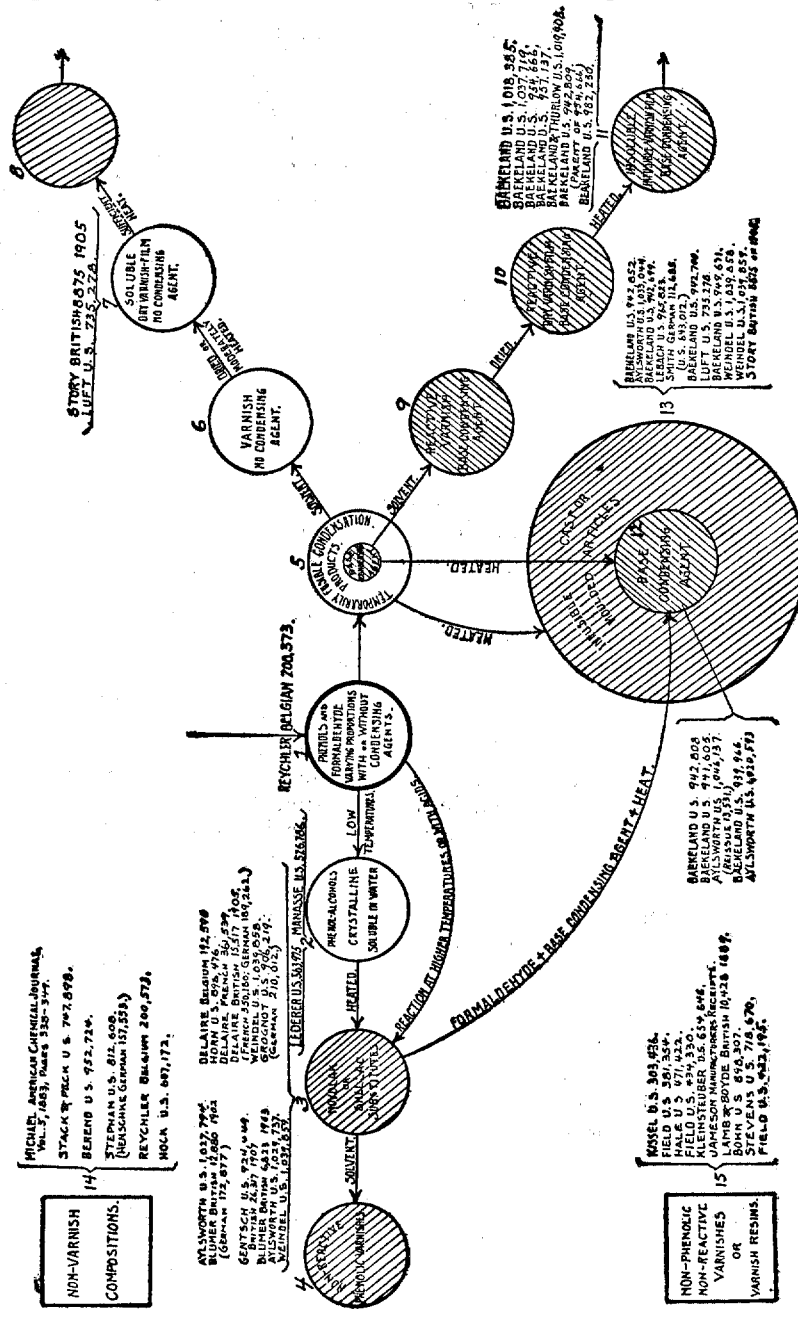
Considering the last two patents in suit for a moment, the defendant claims that they are invalid because they show merely the use of a double solvent with a gum or product which is capable of solution for varnish purposes, which is nothing more than the ordinary defense of aggregation with respect to a combination of mechanical parts. If the use of these solvents with this particular phenolic gum presents a substance having qualities that are different from those of any other compound or substance previously used for the same purpose, it is no defense to the patent to suggest that the physical or chemical processes involved in the mixing and drying or setting of the varnish are the same as those involved in the mixing, drying, or setting of a varnish which would produce different results and show different qualities.

The combination disclosed in the Baekeland patents is new for varnish purposes. It has new qualities, and meets old needs in a new way. The behavior and purposes of the double solvents, and the way in which the varnish passes through the physical and chemical changes, are of course not patentable, any more than the suggestion that the water present is eliminated in the form of vapor would be novel or distinguish the product from other substances. If, however, water or volatile solvents are evaporated, the patentability of the combination from which the water is produced would not be affected by the age of the world's appreciation of the principle of evaporation.

So with the first patent in suit, when we consider the various patents of the prior art by which condensation products, showing either an excess of phenol or an excess of formaldehyde, or condensation by the aid of a large amount of base, or by the acidification of the base and its removal in the form of nonsoluble salts, or if we consider the possibility of obtaining a huge mass of insoluble and infusible material, of irregular shape, by a violent expulsion of steam or gas and a consequent spongy or porous form of the product, or if we consider the production of an insoluble and infusible film in small quantities upon a glass plate or in a test tube, or even if we found the product such as was shown in the Story (English) patent, where by long application of heat a reddish or red-colored film could be produced, or if we consider a condensation product which, while capable of use as a varnish, remains permanently fusible and soluble (such as that distinguished by the novolak type), we nowhere approach to the particular condensation product and the particular combination, for use as a varnish, by which it is possible to certainly, easily, and accurately begin with a condensation product that in combination with certain defined solvents will produce a varnish which with short subjection to moderate heat will produce a colorless, infusible, insoluble, and useful lacquer film of the sort desired for use in the arts and which in certain definitely specified combinations possesses the qualities required where the surface is to be subjected to the influence of an electric current, under conditions where moisture may be absorbed or encountered.

It is unnecessary to go through the patents presented in the prior art in detail. The chart prepared by the plaintiff, and which is shown

below, contains references by number to all of the patents, and indicates the direction of the various reactions and the classification of the products upon the basis of those reactions in each patent mentioned:



It is sufficient to say that in none of the earlier Baekeland patents was a varnish combination disclosed which was like that in the patents in suit, even though Baekeland in some of the earlier patents taught that his particular condensation product was available as a varnish. Nor did any of the earlier Baekeland patents or the patents of the prior art shown in circles 2 and 3 produce the infusible and insoluble substance of the Baekeland patents shown in circles 11 and 13.

The Story (English) patent, as has been seen, presented an acid, rather than a basic condensation product. In cases where pure phenol was used, a large amount of heat or long evaporation was necessary to produce the insoluble or infusible film with the reddish tinge, while the product that Story considered available for varnish purposes was that containing the acid excess and which remains soluble after drying as a varnish.

Such other patents as those set forth in class 15 upon the diagram present nonphenolic or nonreactive varnishes or resins which have nothing to do with the combinations of the patents in suit, except as they may use double solvents or may set forth similar chemical reactions, or may, with the knowledge of those patents, as well as of the Baekeland patents, indicate how an exchange of substance might, by employment of the same chemical reactions as before, produce the Baekeland results. But such patents are not anticipations, nor would they be infringements of the Baekeland patents in suit, and we can therefore dismiss them, as in each case they were substantially dismissed by the defendant's expert upon the trial, by saying that no one of them showed in its entirety the precise varnish or combination of any of the three patents in suit. Even if it does not require invention to trace the resemblances between these patents and the Baekeland patents in suit, or to produce similar results by substitution of known products for those products which were different in these prior art patents, and even if we do not concede to the defendant's expert invention in tracing the points of resemblance and difference, it is evident that his recognition of these points does not raise them to the dignity of defenses, nor are they anticipations of the Baekeland patents.

The doctrine of Underwood v. Gerber, supra, is presented as authority for the claim of invalidity as to the patents in suit, because it is said that in patent 942,809 Baekeland disclosed the same form of varnish resin, and that no patentable novelty is shown in merely combining that resin with a solvent to make a varnish.

The discussion already had shows the difference between the case at bar and Underwood v. Gerber, supra, where a patented or claimed product was subsequently used as an application for the surfacing of paper. But the discussion already had shows further that patent 942,809 describes merely the process or method of producing a patentable substance, while claim 8 describes this condensation in such general form that the description in patent 954,666, of a varnish made therewith, would still be possible as a combination, even though Dr. Baekeland might not be able to patent a second time the condensation product produced by the presence of a base condensing agent in proportions not to exceed one-fifth of the equal molecular proportion of phenolic

body employed after describing that condensation product in his previous patent, 942,809, for which the application was that from which the new application was divided and re-filed.

The first patent in suit was based upon the application for 942,809, was never abandoned, and was not anticipated by the subsequent separate allowance of 942,809 for one of the ingredients of the new and patentable substance which was useful commercially as a varnish.

Claim 2 of patent 954,666 is therefore valid as the definite description of the combination specifically based upon the product patented in 942,809, while claim 1 of patent 954,666 is valid as a general description of a new form of varnish which can be produced by the methods of the specification and which is in more detail identified in claim 2.

The patents will therefore be held valid and infringed, and the plaintiff may have a decree.

UNITED STATES v. SOUTHERN OREGON CO.

(District Court, D. Oregon. July 12, 1915.)

No. 3701.

1. PUBLIC LANDS ⟸66—GRANTS—CONSTRUCTION.

Condition in the grant by Act Cong. March 3, 1869, c. 150, 15 Stat. 340, of public lands to the state of Oregon in aid of a military road, requiring "that the land shall be sold to any one person only in quantities not greater than one quarter section and for a price not exceeding two dollars and fifty cents per acre," *held* not a condition subsequent, but an enforceable covenant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 219, 220; Dec. Dig. ⟸66.]

2. PUBLIC LANDS ⟸66—GRANTS—CONSTRUCTION.

Compliance with such condition was not a mere matter of good faith between the government and the state, Congress having the power to impose such conditions as it desired upon disposing of the public domain, and a grantee to whom the state, by virtue of Act Cong. June 18, 1874, c. 305, 18 Stat. 80 (Comp. St. 1913, § 4871), disposed of its interest is bound to observe the conditions.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 219, 220; Dec. Dig. ⟸66.]

3. JUDGMENT ⟸713—CONCLUSIVENESS—MATTERS CONCLUDED.

When a second suit is upon the same cause of action and between the same parties, the judgment in the first is conclusive as to every question which was or might have been presented and determined in the second.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. ⟸713.]

4. JUDGMENT ⟸586—CONCLUSIVENESS—MATTERS CONCLUDED.

Before suing to forfeit an entire grant of land on account of the grantee's failure to comply with conditions of the grant respecting alienation, the federal government brought other suits seeking to cancel the patents to small portions of the land which it was claimed were not included in the patent or were included by mistake. *Held*, that judgments for the

grantees in those actions did not preclude a subsequent suit to forfeit the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1066, 1098, 1099; Dec. Dig. ⊂⊃586.]

5. ESTOPPEL ⊂⊃62—EQUITABLE ESTOPPEL—LACHES.

The federal government is not estopped to claim forfeiture of a grant of lands on account of the patentees' failure to comply with the conditions of the grant by reason of having full knowledge that the patentees were treating the property as if it was theirs in fee simple, subject to no conditions, for the grant was by act of Congress which has the same constancy as the law.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151–153; Dec. Dig. ⊂⊃62.]

6. PUBLIC LANDS ⊂⊃66—INNOCENT PURCHASERS—WHO ARE.

Where the original grant of public lands from the government contained restrictions on the use of land, the patentee's grantee cannot be a bona fide purchaser without notice, and thus entitled to take the property free from the duty to comply with the burdens.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 219, 220; Dec. Dig. ⊂⊃66.]

In Equity. Suit by the United States of America against the Southern Oregon Company. Decree for complainant.

See, also, 196 Fed. 423.

This is a suit on the part of the general government to have forfeited to it substantially the entire land grant made by Congress, of March 3, 1869, to the state of Oregon to aid in the construction of a military wagon road from Roseburg, in Douglas county, to Coos Bay, in Coos county. The grant is of the odd-numbered sections to the extent of three sections on each side of the line of the road, with indemnity limits of six miles.

Among the provisions of the first section of the act are these: "Provided, that the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses: Provided further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre."

Section 2 provides that "The lands hereby granted to said state shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other."

Section 5 provides that when the Governor of the state shall certify to the Secretary of the Interior that 10 continuous miles of said road are completed, then a quantity of the land granted, not to exceed 30 sections, may be sold, and so on from time to time, until said road shall be completed; completion being required within five years, with a further provision that, if not completed within that time, the lands remaining unsold shall revert to the United States.

Section 6 requires that the Surveyor General shall cause the lands granted "to be surveyed at the earliest practical period after said state shall have enacted the necessary legislation to carry this act into effect." 15 Stat. 340, 341.

On October 22, 1870, the Legislative Assembly of the state of Oregon, by an act thereof, granted to the Coos Bay Wagon Road Company all lands, right of way privileges, and immunities as granted to the state by the act aforesaid, "for the purpose of aiding said company in constructing the road mentioned and described, in said act of Congress, upon the conditions and limitations therein prescribed." Laws 1870, p. 40.

On June 18, 1874, Congress passed a supplemental act, providing for the issuance of patents to the lands granted, to the state of Oregon, on compli-

ance with the terms of the original act, unless the state "shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: Provided, that this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the state is already entitled." 18 Stat. 80, c. 305 (Comp. St. 1913, § 4871).

The road was completed within the time limited, and in due course patents were issued by the general government to the Coos Bay Wagon Road Company. Prior to May 31, 1875, the company sold divers small tracts of the land, aggregating 6,963 acres, and on that date it entered into a contract with one John Miller to sell and convey to him 96,676.96 acres of the granted lands. In pursuance of the contract, the company conveyed to Miller, on the same date, 35,534 acres by deed, and the wagon road by another deed. Subsequently Miller conveyed to Collis P. Huntington, Charles Crocker, Leland Stanford, and Mark Hopkins, and they later, by mesne conveyances, to Wm. H. Besse, who, on December 29, 1883, conveyed to Russell Gray, and he, in turn, on January 5, 1884, conveyed to the Oregon Southern Improvement Company, an Oregon corporation. In further pursuance of the Miller contract, the Road Company, on January 7, 1884, conveyed the remaining 61,143.37 acres to Wm. H. Besse, who, on June 4th following, conveyed to the Oregon Southern Improvement Company. The property was at about the same time conveyed by the Improvement Company by certain trust deeds to secure certain bonds, which deeds were later foreclosed, and the property sold at master's sale and conveyed to the Southern Oregon Company, the defendant, also an Oregon corporation.

Subsequent to May 31, 1875, 4,470 acres of the lands have been sold to individuals, namely, 8 sales by the Road Company, 6 by Crocker, 2 by the Improvement Company, and 14 by the defendant company. Other than these, no lands of the grant have been sold either in large or small tracts.

The testimony in the case indicates that the holders have, almost from the inception of the grant, evinced a purpose not to sell in quantities not exceeding 160 acres to any one person, or for a price not exceeding $2.50 per acre. Indeed, the sales made by the Road Company, the patentee, are in derogation of the terms of the grant as it respects quantity, and the subsequent holders have steadily refused, with rare exceptions, to sell in compliance with the terms of the grant; and the defendant, the present holder, does now refuse so to dispose of the lands, claiming to be the owner of the entire fee-simple interest therein, freed of any obligations whatsoever to the government respecting them.

Clarence L. Reames, U. S. Atty., of Portland, Or., Constantine J. Smyth, Sp. Asst. Atty. Gen., of Omaha, Neb., and Fred. C. Rabb, Sp. Asst. Atty. Gen., of Portland, Or.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for defendant.

WOLVERTON, District Judge (after stating the facts as above). [1] The government is seeking a forfeiture of this grant, on the ground that the clause requiring the land to be sold in quantities not greater than 160 acres to any one person, and for a price not exceeding $2.50 per acre, constitutes a condition subsequent, and that there has been a breach of the condition. The defendant insists that the proviso, alluding to this provision in the grant, is repugnant to the grant, because a limitation on the right of alienation, and therefore void. The position is sought to be substantiated by reason of the alleged fact that the lands could not be sold in 160-acre tracts for any price. The testimony does tend to show that, up to perhaps 15 years ago, there was slack sale for the lands in any quantities. It

cannot be asserted, however, that since that time by far the greater proportion of the granted lands could not have been sold in strict conformity with the provisions of the grant. The defendant company having declined and refused so to dispose of its lands, there has been a positive noncompliance with the letter of the grant.

These contentions, both of the government and of the defendant, have been put to rest, contrary to the views of counsel, by the Supreme Court, in the case of Oregon & California Railroad Co. et al. v. United States, 238 U. S. 393, 35 Sup. Ct. 908, 59 L. Ed. ——, originating in this court and involving the construction of similar provisions contained in grants of like character, in a very able and exhaustive opinion by Mr. Justice McKenna. The contention of the defendant there was in reality slightly different from that made here; it being that the provisos constituted restrictive and unenforceable covenants; but, for all practical purposes, it must be considered the same as here. At least, the reasoning and consideration of the Supreme Court reaches and disposes of both phases of the position advanced. I may be pardoned if I quote extensively from the opinion, for it seems to dispose of every aspect of the contentions stated.

"Congress, therefore," says the court, "had under consideration remedies for violations of the provisions of the act and adjusted them according to what it considered the exigency. As a penalty for not completing the road as prescribed Congress declared only for a reversion of the lands not then patented, for not maintaining it in repair and use Congress reserved the right temporarily to sequester the road, and yet for a violation of the provision for sale to settlers it is urged that Congress condemned to forfeiture, not only the lands then unpatented, but those patented. Mark the difference. Was noncompletion of the road of less consequence than settlement along its line?—not necessarily complete settlement, but any settlement—the refusal, it might be, of the acceptance of a single offer of settlement, or even, as it is contended, of making provision for settlement, being of greater consequence and denounced by more severe penalty than the declared conditions, that is, assent to the act, completion of the road, and its maintenance. This is difficult, if not impossible, to believe.

"It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accomplishment of their purposes, either of the construction of the road or sale to actual settlers; and we think the principle must govern that conditions subsequent are not favored, but are always strictly construed, and where there are doubts whether a clause be a covenant or condition, the courts will incline against the latter construction, indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so. 2 Washburn on Real Property, 4. And this because 'they are clauses of contingency on the happening of which the estates granted may be defeated.' And it is a general principle that a court of equity is reluctant to (some authorities say never will) lend its aid to enforce a forfeiture.

"By this conclusion do we leave the provisos meaningless and the government without remedy for their violation? There is no argument in a negative answer. From the defects of a provision we can deduce nothing, nor on account of them substitute one of greater efficacy.

"But must the answer be in the negative, and by rejecting the contention of the government are we compelled to accept that of the railroad company? or we may say those of the railroad company, for the contentions are many, some of which preclude the application of the provisos, some of which assert their invalidity, and others limit their application.

"If not first in order, at least in more immediate connection with the contention of the government is the contention that the provisos are not conditions subsequent, but simple covenants, and, it is said, restrictive and neg-

ative only, and therefore not enforceable. In support of the contention all of the uncertainties, or asserted uncertainties, of the provisos are marshaled and amplified. * * * And the conclusion is deduced that the actual settlers' clauses, viewed even as covenants, were either impossible of performance, or repugnant to the grants, and therefore void.

"The arraignment seems very formidable, but is it not entirely artificial? It is stipulated that prior to 1887 more than 163,000 acres of the granted lands were sold, nearly all of which were sold to actual settlers in small quantities. If the sale of 163,000 acres of land encountered no obstacle in the enumerated uncertainties, we cannot be impressed with their power to obstruct the sale of the balance of the lands. The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons, and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose 'an affirmative obligation to people the country,' it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made, and it is the concession of one of the briefs that the obligation is enforceable, and that, even regarding the covenant as restrictive, the 'jurisdiction of a court of equity, upon a breach or threatened breach of the covenant, to enforce performance by enjoining a violation of the covenant, cannot be doubted.' Apposite cases are cited to sustain the admission, and in answer to the contention of the government that it could recover no damages for the breach, and hence had no enforceable remedy but forfeiture, it is said: 'But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character, and such that no damage could be calculated, is an added reason for the intervention of equity.' And cases are adduced. We concur in the reasoning and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are laws as well as grants, and must be given the exactness of laws.

"If the provisos were ignorantly adopted, as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber and Stone Act [Act June 3, 1878, c. 151, 20 Stat. 89] to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for sale or credit as they were supposed to have been, and difficulties beset both uses—the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is controversy about all of the asserted facts and conclusions.

"Our conclusions, then, on the contentions of the government and the railroad company, are that the provisos are not conditions subsequent; that they are covenants, and enforceable."

What is there said is applicable here, and amply disposes of the contentions advanced without further reasoning or comment.

[2] In this connection may be considered the further contention of the defendant that the grant was to the state of Oregon and in præsenti, and that compliance with the proviso was a matter of good faith only between the government and the state. It will be remembered that, by the act of June 18, 1874, Congress recognized the right and power of the state to transfer its interests in said grant to any corporation, or corporations, for it declared that in the event of such a transfer, patents should be issued to the corporation or corporations direct. The Legislative Assembly of the state, in making the transfer, did it "upon the conditions and limitations" prescribed in the grant. The state did not pretend to comply with the proviso, or any condition of the grant. These things the Road Company undertook to perform by its acceptance of the transfer, and was bound to their performance, the same as the state. But it is not conceivable that it was a matter of good faith merely with the state, to perform the covenants of the grant, any more than it was with the Road Company. The lands prior to the grant were a part of the public domain, and Congress was empowered to dispose of them to whom it pleased, and upon such conditions as it might impose. It could deal with a state in that regard, the same as with an individual or a private corporation, and, unless it evinced a different purpose in dealing with the state, there could be no different construction placed upon the grant. The obligation of the state for the observance of identical conditions would be the same as that of an individual or a corporation. The cases of Mills County v. Railroad Companies, 107 U. S. 557, 2 Sup. Ct. 654, 27 L. Ed. 578, and Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, have no application here. Those cases relate to the grant by the general government of swamp lands to the state on condition that the proceeds of the lands, "whether from sale or direct appropriation in kind," should be applied in reclaiming the lands, and the court held the appropriation of the proceeds rested solely in the good faith of the state. But here is a grant where the state or its grantee is required to dispose of the lands in a certain specified way, which is a direction of law, and nothing is left to the good faith of the state, except to observe the obligations imposed upon it or its grantee by the acceptance of the grant.

[3, 4] It is next contended that the government is estopped to assert a claim for forfeiture, mainly upon the ground that certain suits were in the past instituted, wherein it had the opportunity of setting up the nature of the grant and insisting upon the performance of the provision or covenant in question, and that, having failed to do so, it should not now be heard to insist upon such performance. The nature of the suits may be noticed briefly.

The first was instituted by the United States against the Road Company and the present defendant February 18, 1896, for the purpose of canceling the Road Company's patent to the N. E. ¼ of the N. E. ¼ of section 9, township 28 S., range 7 W., because, it was alleged, the land was reserved by the terms of the grant. A demurrer was interposed to the bill, which was sustained, and the bill dismissed.

On February 29, 1896, the government instituted another suit against the Road Company and the present defendant, and others, for the purpose of annulling the Road Company's patents to certain lands contained in an overlap of the grants to the Road Company and the Oregon & California Railroad Company. To this bill a demurrer was also interposed and sustained, and the bill dismissed, and the cause was not proceeded with further.

On the same day the government instituted another suit against the Road Company, the Southern Oregon Company, Lorenz Vogl, and others, to cancel the patent of the Road Company to a certain tract of land because reserved from the grant, and 1,099.50 other acres of land because situated outside of the limits of the grant, and patented to the Road Company through oversight and mistake of the ministerial officers of the Land Office. The Road Company and the Southern Oregon Company answered the bill, the latter setting up a complete chain by which it claimed to deraign title from the government under the grant, the manner of selecting the lands under the grant, the approval of the lists, and the issuance of the patents in pursuance thereof. It appears further that the government filed a replication to the Road Company's answer. The reply was demurred to, and the demurrer sustained by the court, and, the government refusing to plead further, on motion of the defendants the suit was dismissed. This is a novel procedure, of course, but such is the record, and the cause was thus disposed of.

Later, on August 25, 1897, the government began another suit, against the Road Company alone, touching the same matter, but demanded, as to the lands alleged to be outside of the limits of the grant that were patented to the Road Company, that the government recover the value thereof to the amount of $2.50 per acre. The suit resulted in a cancellation of the patent to the small tract alleged to have been reserved from the operation of the grant, and a decree against the defendant for $1,099.59, the value of the lands patented alleged to be outside of the delimitation of the grant. While the prayer, among other things, prayed for a construction of the grant, there was no construction of it by the court, other than to ascertain: First, that the small tract of land was reserved by the terms of the grant; and, second, that the other lands patented were outside of the limits prescribed, and therefore, they having gone into other hands, that the Road Company should pay to the government what it received therefor.

Upon strict legal principles, it cannot be maintained that any of these suits, or the disposition thereof, or the judgments or decrees rendered, are a bar or an estoppel against the prosecution of the present suit in any of its phases. It has been long settled that, when a second suit is upon the same cause of action and between the same parties, the judgment in the first is conclusive in the second as to every question which was or might have been presented or determined in the first; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been presented and passed upon. In the latter contingency, the question must further appear upon the

face of the record to have been so litigated, or shown by extrinsic evidence, and it is only when it so appears that the former judgment will operate as an estoppel to the subsequent suit or action. Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Nesbitt v. Riverside Independent District, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956; Northern Pacific Railway v. Slaght, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738; Delaware, L. & W. R. Co. v. Kutter, 147 Fed. 51, 72 C. C. A. 315.

It cannot be said: First, that this is the same cause of suit as any one of the suits above mentioned; and, second, although in each instance between the same parties, treating the defendant here as successor to the Road Company, that the questions here sought to be litigated and determined, or any of them, were directly litigated and determined there. Nor does the case of United States v. California & Oregon Land Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476, help the defendant. The purpose of that case was to have certain patents for land declared void as forfeited, and to establish title in the United States. The suit having failed, it was held to constitute a bar to a subsequent bill brought against the same defendant to recover the same land on the ground that it was excepted from the original grant as being a part of an Indian reservation. In commenting upon the lack of distinction between the two suits, Mr. Justice Holmes said:

"The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee."

In none of the cases relied upon was it attempted to establish the government's title in any of the lands now in dispute, nor was it attempted in any way to require the defendant to observe the exact provisions of the grant, as is now sought to be done, so that I am clear that there is no estoppel by reason of any judgment or decree rendered in any of those cases.

[5] But it is further urged that the government ought to be estopped by reason of having full knowledge of the manner in which the several parties were treating their holdings of these lands (that is, as though they were the owners in fee simple, with absolute title unincumbered by any provision of law or covenant impairing the validity of their title in any way), and that the government has not, through all these years, at any time insisted upon any breach of any alleged condition subsequent, or of any covenant respecting the grant. A complete answer to this is the one given by the Supreme Court to a like contention, and others of a similar nature, made in the case of United States v. Oregon & California Railroad Company et al., supra, as follows:

"We may observe again that the acts of Congress are laws as well as grants, and have the constancy of laws as well as their command, and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel and even to the defenses of laches and the statute of limitations."

[6] One other point is presented, and that is that the defendant is an innocent purchaser, in good faith and for value. But this cannot be, so long as the provision about which the entire case hinges is a covenant pertaining to the grant itself. The grant having the force of law, every purchaser dealing with the grant, as the parties succeeding to the title and rights and privileges of the state have dealt with it, must be charged with full knowledge of all of the provisions of the grant, and cannot therefore claim as innocent purchasers.

The decree in this case will be the same as in the Oregon & California Land Grant Case, namely, that the defendant be enjoined from sales of any of these lands in violation of the covenant, and also from any disposition of them whatever, or of the timber thereon, or from cutting or authorizing to be cut or removed any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendant all the value that the granting act conferred upon the state or the Road Company. In case Congress makes no such provision within eight months, the defendant may apply to the court for such modification of the injunction as may seem appropriate.

The plaintiff is entitled to its costs and disbursements.

HUGHES v. NEW YORK, O. & W. R. R.

(District Court, S. D. New York. August 10, 1915.)

COURTS ⊜353—PROCEDURE—MOTIONS FOR NEW TRIAL—TIME FOR MAKING.

Under court rule 5, declaring that for the purpose of making motions necessary to be made within the term at which judgment is entered each term is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month on which verdict was rendered or judgment or decree rendered, the time for a motion for new trial runs from the month in which judgment is entered, where judgment is entered on the verdict; for the judgment, as well as the verdict, must be vacated if new trial is granted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 933; Dec. Dig. ⊜353.]

At Law. Action by Avasta Hughes, as administratrix, against the New York, Ontario & Western Railroad. On motion by plaintiff to vacate an order vacating the judgment and granting new trial. Motion overruled.

Benjamin F. Patterson, of New York City, for the motion.

Watts, Oakes & Bright, of Middletown, N. Y., opposed.

AUGUSTUS N. HAND, District Judge. This is a motion to vacate my order setting aside the verdict vacating the judgment and granting a new trial. The witness Carpenter has furnished another version of the accident and now says Hughes fell from the cupola of the caboose when the train ran by the switch, but that he thinks he did not testify correctly at the trial when he swore that he actually saw Hughes fall

through the air from the cupola to the floor. This technical and extremely literal interpretation of his letter is not the natural one, and, in view of the witness' many conflicting statements, I think I should require the case to be resubmitted to a jury.

The point is also made that I had no power to grant a new trial because of the language of our rule 5, which is as follows:

"For the purpose of making and filing bills of exceptions and making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree rendered."

This rule evidently overlooks the fact that where a judgment is entered on a verdict the judgment as well as the verdict must be removed if a new trial is to be granted. When a judgment has been entered, it is therefore my opinion that the time to make all motions and take all steps involved in the effectual vacating of the judgment runs from the month in which the judgment is vacated.

The Supreme Court said, in the case of Bronson v. Schulten, 104 U. S. at page 415, 26 L. Ed. 797:

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

"But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

This general principle has been recently enunciated by the Supreme Court in the opinion of Mr. Justice Hughes, in the case of United States v. Mayer, Judge of the District Court, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129.

In the case of Walker v. Moser, 117 Fed. 230, 54 C. C. A. 262, the Circuit Court of Appeals for the Eighth Circuit held that a new trial might be granted in April vacating a judgment and setting aside a verdict where the verdict was rendered in October, motion for a new trial made in November, judgment entered in December, and verdict and judgment set aside in April. The court said:

"But no judgment in the cause was entered at that term, and the cause necessarily and irrespective of the pending motion for new trial, passed over to the November term for the entry of judgment, and any other action that might be taken in the case."

It would appear that at common law the term remained open for the entry of judgment, and any motion vacating that judgment might be made at the term, namely, January, in which the judgment was ren-

dered. By rule 5 of this court the term was judicially extended for motions vacating the judgment until three months after the same was entered. If the plaintiff's view were adopted, our rule instead of extending, as it evidently intends to do, the time to make motions for a new trial, would, in many cases, restrict it to a period less than that allowed by common law. I must therefore regard the words of the rule "verdict is rendered or" as inadvertent and inconsistent with the main purpose of the rule and regard the order vacating the judgment and setting aside the verdict as properly made.

For the foregoing reasons, the motion is denied.

In re TIMOURIAN.

(District Court, S. D. New York. July 28, 1915.)

ALIENS ⇐62—NATURALIZATION—CONTINUITY OF RESIDENCE—TEMPORARY ABSENCE FROM UNITED STATES.

Where an alien during the entire five years next preceding his application for admission to citizenship was domiciled in the United States, where he was in business and intended to remain, the fact that during that time he left the United States on a business trip for his firm, returning as soon as such business was completed, did not break the continuity of his residence required by the naturalization statute.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⇐62.]

In the matter of the application of Onnik Setrak Timourian to become a citizen of the United States. Application granted.

Hugh Govern, of New York City, for petitioner.

Charles E. Muller, U. S. Naturalization Examiner, of Department of Labor, opposed.

AUGUSTUS N. HAND, District Judge. The petitioner educated himself at Roberts College, Constantinople, for life in the United States, and since he came here in 1909 to enter into partnership with members of his family he has had his entire property and business interests in New York. I feel no doubt that the petitioner is an educated, prosperous man who has for years been legally domiciled in New York and is a most desirable applicant for American citizenship. The only question as to his legal qualifications is due to the fact that on March 12, 1913, he went to Persia on a business trip for his firm to buy rugs and carpets and remained away from the United States until August 13, 1914. He took with him a passport good only for six months, spent but a very short time at his old home in Turkey, maintained himself wholly upon New York funds, was engaged while abroad in no other business than buying for his New York house, and returned as soon as the time required for his trip, which owing to various delays was much longer than he had anticipated, would permit.

I think the interruption of this commercial trip is not, under all the circumstances, sufficient to prevent a finding of that continuous residence within the United States contemplated by the statute. I think the opinion of Judge Betts, In re Alien, Fed. Cas. No. 201a, that of Judge Ward in the recent case of In re Schneider (C. C.) 164 Fed. 335, and the language of Judge McPherson in U. S. v. Cantini, 212 Fed. 925, 129 C. C. A. 445, indicate that a man is not to be deprived of citizenship for lack of continuous residence for five years when he has established and kept a legal domicile in the United States for that time and been out of the country less than one-third of the period and then only by reason of unforeseen business exigencies. His domicile during the period of five years is undoubted as well as his intention while on his business trip to return as soon as possible to New York as his permanent home.

I think his case is stronger than that of the sailor whose residence Judge Betts in the case above cited held continuous, within the meaning of the statute, and I shall grant the application accordingly.

LOUISVILLE & N. R. CO. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, Intervener).

(District Court, W. D. Kentucky. July 3, 1915.)

No. 18.

1. COMMERCE ⊜98—INTERSTATE COMMERCE COMMISSION—HEARINGS AND REVIEW.

The power expressly conferred on the Interstate Commerce Commission by Interstate Commerce Act Feb. 4, 1887, c. 104, § 4, 24 Stat. 38, as amended by Act June 18, 1910, c. 309, § 8, 36 Stat. 547 (Comp. St. 1913, § 8566), to authorize a railroad carrier to charge less for a longer than for a shorter distance in special cases, on application and after investigation, clearly implies that the question shall be determined on testimony and after a hearing, and necessarily involves the exercise of judgment and discretion. If an order denying such an application is contrary to the evidence, or not supported by any evidence, the carrier is entitled to relief in the courts, but the weight to be given to evidence is peculiarly for the Commission, as a body experienced in such matters, and on a review of its orders its findings of fact will always be taken as prima facie correct and in most instances as conclusively so.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148; Dec. Dig. ⊜98.]

2. COMMERCE ⊜86—INTERSTATE COMMERCE COMMISSION—APPLICATION FOR ORDER SUSPENDING LONG AND SHORT HAUL PROVISION—BURDEN OF PROOF.

On an application for an order granting such authority, the operation of which would be to create an exception to the express inhibition of the statute, the burden rests on the carrier to show that the case is a special one, and so within the power of the Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 140; Dec. Dig. ⊜86.]

3. COMMERCE ⊜88—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.

General allegations in a petition by a railroad company for review of orders of the Interstate Commerce Commission that their effect would be to deprive petitioner of its property without due process of law *held* not

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supported by such specifications of fact or evidence as to show the invalidity of the orders.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. ⊂⊃88.]

In Equity. Suit by the Louisville & Nashville Railroad Company against the United States in which the Interstate Commerce Commission intervened. On motion for a temporary injunction. Denied and bill dismissed.

See, also, 207 Fed. 591.

Henry L. Stone and W. A. Colston, both of Louisville, Ky., for plaintiff.

Blackburn Esterline, of Washington, D. C., for the United States.

Jos. W. Folk and Edward W. Hines, both of Washington, D. C., for Interstate Commerce Commission.

Before WARRINGTON, Circuit Judge, and EVANS and HOLLISTER, District Judges.

PER CURIAM. The Louisville & Nashville Railroad Company (which we shall call the plaintiff), on December 17, 1910, in due form filed its—

"application before the Interstate Commerce Commission for relief under the long and short haul provisions of the fourth section of the act to regulate commerce."

This application was numbered 1952. It had reference to the freight rates to be charged by the plaintiff throughout its entire system, and might affect those charged throughout the southeastern part of the United States. It was of great length and elaboration, and related to many hundred places. Its purpose was altogether proper, but inevitably it would take a very long time for the Interstate Commerce Commission (which we shall call the Commission) to complete its consideration of every phase of it, and as some of the separate questions involved might be urgent and might be entirely disconnected from other phases of it, necessarily it would result that such separate matters might be investigated and settled before the consideration of others had begun. This would come from the nature of the application itself.

The record does not disclose, nor does it appear to be material, why that part of plaintiff's general application No. 1952, which related to long and short haul rates at Bowling Green, Ky., was taken up by the Commission so promptly, but an investigation into that feature of the application was, in fact, in progress when, on August 8, 1911, the Bowling Green Business Men's Protective Association (which we shall call the Protective Association) filed before the Commission its complaint (No. 4310) against the Louisville & Nashville Railroad Company and many other carriers, in which, after stating the rates fixed so far as they affected Bowling Green, Ky., it averred that those rates were unjust and unreasonable and in violation of section 1 of the act to regulate commerce, and were unduly prejudicial to the interests of Bowling Green and unduly preferential to the interest of the cities

of Clarksville and Nashville, Tenn., and Louisville, Ky., and, in a majority of instances, were greater charges for a shorter distance than for a longer one.

The questions arising alike upon that phase of the plaintiff's application which involved rates at Bowling Green and upon the complaint of the Protective Association were, to some extent, heard together, the parties consenting to the reading at both hearings of certain testimony taken on the plaintiff's application before the Protective Association had filed its complaint. After hearing all parties upon the questions thus involved, the Commission returned its findings and decision, in which it dealt both with the application of the plaintiff and the complaint of the Protective Association (see 24 Interst. Com. Com'n R. 228), and thereupon entered certain orders made effective September 1, 1912 (later changed to October 15th), which are hereinafter set forth in the margin, and which required the plaintiff to abstain and desist for a period of two years from charging, demanding, collecting, or receiving any higher rates for the transportation of traffic from or to certain named points than is done from or to other certain points. The plaintiff subsequently filed an elaborate petition for a rehearing of these rulings.

On October 8, 1912, the Commission entered orders which, except as we have numbered them, are as follows:

"At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 8th day of October, A. D. 1912.

"Fourth Section Order No. 1361.

"In the Matter of That Portion of Application No. 1952 of the Louisville & Nashville Railroad Company, by A. R. Smith, Its Third Vice President, for Itself and on Behalf of Its Connections, for Relief from the Provisions of the Fourth Section of the Act to Regulate Commerce, as Amended June 18, 1910, Respecting Class and Commodity Rates.

"Class and Commodity Rates.

"Upon further consideration of the record in the above-entitled case:

"(1) It is ordered, that the order heretofore entered on June 4, 1912, in said case be, and the same is, hereby amended to read as follows:

"(2) This application, No. 1952, filed December 17, 1910, asks, among other things, for authority to continue to charge lower rates to and from Louisville, Ky., Clarksville and Nashville, Tenn., than are concurrently in effect on like traffic to and from Bowling Green, Ky. A hearing having been held upon this application, in so far as it relates to rates on freight traffic to and from the points hereinbefore described, and full investigation of the matters and things involved therein having been had, and the Commission having, on the 4th day of June, 1912, made and filed a report containing its findings of fact and conclusions thereon, which said report is herein referred to and made a part hereof.

"(3) It is ordered, that that portion of said application, No. 1952, which seeks authority to continue to charge lower rates on traffic through Bowling Green, Ky., to and from Nashville, Tenn., than are contemporaneously in effect on like traffic to and from Bowling Green, Ky., be, and the same is hereby, denied, effective December 1, 1912.

"(4) It is further ordered, that that portion of said application, No. 1952, which seeks authority to continue to charge lower rates on oranges from Jacksonville, Fla., through Bowling Green, Ky., to Louisville, Ky., than are contemporaneously in effect on like traffic to Bowling Green, Ky., be, and the same is hereby, denied, effective December 1, 1912.

"(5) It is further ordered, that the petitioners herein be, and they are hereby, authorized to continue to charge lower rates on sugar from New Orleans, La., through Bowling Green, Ky., to Louisville, Ky., than are contemporaneously in effect on like traffic to Bowling Green provided that the present rates to Bowling Green are not exceeded.

"(6) The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any other provision of the act."

On the same day in case No. 4310 of the Protective Association against the Railroad Company the Commission overruled the Railroad Company's petition for a rehearing, although it set aside its orders of June 4th. On the day immediately preceding the entry of the latter orders the plaintiff, without awaiting the result of its petition for a rehearing, commenced this action in equity in the Commerce Court against the United States as respondent, and in which the Interstate Commerce Commission subsequently intervened, seeking to enjoin the enforcement of the Commission's orders of June 4, 1912. On November 11, 1912, the plaintiff filed a supplemental petition, showing that the orders of June 4th had been vacated; that its petition for a rehearing had been overruled, and that the Commission had, on October 8th, made the orders in the fourth section application case which are copied above. Subsequently the Commerce Court (Louisville & N. R. Co. v. U. S., 207 Fed. 591), holding that the orders entered by the Commission on October 8, 1912, were not such as it could review, dismissed the action. Pending an appeal from that decision, the Supreme Court, in the Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408, took a view of the question of jurisdiction different from that of the Commerce Court, and on March 1, 1915, upon the appellee's confessing the error, the Supreme Court reversed the decree in this case. Meantime the existence of the Commerce Court having terminated, the case came to this court when the mandate of the Supreme Court was sent down to it in April, 1915.

The third and fourth of the orders of the Commission (as we have numbered them) made October 8, 1912, denied to the plaintiff parts of the relief from the provisions of the long and short haul clauses of section 4 for which it had applied in respect to Bowling Green, Ky., though the fifth of those orders gave relief as to another part. The complaint of the Protective Association, on the other hand, was largely based upon that portion of section 3 of the act to regulate commerce, which is in this language:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This complaint made charges against the carrier and its rates which, if sustained, would have led to a readjustment of those rates and possibly other relief. But while on June 4th the Commission made orders which might have brought about that result, they were set aside on October 8th before they became effective, and so far at least as the

record in this case shows (but see Bowling Green Business Men's Protective Ass'n of Bowling Green, Ky., v. Louisville & N. R. Co., 31 Interst. Com. Com'n R. 1), the matter has been at a standstill ever since. Certainly no decision which became effective upon the Protective Association's complaint was rendered, and no injury, in the legal sense, had come to the plaintiff by anything done upon the complaint of the Protective Association. Nevertheless the plaintiff in its supplemental petition says:

"That as it appears from the record that the Commission was of the opinion that the findings and orders previously made by it and complained of in the original petition herein were improper, the Commission ought, in justice and equity, to have granted the petition for rehearing in the said proceedings, which petition for rehearing the Commission has denied, and that since it appears from the Commission's own action that the findings, conclusions, and orders of the Commission made upon the hearings had were erroneous and improper, sufficient reason was made to appear why the rehearing asked should have been granted, and it was an abuse of discretion on the part of the Commission to refuse such rehearing; and the orders made by the Commission on October 8, 1912, as hereinabove set forth, which deny the said petition for rehearing, and which deny in part relief under the fourth section of the act to regulate commerce applied for, are orders made without the full hearing and investigation contemplated by the act to regulate commerce, and are unlawful on that account."

In the same pleading the plaintiff further avers as a foundation for the relief sought that:

"The orders made and issued by the Interstate Commerce Commission on the 8th day of October, A. D. 1912, as hereinabove set forth, including the orders now complained of, were made and issued with the design and intent to accomplish the following purposes: (a) To destroy the existing cause of action sought by petitioner to be enforced in this cause pending in this honorable court; (b) to deprive this honorable court of all jurisdiction over this cause and the subject-matter thereof by so changing the form of the orders as to accomplish substantially the same results sought to be accomplished by the orders in the original petition herein complained of, and yet have it appear that the orders issued by the Commission are negative orders, or orders resting solely within the discretion of the Commission and not subject to review by this honorable court; (c) to prevent all judicial investigation and determination of the reasonableness, fairness, and validity of the orders now complained of."

These averments in the plaintiff's supplemental petition were specifically denied in the answer. Moreover, it was there averred that the orders of the Interstate Commerce Commission sought to be set aside and annulled, the report rendered in connection therewith and relating thereto, and the findings of fact in said report and order contained were made upon due investigation and after a full hearing and upon substantial and sufficient evidence and due consideration thereof.

No direct testimony was offered in support of the charges made in the plaintiff's supplemental petition which we have copied, and it may suffice to say that the court cannot indulge any presumption that they are well founded. It is true that some confusion has been introduced into the case by the substitution of the orders of October 8th for those of June 4th. For example, counsel for plaintiff insist that the orders of October 8th are "third section orders made on a fourth section application." This insistence overlooks the fact that the case of the

Protective Association, a third section case, and plaintiff's application, a fourth section case, were heard together, and that it was agreed by counsel that the evidence was, so far as applicable, to be considered in each of the cases. In determining that question the court will be at liberty to examine the whole record and draw such conclusions therefrom as may be proper, but that is essentially different fom saying that there is anything to warrant the conclusion that the Commission in what it did was actuated by any of the wrongful motives imputed to it in the plaintiff's supplemental petition.

Coming then to the consideration of the validity of the third and fourth of the orders of October 8, 1912, we are told by the counsel for the plaintiff in their brief that their main contentions are that the two orders complained of should be annulled and their enforcement enjoined: First, "because the order complained of is not such a negative order or order of denial as the Commission had power to issue under the fourth section of the act to regulate commerce;" and, second, "that even if the order complained of was and is a negative order or an order of denial, such as is contemplated by the fourth section of the act to regulate commerce, the order is void because it is contrary to the indisputable nature of the evidence and is not supported by any evidence." In addition to the main contentions thus stated by the plaintiff's counsel other reasons are urged, but they appear to be of a minor and subsidiary nature.

The fourth section of the act in terms forbids a carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, etc., provided that upon application to the Interstate Commerce Commission the carrier may, in special cases after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of property. As we have seen, the plaintiff's application, No. 1952, was on its face one "for relief under long and short haul provisions of the fourth section of the Act to Regulate Commerce," and paragraph 1 of the application begins with these words:

> "For authority to continue and establish rates for the transportation of freight between points hereinafter specified lower than rates concurrently in effect from or to or between intermediate points."

Among the points included in the section of the application referred to is Bowling Green, Ky. By its application No. 1952, so far as it is now under consideration, the plaintiff attempted to present a "special case" in which it should, in respect to Bowling Green, Ky., be authorized by the Commission under section 4 of the act to charge less for a longer than for a shorter distance for the transportation of property. The effect of the third and fourth of these orders is a denial of such authorization, which leaves the plaintiff no alternative but to obey that provision of section 4 which forbids the charging of less for a longer than for a shorter distance. Or to state it more in detail, the effect of these orders is: (a) To deny plaintiff's applica-

tion for authority to continue to charge less for a longer than a shorter distance on traffic going through Bowling Green, and which had come from or was going to Nashville, than it charges on like traffic which stops at or which starts from Bowling Green; (b) and to also deny plaintiff's application for authority to continue to charge less for a longer than a shorter distance on oranges from Jacksonville, Fla., which passed through Bowling Green to Louisville than on like traffic which stopped at Bowling Green; but (c) to grant plaintiff authority to continue to charge lower rates on sugar from New Orleans, which passes through Bowling Green, than is charged on like traffic which stops there. That is to say, the Commission refused to relax the rule as to long and short haul charges prescribed in section 4 in the first two instances, but consented to do so in the last. That the Commission had power to do all this after investigating plaintiff's application No. 1952 we do not doubt. And that it failed to act on other phases of the fourth section application No. 1952 cannot per se invalidate the orders actually made.

When the orders of October 8th analyzed above are compared with those of June 4th (copied in the margin [1]) we see how much the Com-

[1] NOTE.—At general session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 4th Day of June, A. D., 1912.

No. 4310.

Bowling Green Business Men's Protective Association of Bowling Green, Ky., v. Louisville & Nashville Railroad Company and Others.

Fourth Section Application No. 1952.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

1. It is ordered, that the above-named defendants, according as they participate in the traffic, be, and they are hereby, notified and required to cease and desist, on or before the 1st day of September, 1912, and for a period of two years thereafter to abstain, from charging, demanding, collecting, or receiving any higher rates for the transportation of traffic from New York, N. Y., and related points, to Bowling Green, Ky., than those contemporaneously maintained over their lines on the same traffic from the same points of origin to Nashville, Tenn., when such traffic passes through said Bowling Green.

2. It is further ordered that said defendants, according as they participated in the traffic, be, and they are hereby, notified and required to establish, on or before the 1st day of September, 1912, and for a period of two years thereafter to maintain and apply to the transportation of traffic from New York, N. Y., and related points, to Bowling Green, Ky., rates which shall not exceed those contemporaneously maintained over their lines on the same traffic from the same points of origin to Nashville, Tenn., when such traffic passes through said Bowling Green.

3. It is further ordered that said defendants, according as they participate in the traffic, be, and they are hereby, notified and required to cease and desist, on or before the 1st day of September, 1912, and for a period of two years thereafter to abstain from charging, demanding, collecting, or receiving any higher rates for the transportation of oranges from Jacksonville, Fla., to Bowling Green, Ky., than those contemporaneously maintained over their lines on the same commodity from said Jacksonville to Louisville, Ky.

4. It is further ordered that said defendants, according as they participate

mission changed its views. Plaintiff's petition for a rehearing directed against the orders of June 4th, was, in form, overruled, though we cannot know precisely what the reasoning was which actuated the Commission in making the change, inasmuch as it made no statement on the subject, but we may fairly and reasonably conclude that while it denied the petition for a rehearing, it became convinced of some error or defect in its earlier orders, and therefore changed or modified them to the later form. This is all the more apparent when we see that the orders of June 4th unquestionably were not made under section 4 of the act, but under other sections. It is, we think, fair to assume that the petition for a rehearing aided in producing results to that extent, whatever effect it may have had on the complaint of the Protective Association, which apparently was left undisposed of.

Whether or not the orders complained of are or are not negative in character or form, it must be regarded as the settled law of this case that they may be reviewed by the court and their enforcement enjoined if proper grounds therefor are made to appear. This results from the fact that when the case reached a trial in the Commerce Court the orders of June 4th complained of in the plaintiff's original petition had been eliminated by being rescinded by the Commission, thus leaving in contention only the orders of October 8th, complained of in the supplemental petition. The Commerce Court, holding that it had no jurisdiction to afford any relief as to them, dismissed plaintiff's petition, and plaintiff appealed to the Supreme Court. There the appellees confessed error, and the Supreme Court, accepting that confession, reversed the judgment of the Commerce Court. It is altogether useless to discuss whether the Supreme Court under other circumstances would have applied to the orders in question the rule as to jurisdiction announced in the Intermountain Rate Cases. We are bound to regard that rule as having already been applied by that court to this case.

As showing the settled general principles upon which cases to enjoin the enforcement of the orders of the Interstate Commerce Commis-

in the traffic, be, and they are hereby, notified and required to establish, on or before the 1st day of September, 1912, and for a period of two years thereafter to maintain, and apply to the transportation of oranges from Jacksonville, Fla., to Bowling Green, Ky., rates which shall not exceed those contemporaneously maintained over their lines on the commodity from said Jacksonville to Louisville, Ky.

5. It is further ordered that said defendants, according as they participate in the traffic, be, and they are, hereby, notified and required to cease and desist, on or before the 1st day of September, 1912, and for a period of two years thereafter to abstain from charging, demanding, collecting, or receiving, any higher rates for the transportation of traffic from Bowling Green, Ky., to Montgomery, Ala., than those contemporaneously maintained over their lines on the same traffic from Clarksville, Tenn., to Montgomery, Ala.

6. And it is further ordered, that said defendants, according as they participate in the traffic, be, and they are hereby, notified and required to establish, on or before the 1st day of September, 1912, and for a period of two years thereafter maintain, and apply to the transportation of traffic from Bowling Green, Ky., to Montgomery, Ala., rates which shall not exceed those contemporaneously maintained over their lines on the same traffic from Clarksville, Tenn., to Montgomery, Ala."

sion proceed, a few of the authorities may be noted. In the Intermountain Rate Cases, 234 U. S., at page 485, 34 Sup. Ct., at page 991 (58 L. Ed. 1408), after alluding to the fact that the amendment of the Interstate Commerce Act of June, 1910, had taken from the carrier certain powers in respect to the long and short haul provision, and had transferred the same to the Interstate Commerce Commission, the court said:

"But while the public power, so to speak, previously lodged in the carrier, is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain, under authorized circumstances, the sanction of the Commission to charge a lower rate for a longer than for a shorter haul, because of competition or for other adequate reasons, is expressly preserved, and, if not, is, in any event, by necessary implication, granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the 2d and 3d section."

In Interstate Commerce Commission v. Union Pacific Railroad Co., 222 U. S. at page 547, 32 Sup. Ct. at page 110, 56 L. Ed. 308, it was said:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless: (1) Beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law; but questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Int. Com. Com. v. Ill. Cent., 215 U. S. 452, 470 [30 Sup. Ct. 155, 54 L. Ed. 280]; Southern Pacific v. Int. Com. Com., 219 U. S. 433 [31 Sup. Ct. 288, 55 L. Ed. 283]; Int. Com. Com. v. Northern Pacific, 216 U. S. 538, 544 [30 Sup. Ct. 417, 54 L. Ed. 608]; Int. Com. Com. v. Alabama Midland Ry. Co., 168 U. S. 144, 174 [18 Sup. Ct. 45, 42 L. Ed. 414]."

And in United States v. Louis. & Nash. R. R. Co., 235 U. S. 321, 35 Sup. Ct. 115, 59 L. Ed. 245, the court said, in cases like this, that:

"It must be determined whether the action of the Commission was repugnant to the Constitution, in excess of the powers which that body possessed, or, what is equivalent thereto, was wholly unsustained by proof."

Section 4 of the act as amended June 18, 1910, reads:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such

common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: Provided further, that no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission, it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

It is thereby expressly made unlawful for the carrier to charge more for a shorter than for a longer distance. That is the general rule Congress deemed it wise to prescribe, but the Commission was empowered, after investigation, to relax the general rule by authorizing the carrier to charge less for longer than for shorter distance in special cases. This necessarily involves the exercise of judgment and discretion.

Bearing in mind the statement of plaintiff's counsel that their "main contentions" are: First, that the orders of the Commission were not such as it had power to make; and, second, that they were void because contrary to the indisputable nature of the evidence and not supported by any evidence—it will be sufficient to say as to the first of these contentions that it is without merit because the Commission, by the express terms of section 4, had power to grant or deny the authorization for which the plaintiff applied. If, however, the orders complained of were contrary to the indisputable nature of the evidence, then the second of plaintiff's main contentions is sound, and the orders made under such conditions, being arbitrary and unjust, cannot be sustained, and plaintiff would be entitled to relief. Although the briefs brought to our attention have been extremely voluminous, we confess some doubt as to what the plaintiff's counsel mean by the phrase "the indisputable nature of the evidence" as applicable to the record before us. As much of the evidence is of a nature that may be disputed, and as some of it certainly has been disputed, we suppose the phrase must be limited to such physical facts as pertain to the existence, the course, and the characteristics of the Cumberland, Green, and Barren rivers, and the location upon one of Nashville, Tenn., and upon another of Bowling Green, Ky., and also to the physical facts that there are railroads other than plaintiff's operating at Nashville, though there is no other operating at Bowling Green. These incontestable facts appear, but, though most important, there is other evidence in the record to which the term "indisputable" is not applicable.

[1] Coming then to the consideration of the evidence as a whole, we may premise several general observations.

1. The requirement of section 4 that such authorization shall be made, if at all, "after investigation" clearly implies that the question shall be determined upon testimony and after a hearing.

2. The "value of such evidence necessarily varies according to the circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies, and history of rate making in each section of the country." I. C. C. v. Louis. & Nash. R. R., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; Louis. & Nash. R. R. v. United States and I. C. C., 238 U. S. 1, 35 Sup. Ct. 696, 59 L. Ed. —, opinion of Supreme Court delivered June 1, 1915.

3. It has been settled by repeated decisions of the Supreme Court that findings of fact by the Commission are always prima facie correct and in most instances conclusively so. United States v. L. & N. R. R. Co., 235 U. S. 320, 35 Sup. Ct. 113, 59 L. Ed. 245; United States v. Louis. & Nash. R. R. Co., 236 U. S. 318, 35 Sup. Ct. 363, 59 L. Ed. 598.

[2] In considering the claims of counsel for the plaintiff that there is no evidence to support the orders in dispute, it is to be borne in mind that the purpose of the application of plaintiff was to be relieved from the operation of the long and short haul clause of section 4 of the statute. Such relief could be granted only upon a showing of facts which would constitute a special case within the meaning of the proviso of that section. This plainly cast upon the plaintiff the burden of proof; for the effect of granting the application would necessarily operate to create an exception to the express inhibition of the statute. As the Commission said in Railroad Commission of Nevada v. S. P. Co., 21 Interst. Com. Com'n R. 329, 341:

"(3) That it must be affirmatively shown by the carriers seeking such exception that injustice will not be done to intermediate points by allowing lower rates at the more distant points.

"(4) That the intendment of the law is to make its prohibition of the higher rate for the shorter haul a rule of well-nigh universal application, from which this Commission may deviate only in special cases, and then to meet transportation circumstances which are beyond the carriers' control; that is to say, a carrier shall not prefer the more distant point by giving it the lower rate because of any policy of its own initiation, but if at the more distant point it finds a condition to which it must conform under the imperious law of competition if it would participate in traffic to that point, it may discriminate against the intermediate point without violating the law, provided it establishes such necessity before the Commission."

Examination of the record shows that substantial evidence was presented to the Commission upon all the issues involved. The conditions prevailing at Bowling Green, as also those at Nashville and Clarksville, were elaborately described by witnesses called by the Protective Association of Bowling Green and the Railroad Company. The Railroad Company sought, for example, to show that the rates at Nashville were fixed by both rail and water competition, and that while the rail rates to and from Bowling Green were higher than those prevailing between Louisville and Nashville over the same road and in either direction, the intermediate rates were reasonable, and that no evidence was offered to the contrary. This latter feature was met, however, by testimony and correspondence which tend to show that the Railroad Company controlled the Bowling Green river rates as well as its own rates. Interstate Com. v. Louisville, etc., R. R., 190 U. S. 273, 283, 23 Sup. Ct.

687, 47 L. Ed. 1047. Again, the competitive conditions, as claimed by the Railroad Company to exist at Nashville, were met by evidence tending to show that the rail competition at that point was negligible, that the competition afforded by the Cumberland river was potential rather than actual, and that the Barren and Green rivers, if their navigation were not interfered with by the plaintiff, would furnish better and more continuous facilities for navigation than the Cumberland, and would place Bowling Green in substantially the same situation as that of either Nashville or Clarksville. The evidence was exhaustively considered in the report of the Commission, and it would serve no useful purpose to repeat what was shown there. It is sufficient to say that the evidence was conflicting, and that we should not be warranted in disturbing the conclusions of fact reached by the Commission.

It is not our province to weigh the evidence (L. & N. R. R. Co. v. Behlmer, 175 U. S. 674, 675, 20 Sup. Ct. 209, 44 L. Ed. 309), or to do more than ascertain whether there was, in fact, substantial evidence heard and considered by the Commission, for if that were the case, its orders are beyond our control.

[3] The fifth of the amendments to the Constitution of the United States covers the great and fundamental proposition that no person shall be deprived of life, liberty, or property without due process of law, and one of the points made by the plaintiff's counsel in one of their briefs is thus expressed:

"The Commission's order is broader than the fourth section hearings held in connection therewith, and hence deprives petitioner of its property without due process of law."

We cannot see that the constitutional provision referred to has a very acute bearing upon the case, nor recall that the proposition was pressed at the argument, but as an objection of the character indicated should always receive the court's attention, we have analyzed plaintiff's pleading to see upon what averments the contention is based.

In its supplemental petition which covers the plaintiff's allegations against the two orders of October 8, 1912, and limits this litigation to them, it is insisted, that their enforcement will result in taking plaintiff's property without due process of law, in contravention of the Constitution of the United States and more particularly in contravention of the fifth amendment thereto, and the pleading specifies: First, that this will result from the fact that those orders and the testimony upon which they were based were broader than plaintiff's fourth section application; second, that the Commission, by its course, unwarrantably and unlawfully attempted to deprive plaintiff of the right and opportunity for a judicial review of those orders; third, that they deprive the plaintiff of "the right to have and enjoy its property without being deprived thereof without due process of law"; and, fourth, that the enforcement of the orders will result in a loss of revenue on business going from and coming to Bowling Green of at least $31,000 per annum. While these general averments are made by plaintiff, there are no specifications of the facts from which we could determine whether or not the rates which would be put in force as a result of the orders complained of would be such as to deprive

the plaintiff of a fair return upon the money invested. In short, while a general complaint is made of deprivation of property without due process of law, no allegations are found in the pleading showing that the rates will be confiscatory if put in operation. In these essential respects there is no sufficient showing, and certainly none in detail, either in the pleading or in the testimony.

We have shown how the two orders of October 8th were, in our opinion, responsive to the plaintiff's fourth section application 1952. It is quite true that part of the testimony was heard by the Commission upon that application, and at the same time upon the Protective Association's complaint No. 4310, which was mainly based upon other sections of the act, but this course was pursued for convenience and by consent of parties. While the testimony upon the Association's complaint and that upon plaintiff's application was probably all considered together, we cannot see nor say that the former unduly influenced the Commission in its decision upon the latter. Both cases by common consent were heard together, and what we have found is that there was substantial testimony heard by the Commission upon plaintiff's fourth section application. If literally it be true that the testimony actually heard by the Commission was broader than plaintiff's fourth section application, that situation grew out of the consent referred to, though it does not follow because it was thus made broader that no substantial testimony was heard and considered which had relation to that application.

Nor, as already indicated, can we find any evidence which tends to sustain plaintiff's contention that the orders complained of resulted from any course pursued by the Commission in an attempt to deprive plaintiff of a right and opportunity for judicial review of those orders. The fact that we are now reviewing those orders shows that, even if the Commission had such purpose, it was futile and affords no basis for an injunction.

Only one other of the plaintiff's many contentions seems to require separate notice. It is that the order of the Commission is based exclusively upon the theory of estoppel. If we assume that the Commission has no power for that reason to decide a question coming before it, we nevertheless find nothing in the record, nor in the Commission's opinion (24 Interst. Com. Com'n R. 228), which shows plaintiff's assertion to be well founded. This contention must therefore be overruled.

We must, upon all the considerations expressed, hold that the orders of the Commission made October 8, 1912, are beyond the control of the court, because neither of those orders comes within the limits of our powers as settled by the decisions of the Supreme Court in the cases we have cited and many others.

At the final hearing of the case in this court the plaintiff offered to read as evidence: (1) The testimony of A. R. Smith, taken in this case at the hearing before the Commerce Court; (2) the affidavit of C. B. Compton filed with the Commerce Court while the case was pending there; and (3) a certified copy of the stenographer's notes of certain testimony taken April 14, 1914, in the Protective Association's

Case No. 4310, including certain parts of fourth section applications Nos. 1601 and 1604, filed by C. E. Fulton, agent, on behalf of carriers participating in rates named in Tariff No. A–42. This is an original suit in equity, and we would by no means be understood as holding generally that original evidence may not be received and heard to sustain averments made in the pleadings, but we see no reason to conclude that the affidavit of Compton, made without opportunity to cross-examine him, is admissible over the defendant's objection, in the absence at least of a showing that the testimony could not have been given by him as a witness in open court at the trial where he could have been cross-examined, and especially as his deposition could have been taken on due notice. Nor can we discern any reason why testimony taken in another case (long after that case was separated from this one, if indeed it ever had any connection with this particular litigation) can be admissible in this case without the consent of defendants, in view of the fact that it was entirely possible for the persons who testified in the other case to be produced as witnesses here. These reasons apply also to plaintiff's offer to read as testimony parts of the two fourth section applications filed by Fulton, as agent for certain carriers. We think it clear, therefore, that defendant's objections to these offers of testimony should be sustained.

The testimony of A. R. Smith was taken when the case was originally heard in the Commerce Court. Counsel for the defendants objected to it there, their principal reason therefor being that the court had no power to hear the case at all. That view was finally taken by the Commerce Court, though not by the Supreme Court. Under these circumstances we think the defendant's objection to this testimony should be overruled, though what weight should be given to it upon the principal question involved is a very different proposition.

Our conclusions are that the plaintiff's motion for a temporary injunction pendente lite should be overruled and denied, and that the bill should be dismissed. A decree accordingly will be entered.

CALDWELL et al. v. TWIN FALLS SALMON RIVER LAND & WATER CO. et al.

(District Court, D. Idaho, S. D. June 29, 1915.)

No. 494.

1. WATERS AND WATER COURSES ⊂=254—IRRIGATION SYSTEMS—CONTRACTS WITH SETTLERS—CONSTRUCTION.

A corporation which had contracted with Idaho for the construction of an irrigation system made contracts with settlers which recited the execution of the state contract, the commencement of construction work, and notice from the State Land Board that it might sell or contract rights to the use of water, and which provided that in consideration of the payment of a specified sum, and the covenants of the settlers, the settlers should become entitled to shares of stock in a corporation organized to operate the system, which certificate declared that the owner thereof

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

was entitled to receive one-hundredth of a cubic foot of water per second per acre for land described, and to a proportionate interest in the system, and which fixed the irrigation season from April 1st to November 1st of each year. The settlers obligated themselves to pay at the rate of $40 per acre for water. *Held*, that the settlers' contracts for water were contracts for the sale of a specific water right for each acre of land described and a proportionate interest in the system.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂⊃254.]

2. WATERS AND WATER COURSES ⊂⊃254—IRRIGATION SYSTEMS—CONTRACTS TO SUPPLY WATER—CONSTRUCTION.

A contract between a corporation and Idaho for the construction of an irrigation system and subsequent contracts between the corporation and settlers to supply the settlers with water for irrigation must be read together to determine the rights of the settlers, though their contracts, in so far as they expressed the agreement, are controlling, provided they contravene no statute of the state or federal government.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂⊃254.]

3. WATERS AND WATER COURSES ⊂⊃254—IRRIGATION SYSTEMS—CONTRACTS FOR CONSTRUCTION—RIGHTS AND LIABILITIES.

A contract between a corporation and Idaho for the construction of an irrigation system, binding the corporation to build the system, to sell shares or water rights therein, to transfer the ownership of the system to the settlers, and to supply a reservoir capacity, and a canal capacity of one-hundredth of a second foot for each acre of land sold, reciting that the corporation holds a permit for the appropriation of 1,500 second feet of the waters of a river and that it has been determined that the natural flow of the stream, supplemented by a reservoir capacity, will provide 2¾ acre feet of water per acre for each acre to be irrigated, and authorizing the corporation at its option to contract to sell rights, authorizes the corporation to make contracts with settlers for the sale of water to the amount of one-hundredth of a cubic foot per acre and a proportionate interest in the system.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂⊃254.]

4. WATERS AND WATER COURSES ⊂⊃254—IRRIGATION SYSTEMS—CONTRACTS FOR CONSTRUCTION—RIGHTS AND LIABILITIES.

A stipulation, in a contract between a corporation and Idaho for the construction by the corporation of an irrigation system, that no application to enter land will be approved by the state unless the applicant shall have entered into a contract with the corporation for the purchase of sufficient shares or water rights for the irrigation of the land, such shares or water rights to be evidenced by the stock of another corporation to be formed to ultimately take title to and operate the system, shows that the corporation, contracting to furnish water to settlers, sells water rights and not merely certificates of stock in the corporation to be formed to take title and operate the system.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂⊃254.]

5. WATERS AND WATER COURSES ⊂⊃254—IRRIGATION SYSTEMS—CONTRACTS FOR CONSTRUCTION—RIGHTS AND LIABILITIES.

A stipulation, in a contract between a corporation and Idaho for the construction by the corporation of an irrigation system, that priority of application for water rights or priority of entry and settlement shall not confer on the settler priority in the use of water, must be read in connection with the stipulation that, to the extent of the capacity of the irrigation works and to the extent of the water rights to which the corpo-

ration is entitled, it shall sell or contract to sell water rights, and a stipulation prohibiting the sale of water rights beyond the carrying capacity of the system, and when so read it does not imply an understanding that water rights may be sold in excess of the normal capacity of the system, but applies to seasons of abnormally low water, and forestalls any claim that might be set up by the earlier settlers that they were entitled to be supplied to the full extent of their rights to the exclusion of later settlers at any time when, due to abnormal conditions or casualty, there was insufficient water to supply all rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂=254.]

6. WATERS AND WATER COURSES ⊂=254—IRRIGATION SYSTEMS—CONTRACTS FOR CONSTRUCTION—RIGHTS AND LIABILITIES.

A provision, in a contract between a corporation and Idaho for the construction by the corporation of an irrigation system and for the organization of another corporation to take title to and operate the system, that each of the shares or water rights shall represent a carrying capacity sufficient to deliver water at the rate of one-hundredth of one cubic foot of water per second, and each share or water right sold or contracted to be sold shall represent a proportionate interest in the canal and irrigation works, together with all rights and franchises therein, based on the number of shares finally sold, must be construed against the corporation preparing the contract, and when so construed is in harmony with subsequent contracts between the corporation and settlers, stipulating that the settlers shall receive one-hundredth of a cubic foot of water per acre per second during the irrigation season.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂=254.]

7. WATERS AND WATER COURSES ⊂=254—IRRIGATION SYSTEMS—CONTRACTS FOR CONSTRUCTION—RIGHTS AND LIABILITIES.

A stipulation, in a contract between a corporation and Idaho for the construction by the corporation of an irrigation system, for the transfer of the ownership and control to a new corporation, organized to take over title to and operate the system, and for the issuance to the settlers of a share of stock therein for each acre of land for which a water right was sold, and that the capital stock thereof shall consist of 150,000 shares, intended to represent one share for each acre which may be irrigated from the system, does not give any right to sell water rights in excess of the available water supply, where other provisions of the contract declare that the corporation, to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled, shall sell water rights, and prohibit the sale of water rights beyond the carrying capacity of the system or in excess of the appropriation of water therefor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂=254.]

8. WATERS AND WATER COURSES ⊂=254—IRRIGATION SYSTEMS—CONTRACTS FOR CONSTRUCTION—RIGHTS AND LIABILITIES.

A stipulation, in a contract between a corporation and Idaho for the construction by the corporation of an irrigation system, that water is to be delivered for irrigation purposes in such quantities and at such times as the condition of the crops and the weather may determine, does not qualify the rights of settlers defined in subsequent contracts between the corporation and settlers, stipulating for furnishing one-hundredth of a cubic foot of water per acre per second.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⊂=254.]

9. WATERS AND WATER COURSES ⟸254—IRRIGATION SYSTEMS—CONTRACTS FOR CONSTRUCTION—RIGHTS AND LIABILITIES.

A contract between a corporation and Idaho for the construction by the corporation of an irrigation system provided that the certificate of shares of stock of a new corporation, to be organized to take title and operate the system, should be made to indicate the interests represented in the system—a water right of one-hundredth of a cubic foot per second for each acre of land irrigated and a proportionate interest in the system. It also recited that the corporation held a permit for the appropriation of 1,500 second feet of the waters of a stream and that it had been determined that the natural flow thereof, supplemented by a reservoir, would be sufficient to supply 2¾ acre feet per acre for each acre to be irrigated, and that each of the shares or water rights should represent a carrying capacity sufficient to deliver water at the rate of one-hundredth of one cubic foot of water per acre per second and represent a proportionate interest in the system. *Held*, that the contract did not contemplate a sale only of undivided interests in water, and it was not inconsistent with contracts with settlers to furnish one-hundredth of a cubic foot of water per acre per second.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⟸254.]

10. WATERS AND WATER COURSES ⟸254—IRRIGATION SYSTEMS—CONTRACTS FOR WATER—RIGHTS AND LIABILITIES.

Though the waters of the state belong to the public, and though the private right which an individual acquires by appropriation or purchase is usufructuary only, an owner of land, in the exercise of ordinary prudence, may by appropriation or contract provide himself with an available water supply, which shall be subject to his demand at all times when he has need therefor, and a contract for a specific amount of water is not objectionable as encouraging wasteful use thereof.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⟸254.]

11. WATERS AND WATER COURSES ⟸254—IRRIGATION SYSTEMS—CONTRACTS FOR WATER—RIGHTS AND LIABILITIES.

A contract of sale of one-hundredth of a cubic foot of water per acre per second, fixing the irrigation season from April 1st to November 1st of each year in accordance with a contract between Idaho and a corporation for the construction of an irrigation system and the sale of water rights, expresses the understanding of the parties touching the total amount of water the corporation must have available to comply with the contract and binds the corporation to make provision for that quantity.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⟸254.]

12. WATERS AND WATER COURSES ⟸254—IRRIGATION SYSTEMS—CONTRACTS FOR WATER—RIGHTS AND LIABILITIES.

Where contracts between a corporation constructing an irrigation system and settlers for the supplying to the settlers of water for irrigation stipulate for an inadequate supply of water, the court could not grant relief to the settlers, nor could it grant relief to the corporation, contracting to furnish more water than the settlers needed, but the terms of the contracts defined the rights and obligations of the parties.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⟸254.]

13. WATERS AND WATER COURSES ⟸254—IRRIGATION SYSTEMS—CONTRACTS FOR WATER—RIGHTS AND LIABILITIES—JURISDICTION OF COURTS.

Where a corporation which had contracted with Idaho for the construction of an irrigation system made contracts with settlers calling for the supplying of water in excess of the capacity of the system, the court could not scale down proportionately the amount of the water

rights and the consideration to be paid therefor, but would compel the corporation to rescind all contracts which could be rescinded and restrain it from collecting overdue installments on contracts until there was reasonable assurance that the water contracted for would be delivered.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. ⟸254.]

In Equity. Suit by A. E. Caldwell and others, in their own behalf and in behalf of all persons similarly situated, against the Twin Falls Salmon River Land & Water Company and others. Decree for plaintiffs ordered.

C. O. Longley and W. E. Golden, both of Twin Falls, Idaho, for complainants.

S. H. Hays, of Boise, Idaho, for defendant Twin Falls Salmon River Land & Water Co.

P. B. Carter, of Boise, Idaho, for Salmon River Canal Co.

Richards & Haga and McKeen Morrow, all of Boise, Idaho, for Commonwealth Trust Company of Pittsburgh and A. C. Robinson.

DIETRICH, District Judge. This controversy grows out of the construction, under the Carey Act (Act Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [Comp. St. 1913, § 4685]), of an irrigation system commonly known as the Salmon River project. The plaintiffs are severally in the possession of lands upon the project, and hold what are called settlers' contracts for water for the irrigation thereof; they bring this suit not only for themselves but in behalf of all other settlers. The defendant Twin Falls Salmon River Land & Water Company, hereinafter called the "Company," is the corporation which, pursuant to the Idaho statutes, contracted with the state for the construction of the system and made agreements with the plaintiffs and others for water rights. It also issued bonds, to secure the payment of which it assigned as collateral these settlers' contracts to the defendant Robinson, and executed a trust deed on all of its interest in the system to the defendant Commonwealth Trust Company of Pittsburgh, as trustee. All of its property rights are thus hypothecated as security for the payment of its bonds, the interest upon which has for some time been in default. The defendant Salmon River Canal Company is the corporation organized as provided in the state contract and the settlers' agreements, for the purpose of ultimately taking title to, and operating, the system; as yet it is but the creature, and is under the control, of the Company.

The contract with the state was executed April 30, 1908, and the opening for entry to holders of water right agreements of 80,000 acres of land was advertised for June 1, 1908; and when this suit was commenced the Company had executed numerous agreements for water rights covering an aggregate of 73,000 acres. The gist of the plaintiffs' complaint is not that the construction work has been improperly done, but that this acreage is greatly in excess of the area for which water is available, even during years of normal run-off. For that reason, they contend, the Company has failed to comply with the

terms of its agreements, and accordingly they are refusing to pay the installments due on account of the purchase price. The trustee and the collateral holder are demanding payment, and have brought several suits in foreclosure, which naturally have caused some irritation, and altogether much unrest prevails. While it is highly desirable that the controversy be fully and finally settled without delay, its immediate determination is attended with great, if not insurmountable, difficulties. The project is dependent for its water supply upon the Salmon river, a stream which, except during the flood-water period in the spring, is a creek rather than a river. And the chief feature of the project, therefore, is a reservoir, by which it was contemplated there could be stored, for use in the summer season, 180,000 acre feet. But, in determining at the present time the available supply during an average year, we are not only confronted with the uncertainties inherent in an estimate of the probable run-off of a variable stream, but we would be driven to a measure of speculation as to what the normal loss, now very great, will ultimately be from seepage in both the reservoir and the canals. And in addition to this consideration the Company is presently engaged in litigation with other claimants, who assert a superior right to divert large amounts of water from the higher reaches of the stream and its tributaries. Moreover, when it is remembered that there are no other accessible water resources, and that there is a provision in the contract putting all water-right agreements upon an equal footing regardless of the date of their execution, it will be seen that the question of an appropriate and feasible remedy is a most perplexing one, should it be held that the plaintiffs are entitled to relief.

[1] The fundamental question is one of the meaning of the contracts. The issue here is a broad one. The plaintiffs contend that primarily they contracted for a water right of a definite amount, which incidentally carried with it ownership of an undivided interest in the system. The defendants say that only an undivided interest in the system was sold, which carried no specific amount of water, but only a divisional share, the extent of which must depend upon the ratio between the water actually available for the system and the aggregate number of contracts which the Company sees fit or is able to sell.

It is quite impracticable here to follow in detail the elaborate argument by which the defendants seek to maintain their position. It is not convincing. In the first place, it is highly improbable that settlers would have signed a contract by which they must obligate themselves to pay at the rate of $40 per acre for the mere chance of sharing with an indefinite number of others in a projected irrigation system concerning the capacity and efficiency of which they could, in the nature of things, have but little information. As is well known, those who buy water rights upon these projects are generally men of small means, without irrigation experience, widely scattered, and often residing a long distance away They are not directly interested in the project as a whole, but they want to know what 40 or 80 or 160 acres of land will cost with an adequate water right. They have no means of determining whether a proposed reservoir will hold water, or whether the watershed is sufficient to fill it; these are matters pe-

culiarly for the Company to investigate. Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the Company would give no promise of a sufficient supply, no assurance of any specific quantity, no undertaking that any given amount would be available for the project as a whole, and no guaranteed limit upon the number of acres for which water rights would be sold?

Upon the other hand, as bearing upon the probability or improbability of the willingness of the Company to sell a specific right or a definite quantity, it had full confidence in the adequacy of its supply. In a printed circular setting forth the advantages of the project, we have, among others, these statements:

"Water supply of the best and in abundance. * * * The water supply * * * is obtained from the Salmon river, which has a vast drainage area in the Cassia National Forest Reserve. The water right is perfect, and there is no land susceptible of irrigation above the Salmon tract, and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres in normal years, and as a rule the spring run-off is far greater than the amount of water required for the irrigation of this amount of land for the full season."

It will thus be seen that no doubt was entertained of an abundance of water, and, if it was confident of a supply sufficient in normal years for 150,000 acres, there is no apparent reason why it should not, for the purpose of selling rights for 80,000 acres, make its contracts attractive by incorporating therein an undertaking to furnish a comparatively small specific amount; with such a margin of safety there could be no substantial risk.

Now as to the contracts themselves: A printed form was prepared by the Company and offered to the public, which is the form held by the plaintiffs and all other settlers. This recites the incorporation of the Company, its execution of the state contract, the commencement of construction work, notice from the State Land Board that it (the Company) migh proceed to sell or contract rights to the use of water, and thereupon it is agreed that in consideration of the payment of a certain amount of money, and the covenants on the part of the settler, the settler "shall become entitled to ——— shares of the stock of the Salmon River Canal Company, Limited, the certificate thereof to be in form as follows":

"..... Shares. .....190...

"This is to certify ..... is the owner of ..... shares of the capital stock of the Salmon River Canal Company, Limited.

"This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land: ..... in accordance with the terms of the contract between the state of Idaho and the Twin Falls Salmon River Land & Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls Salmon River Land & Water Company, based upon the number of shares finally sold in accordance with the said contract between the said company and the state of Idaho.

"Salmon River Canal Company, Limited,
"By ....., President

"Attest: ....., Secretary."

Then follows a clause dedicating the water right to the land described, and to none other. There are numerous other provisions touching the manner and times for paying the purchase price and maintenance charges, the temporary operation of the system, and other subjects not relevant to the present inquiry. The irrigation season is defined to be from April 1st to November 1st of each year. Certain other clauses which may be deemed to be pertinent are as follows:

"Said certificate (that is, said certificate of stock) to be delivered as provided for in said state contract and under the conditions therein stated. * * * This agreement is made in accordance with the provisions of said contract between the state of Idaho and the company, which, together with laws of the state of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited. * * * This contract is made pursuant to and subject to the contract between the company and the state of Idaho, and the existing laws of said state."

The import of the instrument, standing alone, as it would be understood by an intelligent layman with no preconceived notions of its meaning, is not open to debate. It is a contract for the sale of a specific water right of one-hundredth of a second foot per acre for each acre of land described, and as an incident thereto a proportionate interest in the irrigation system. The holder of a certificate of stock, so the contract reads, is entitled "to receive one-hundredth of a cubic foot of water per acre," and "a proportionate interest in the dam, canal, water rights," etc. The defendants' contention wholly ignores the first of these co-ordinate clauses, and limits the right granted precisely to the second. But the clauses are neither inconsistent with each other nor identical in meaning, and no reason is apparent why they should not both be given effect. If the suggestion be made that in form the contract provides only for the transfer of the certificate of stock in the Canal Company, and does not in terms convey a water right at all, the answer is that the technical form is quite unimportant. The clear purport of the entire instrument is the sale of the water right, and that is undoubtedly the sense in which the Company expected it would be understood, and in which it was understood by the settler. One of the preliminary recitals is that the State Board had notified the Company that it could proceed to sell, not certificates of stock, but water rights; and paragraph 3 reads: "The consideration for the water rights hereby agreed to be conveyed is the sum of $———," etc. It will not be assumed that the instrument was cunningly drawn to deceive the unwary, "to keep the word of promise to the ear and break it to the hope."

[2] By itself the settler's contract thus appears to be unequivocal, and we next inquire whether its apparent import is materially qualified by its references to and adoption of the state contract. Doubtless the two instruments must be read together, and in some respects the one is to be deemed the complement of the other. But it is to be borne in mind that the settlers' contracts are subsequent in time to that of the state, and in so far as they clearly and fully express the agreement of the parties upon a given subject they are controlling,

provided, of course, they contravene no statute of the state or of the nation.

[3] In this connection it is not to be overlooked that the state contract expressly provides that the Company may at its option contract to sell rights upon terms more favorable than those which it prescribes. But, were a different view to be taken, is there anything in the state contract so opposed to the idea of a water right of a definite amount that it must be held to render the granting clause in the settler's contract inoperative? The first paragraph binds the Company to build the system, "and to sell shares or water rights" therein, "and also to transfer the ownership," etc., of the system to the settlers—a general plan entirely in harmony with the settler's contract. By paragraph 2 the Company is required to supply a reservoir capacity of 180,000 acre feet, and a canal capacity of one-hundredth of a second foot for each acre of land sold. In paragraph 4 there is an apparent difficulty, not, however, strictly in relation to the proposition of a definite water right; a specific amount is suggested which does not appear to correspond with that called for by the settler's contract. The paragraph recites that the Company holds a permit for the appropriation of 1,500 second feet of the waters of Salmon river, and thereupon the statement is made that it "has been determined" that the natural flow of the stream, supplemented by a reservoir capacity of 180,000 acre feet, will be sufficient to provide "two and three-fourths acre feet of water per acre for each acre of land to be irrigated." Thereupon follows a reiteration of the obligation of the Company to construct canals of a sufficient capacity for one-hundredth of a second foot per acre. Now assuming a continuous flow of one-hundredth of a second foot per acre throughout the entire period from April 1st to November 1st of each year, there is a want of correspondence between 2¾ acre feet and one-hundredth of a second foot, for a flow of one-hundredth of a second foot would deliver 2¾ acre feet in approximately 4½ months. But it may very well have been understood that, while the nominal irrigation season extended from April 1st to November 1st, as a matter of fact the actual season is much shorter, and in that view the discrepancy is more formal than real.

[4] In paragraph 6 it is agreed, upon behalf of the state, that no application to enter land will be approved unless the applicant shall have entered into a contract with the Company "for the purchase of sufficient shares or water rights" for the irrigation of the land, "said shares or water rights to be evidenced by the stock of the Salmon River Canal Company"—language which makes additionally clear the fact that the Company was selling water rights, not merely certificates of stock in another corporation.

[5] In the same paragraph is found an agreement that priority of application for water rights, or priority of entry and settlement, shall not confer upon the settler priority of right in the use of water. This stipulation is not to be taken as implying an understanding that water rights might be sold in excess of the normal capacity or serviceability of the system, for it is to be read in connection with another clause in the same paragraph, providing that, "to the extent of the capacity of the irrigation works and to the extent of the water rights to which

it is entitled," the Company shall sell or contract to sell water rights; and the last part of paragraph 9, which expressly prohibits the sale of water rights "beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor." This provision against priority of right was doubtless inserted to cover seasons of abnormally low water, and to forestall the claim that might be set up by the earlier settlers that they were entitled to be supplied to the full extent of their rights, to the exclusion of later settlers, at any time when, due to such abnormal conditions or to some casualty, there was insufficient water fully to supply all rights. In that view the several provisions of the contract are in harmony, and all are given effect; whereas, if the defendants' contention be adopted, not only is the express language of the settler's agreement set at naught, but the clauses last above quoted from the state contract are rendered meaningless. For if the settlers' contracts convey no specific water rights, but only undivided interests in the system, it is manifest that such water right as the Company possesses never could be exhausted or exceeded, for any right, be it large or small, is capable of division into an infinite number of shares.

[6] In paragraph 8 is found the following provision:

"Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth ($1/100$) of one (1) cubic foot of water per acre per second of time, and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal."

Standing alone, this language is susceptible to a construction tending to support the defendants' contention; but it may also be read entirely in harmony with the settler's contract. Under the familiar rule that a printed form of agreement will be construed most strongly against the party by whom it is prepared, the doubt here would have to be resolved against the Company, even if we had nothing but the state contract. And why, it is pertinent to ask, should the state have so carefully insisted upon a canal capacity of one-hundredth of a second foot per acre if the water was not to be supplied up to practically that capacity? It would seem to be wanton waste to build a canal twice the size needed. It is futile to say that an additional capacity might have been required for the rotation system of delivery, the possibility of which was contemplated, for, under such a system, the flow in the main canals and laterals is not necessarily variable; the fluctuation or periodic use is only in the sublaterals and individual ditches.

[7] In paragraph 10 provision is made for the organization by the Company of the Salmon River Canal Company, and the transfer to it of the ownership and control of the system, and for the issuance to the settlers of a share of stock therein for each acre of land for which a water right is sold. The capital stock of the company, it is stipulated, shall consist of 150,000 shares, "which amount," such is the provision, "is intended to represent one share for each acre of land which may be hereafter irrigated from said canal." But, while

thus provision is made for the possible irrigation of 150,000 acres, there is no right or license implied to sell water rights in excess of the available supply of water, whatever that may turn out to be. Plainly the clause is to be read together with the limitation in that respect already discussed.

[8] It is sought to attach significance to other language found in paragraph 10, to the effect that water is to be delivered for irrigation purposes in such quantities and at such times as the condition of the crops and the weather may determine. By its very terms this provision is made to relate only to the period during which the Company shall have charge of the system, before it passes into the control of the water users. But, putting aside that consideration, manifestly the regulation pertains, not to the measure of the settler's water right, but only to the method of giving such right its greatest efficiency. Probably never before in Southern Idaho, save in some exceptional case, had water been given so high a duty as one-hundredth of a second foot to the acre. In the early history of the state at least one-fiftieth of a second foot was generally recognized as being necessary, and in more recent years, upon the more expensive projects, the duty was more or less frequently increased to one-eightieth of a second foot. It is reasonable to assume, therefore, that both the officers of the Company and the State Land Board realized the necessity of adopting economical methods for distributing and applying the water, if the allotment of one-hundredth of a second foot was to prove sufficient and satisfactory. Undoubtedly rotation of use is superior to the more primitive method of continuous flow, and therefore the Company was authorized, so long as it remained in control, to establish such system, and accordingly to deliver the water to which the settler was entitled at such times and in such quantities as would best supply his needs; but in thus providing for an efficient method of delivery no authority was implied to reduce the aggregate amount or volume to which the settler is entitled. Therefore the provision, even if it could be regarded as of continuing force, in no wise tends to qualify the settler's right as the same is defined in his contract.

[9] Perhaps in greater detail than the reasonable length of a judicial opinion would ordinarily warrant, I have now brought under review all the clauses of the state contract which can be deemed to give even the most remote support to the defendants' contention; and it is submitted that they present no real conflict with the settler's contract. Upon the other hand, we find upon further examination that in its most vital feature the precise language of the latter is expressly authorized by the former, for in paragraph 10 of the state contract it is directed that:

"The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated, as provided in paragraphs IV and VIII of this contract, and a proportionate interest in the said canal and irrigation works, based upon the number of shares ultimately sold therein."

Moreover, by its reference to paragraphs 4 and 8, this provision illuminates their meaning and brings them clearly into harmony with

the settler's contract. It is accordingly concluded that the theory of a sale only of undivided interests is untenable.

[10] Now shifting their position, the defendants say that if anything more than an undivided interest was sold it was not a specific amount of water, but only a right to use such quantity from time to time as might be reasonably necessary to supply the settler's needs. Such presumptively must have been the intention of the parties, so it is argued, for a contract for a definite water right, if not in contravention of the Constitution and statutes, is opposed to the policy of the state, in that the only right the individual can acquire in water is the right to apply it to a beneficial use, and, inasmuch as needs are always variable and fluctuating, title to a definite or specific quantity of water cannot be granted or acquired. Such plausibility, however, as the reasoning may have, is due to a confusion of terms, and a consequent confusion of ideas. It may be conceded that the waters of the state belong to the public, and that the private right which the individual acquires by appropriation or purchase is usufructuary only, and further that at any given time the extent of his reasonable need is the measure of the maximum amount he is entitled for the time being to divert from the stream or to receive and use. But this is not to say that in the exercise of ordinary prudence the owner of land may not, by appropriation or contract, provide himself with an available supply which shall be subject to his demand at all times when he has need therefor. Were the defendants' contention to prevail, the existing uncertainty and unstability of titles to water rights would give place to utter chaos. If, for the reasons counsel advance, it was incompetent for the settler to contract for a specific right, it was equally incompetent for the Company by appropriation to acquire any specific or definite right. Water decrees adjudicating the extent of appropriators' rights would be of no effect, and that which the defendants are urging here, namely, a determination of the duty of water, would be an idle thing; for what the farmer needs this year for the proper irrigation of his crops may be too much or too little for the coming year. A contract for a specific amount no more warrants or encourages wasteful use than does a judicial decree or State Engineer's permit. The possibility that the settler may not at all times be able to use the maximum of his available right, whether such right be acquired by appropriation or by contract, is without significance. That is only to say that in that event, and for the time being, the water becomes subject to use by others having inferior rights. I know of no consideration of public policy opposed to the exercise by farmers of that degree of prudence which is expected of men in other vocations in providing a margin of safety to cover contingencies. What would be thought of a hydroelectric company furnishing light and traction facilities to an urban community, if it relied upon a power installation just sufficient to meet the needs of the community in normal years, without any margin of safety to cover the contingency of low water or of casualties known to be incident to such an enterprise? If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average, or when, through accidents to the system, there is par-

tial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. Ordinarily for the farmer not to make provision against such contingencies would be counted against him for carelessness. So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. Economy of use is not synonymous with minimum use. Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

[11] Now if the contract is lawful, and if therefore the Company could and did contract for the sale of specific rights, and if such rights were not to be sold in excess of the water supply, what is the quantitive measure, if any, provided by the contracts for such rights? We have seen that the sale was of "one-hundredth of a second foot" to the acre, and ordinarily, it is to be conceded, if this phrase were used with reference alone to a water right in the natural flow of a stream, it would be accepted as a sufficiently clear and complete description in itself. It would import a right in the owner at any time he had need, and so long as he had need, to divert and use a stream of the magnitude thus described. The question of the quantity of water, in cubical measure, would rarely arise, for no one would be interested in calling it up. But here the outstanding feature of this system is the reservoir, and obviously in estimating the acreage capacity of a reservoir we must not only have the size of the stream to be delivered per acre, but also the length of time it is to run. Upon this point of time, it must be conceded, the contracts taken together are not wholly free from ambiguity. If we dismiss, as I think we may, without discussion, the idea that either party has the power to determine the period to suit himself, there are left three possible alternatives. We may couple the one-hundredth of a second foot with the duration of what is designated as the irrigation season—that is, from April 1st to November 1st of each year—and conclude that the settler is entitled to receive a total quantity of water equal to a continuous flow at the rate of one-hundredth of a second foot per acre for the entire season, which would amount to approximately 4⅕ acre feet. In this view the settler who uses no water during the months of April and May could double the supply to which he would ordinarily be entitled during the months of June and July. While the language of the contracts is susceptible to such a construction, it is doubtful whether at the time they were executed any water rights had ever been so defined in this section of the country, and it is wholly improbable that either party contemplated such a radical departure from irrigation practice.

A second view is that we may reject the period of the irrigation season as not having anything to do with the question of the quantity of water, but only as establishing the limits of time beyond which no water could be furnished, and adopt the theory that one-hundredth of a second foot was to be delivered during this period at such times only as the settler's need required, without the right on his part to hoard or save for the future by failing to use continuously, and hence without the right at any time to demand a flow in excess of one-hundredth of a second foot per acre. Such a right would be closely analogous to that of one who, as an original appropriator, is decreed at the rate of one-hundredth of a second foot per acre of the natural flow of the stream; he would have the right to divert that amount continuously up to the limit of the beneficial use to which he could apply it, but he could not, by refraining from use to-day, divert twice the amount to-morrow. The difficulty about this view is that it fails to take account of the necessity of measuring the reservoir, and hence leaves hopelessly uncertain one factor essential to the computation of the required capacity of the system as a whole. But not only here is that one of the vital questions, but it is reasonable to suppose that the parties had it more or less definitely in mind when they entered into the contracts.

A third view, and one which in many respects is identical with the one just discussed, but which covers the point last noticed, is that a right was contemplated sufficient to enable the settler to receive water at the rate of one-hundredth of a second foot per acre continuously during the season of actual irrigation needs, the amount of which the parties estimated and understood to be 2¾ acre feet; and this view I am inclined to adopt. It is not at variance with any of the terms of the contract, it gives a measure of effect to all, and is in conformity with current and general irrigation practice in the state, with reference to which it may be assumed the parties contracted; and furthermore it entails no unreasonable results. The parties doubtless understood that, while it is provided that water could be demanded at any time between April 1st and November 1st, demands in April and October would be exceptional, and in May and September generally very light, and that it was therefore reasonable to assume that on the average a resource of 2¾ acre feet would be sufficient to supply the settler's right of a continuous flow, during the irrigation period, of one-hundredth of a second foot per acre. Practically, therefore, and in effect, the provision in the state contract with regard to the 2¾ acre feet is not inconsistent with or a limitation upon the definition of the settler's right embraced in his contract, namely, a right to receive one-hundredth of a second foot during the season of his need for water; it is merely the expressed understanding of the parties touching the total amount of water the Company must have available in order safely to provide for this need and thus to comply with its contract. In effect it amounts to an agreement by the Company that it will make provision for that quantity, and an agreement upon the part of the state and the settler that such provision will be accepted as full compliance with the obligation to supply the settler up

to the limit of his needs at the rate of one-hundredth of a second foot per acre during the entire irrigation season from April 1st to November 1st. In this way, upon the one hand, the right of the settler is defined, and upon the other the duty of the Company is made clear and specific. The latter could not legitimately sell water that it did not have, and when at the rate of 2¾ acre feet per acre it had sold up to the available supply in its reservoir, as supplemented by the natural flow of the stream during the irrigation season, it was bound to stop.

There is no force to the argument by which the defendants attempt to array against this view the provisions of paragraph 10 of the state contract, authorizing rotation of use, and delivery "in such quantities and at such times as the condition of the crops and the weather may determine." Note has already been made of the fact that these provisions are temporary only, and are in terms limited to the brief period of the Company's control and administration of the system, and the whole argument might properly be dismissed with the suggestion that we are led into confusion rather than into clarity of reasoning by doing violence to the language of the contract and arbitrarily assuming that these provisions are upon the same footing with others of a permanent character. But, if for the sake of the argument we join with the defendants in indulging this unwarranted assumption, the general conclusion here reached is in no wise affected. It is plain that the two clauses, the one providing for one-hundredth of a second foot per acre, and the other for "such quantities * * * as the condition of the crops and weather may determine," if they relate to the same subject-matter, cannot stand together; one is constant and the other variable, and plainly as measures of a single right or duty they are inconsistent. The one must be understood to pertain to the extent of the right and the other to the method of delivery. How can we say that the settler's right is the right to receive such amounts of water and at such times during the irrigation season as the condition of his crops may require, and at the same time say that the water is to be delivered to him at the rate of one-hundredth of a second foot per acre? That would be a contradiction of terms. Upon the other hand, to say that the right is to receive water at the rate of one-hundredth of a second foot per acre, flowing continuously during the actual irrigation season, the amount thereof being estimated at 2¾ acre feet, and that this amount be delivered from time to time in such quantities as the conditions require, is to define the right and to prescribe a method of delivery involving no contradictions or inconsistencies, and no departure from the best irrigation practice. As already noted, this latter view is the only one under which these clauses in paragraph 10, treated as permanent provisions, can be given effect without rendering inoperative other clauses of the contract, and in this view they are in no wise opposed to the theory of a definite and specific water right.

[12] It is scarcely necessary to add that, if the view I have taken of the meaning of the contracts is correct, the duty of water, when applied in accordance with principles which are coming to have the sanction of scientific experimentation, is an immaterial in-

quiry. The rights of the parties are defined by their written agreements, and even if upon investigation we should find, in harmony with the popular view, that one-hundredth of a second foot is quite inadequate, no relief upon that account could be granted to the plaintiffs. So, upon the other hand, and for like reasons, a finding that the settler could get along with something less than that amount would furnish no ground upon which to relieve the defendant company from its contractual obligations. Whatever may be the proper duty of water, we cannot make a new agreement for the parties. If the right granted is too great, and the settler attempts to use water wastefully, that is a matter of which the state and other appropriators upon the stream may complain; it is no concern of the defendants. The terms of the agreement were fixed by the Company, not by the settler; presumably the latter was induced to obligate himself to pay the price in the expectation that he would get the proposed water service. It may be assumed that at the time the contracts were negotiated the Company deemed it impracticable to adopt a higher duty for water, and thought that few would be willing to undertake to reclaim the land, and in many cases to risk their all, without the assurance of at least the supply agreed upon. They are entitled to receive what they contracted for. It is to be borne in mind that the evidence touching the duty of water was not offered for the purpose of illuminating the meaning of the writings. Possibly knowledge of what at the time they were executed, was generally understood to be a reasonable amount of water for irrigation needs, might be of some assistance in determining the meaning the parties attached to the phraseology employed; but manifestly the present views of scientific experts and skilled specialists cannot be considered for that purpose, and in that view the evidence was excluded.

To summarize, the contract, as I have construed it, runs counter to no provision of the Constitution, no statute, and no principle of public policy. The right provided for is no more specific than that defined and established by a judicial decree or by a proceeding before the State Engineer in favor of an original appropriator. The construction no more authorizes or permits wasteful use than does a decree or a State Engineer's permit. It eliminates inconsistencies and gives effect to all the provisions of the agreements. Not only is it in accord with the plain import of the language employed, but it is strongly supported by the surrounding circumstances. As we have seen, the Company had confidence that the stream would supply a sufficient amount for 150,000 acres, and it procured a permit sufficient to provide at the rate of one-hundredth of a second foot per acre for that area. At that time water rights were customarily appropriated, decreed, contracted for, and sold, as definite quantities, and with rare, if any, exceptions, the amount deemed to be necessary, both popularly and by the courts, exceeded the amount here provided for. In the light of these circumstances, the contract must have appeared to be a reasonable one for the Company to make, and no argument of improbability is available as a ground for qualifying the meaning which the phraseology naturally imports.

[13] If then the settler is entitled to receive one-hundredth of a second foot or 2¾ acre feet per acre, it stands conceded that the Company sold, and has outstanding, contracts very greatly in excess of the capacity of the system. Just what this excess is I do not at the present juncture attempt to determine. Aside from the consideration that the period during which we have accurate information touching the run-off of the watershed is comparatively short, and therefore the data inconclusive, a definite finding upon this point should await the final determination of claims of other appropriators upon the stream, which are now in the course of adjudication in this court. Prior rights are asserted under these claims, and they are of such magnitude that no reliable computation can be made of the amount of water probably available for this project, in normal years, until their status and dignity are determined. It is also highly desirable, if not wholly indispensable, that we have the benefit of further experience and observation touching the amount of seepage which may be permanently expected in both the reservoir and the canals.

Relief.

While, if the conclusions I have reached are correct, plainly the settlers are entitled to a measure of relief, a feasible remedy is not so clear. The obvious course would be to require the Company to supplement its existing water supply, but additional water is not to be had. If it be suggested that the area of the tract be reduced by cutting off all contracts executed after the full capacity of the system had been sold, it is to be said that, even should it be held that such a course is legally possible, it could not be taken without the presence of all the contract holders; and, furthermore, it is not impossible that some of those who contracted last have been more diligent in reclaiming their lands and placing improvements thereon than those who contracted earlier. So of the suggestion that all contracts be scaled down proportionately both in the amount of the water right and the consideration to be paid therefor—the practical difficulties are very great, and we have not before us the contract holders, who are admittedly indispensable parties to such relief. The Company should, of course, sell no more rights, and, if it be necessary, should be restrained from so doing. Furthermore, it should, in so far as may be practicable, call in such outstanding contracts as are subject to rescission. It was represented at the trial, as I understood, that so many contracts had been abandoned, and so many others are subject to forfeiture, that the Company might, at its option, reduce the aggregate of the outstanding contracts from approximately 73,000 acres to approximately 55,000 acres. It should be required to exercise its right of rescission wherever it exists, and by negotiation it is reasonable to believe it may further reduce the irrigable area. It should also be restrained from attempting to collect overdue installments on contracts until there is reasonable assurance that the settlers will receive that for which they have promised to pay. For the present at least I do not look favorably upon the prayer for a receiver. The system is apparently being carefully and intelligently managed, and no relief is needed in that respect. The suggestion that a receiver collect the installments due, for the purpose

of creating a fund out of which to pay damages, if feasible at all, does not impress me as being presently necessary. An order or an interlocutory decree will be entered restraining the Company from making any contracts or waiving any right of forfeiture of existing ones, and also restraining it, together with the other defendants, from collecting or attempting to enforce payments upon the contracts until the settlers have been provided with the water supply contracted for, or are given trustworthy assurance that it will be provided. Leave will be granted to either party to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to: (1) The amount and dignity of the rights awarded to adverse claimants in the Vineyard Company suit hereinbefore referred to and now pending in this court; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water contracts actually outstanding at the time of the application; and, upon the submission of such proof, for the entry of a final decree.

SABRE v. UNITED TRACTION & ELECTRIC CO. et al.

(District Court, D. Rhode Island. June 1, 1915.)

1. CORPORATIONS ⇐170—RIGHTS OF STOCKHOLDERS—HOLDING COMPANY.
A stockholder in a holding company, chartered for the purpose of buying, holding, and selling stock and securities of other corporations, is not a stockholder, nor entitled to the rights of a stockholder, in another corporation, stock of which is owned by the holding company, and the leasing or sale of all of the property of a corporation controlled by the holding company through stock ownership, by the unanimous vote of the stockholders of the lessor or vendor, does not require for its validity the unanimous consent of the stockholders of the holding company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624–632; Dec. Dig. ⇐170.]

2. CORPORATIONS ⇐377—HOLDING COMPANIES—SEPARATE ENTITY OF CONTROLLED CORPORATION.
When one corporation owns all of the stock of another, a court of equity may, in some instances and for some purposes, ignore the existence of the latter and treat the dominant company as if it alone were the owner and operator of the business of the controlled corporation; but the court cannot disregard forms prescribed by statute for securing corporate rights, nor give corporate rights to, nor enlarge the corporate powers of, the controlling corporation, and where it is without authority under its charter to conduct the business of the controlled corporation, the distinction between the two corporations is a matter of substance, and not merely of form, and their independent existence must be recognized.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1531–1534; Dec. Dig. ⇐377.]

3. CORPORATIONS ⇐180—POWERS—ACTS REQUIRING UNANIMOUS CONSENT OF STOCKHOLDERS.
The unanimous consent of all the stockholders of a corporation is not essential to the doing in good faith of any act within its charter powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665–673; Dec. Dig. ⇐180.]

4. CORPORATIONS ⟸189—RIGHTS OF STOCKHOLDERS—ESTOPPEL.

A stockholder, who after what he claimed was an illegal transaction on the part of the corporation, retained his stock for four years and received increased dividends thereon, is estopped to claim that because of such transaction he is entitled to require the corporation to purchase and pay for such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706–722; Dec. Dig. ⟸189.]

In Equity. Suit by George W. Sabre against the United Traction & Electric Company and the Rhode Island Securities Company. Decree for defendant Traction Company, and for complainant against the defendant Securities Company.

See, also, 156 Fed. 79.

Lewis A. Waterman and Gardner, Pirce & Thornley, all of Providence, R. I., for complainant.

Edwards & Angell, of Providence, R. I., for respondents.

BROWN, District Judge. This is a bill in equity by a minority shareholder, holding 400 shares of the defendant Traction Company, against that company and the Rhode Island Securities Company. Both defendants are New Jersey corporations. The opinion of this court upon demurrer to the bill, reported in Sabre v. United Traction & Electric Company, 156 Fed. 79, sets forth in some detail the allegations of the bill, and may be referred to in connection with this opinion.

The complainant objects to certain leases for terms of 999 years made by several street railway corporations to the Rhode Island Company, a Rhode Island corporation, whose shares were owned by the Rhode Island Securities Company. The leases were made through the exercise by the Traction Company of its voting power as a holder of substantially all the shares in each of the lessor corporations. His objection is, in substance, that the leases and agreements pursuant to which the leases were made effected a diversion of the net earnings of the street railway companies from the shareholders of the Traction Company to the shareholders and bondholders of the Securities Company.

Though complainant's brief asserts that the transaction looks like a clever scheme to divert from a minority of the shareholders of the Traction Company a large part of the future net earnings of the railway companies, there is no charge of fraud.

The bill alleges that before the making of these leases the United Traction Company, by virtue of its share holdings, received the earnings of these corporations; that the moneys so received were applicable to the payment of dividends to shareholders of the United Traction Company; that as a shareholder the complainant was justly entitled to his proportionate share of the entire net earnings of the various street railway companies whose stock was owned by the Traction Company; and that since the making of the leases his returns on his investment in the stock of the Traction Company are practically limited for all time to an annual dividend of 5 per cent. on his stock

at par, and to a proportionate share of the dividends upon a small fraction of the stock of the Rhode Island Securities Company.

It is the contention of the complainant that by the leases he and other shareholders of the Traction Company were wrongfully deprived of much the greater part of the surplus earnings of the street railway corporations over and above the amount of the dividends paid upon the stock of the Traction Company.

The complainant urges that the case should be treated as if the Traction Company were the direct owner of the street railway properties that were leased; that the Traction Company was not a mere holding company, but was organized for the purposes of consolidating the electric street railway properties in Providence and vicinity, and of actually controlling and managing them as one system, and that it did thus actually control and manage them as its sole business; that under such conditions a court of equity, disregarding the form and looking at the substance, should ignore the existence of subsidiary corporations that are mere puppets of the corporation that controls them.

Next the complainant contends that:

"Corporations have no right to transfer their property and franchises by long-term leases and thus practically go out of business without the unanimous consent of their stockholders, unless this is expressly provided for by statute at the time of the creation of the corporation; or, if the statute is enacted subsequent to the formation of the corporation, unless proper provision is made for ascertaining and paying to each dissenting stockholder the fair value of his stock."

This is the main proposition of law which complainant seeks to apply to the facts of this case.

The argument proceeds with the contention that the leases, therefore, could properly be made only by the unanimous consent of all the shareholders of the Traction Company, and that as there was no such unanimous consent, nor even a consent by a majority vote of the shareholders, and although all the other shareholders in the Traction Company finally assented, the complainant, as a nonassenting shareholder, still has the right to object to a transaction which requires, but did not have, unanimous consent of all shareholders.

[1] It is impossible, however, to accept the contention that the nonassent of a shareholder of the Traction Company should be given the same effect as the nonassent of a shareholder in each of the lessor street railway companies. Neither as a matter of form nor as a matter of substance can the complainant be regarded as a shareholder, or entitled to claim the rights of a shareholder in any one of the lessor companies. He is merely a shareholder in a corporate owner of all the stock of the street railway corporations, each of which is still a distinct corporation whose individual existence cannot be ignored.

The United Traction Company was organized under the laws of the state of New Jersey. Under its articles of incorporation it had no power to engage in the business of operating street railway companies in the state of New Jersey, in the state of Rhode Island, or elsewhere. It derived no such authority from the Legislature of the state of Rhode Island, and its only rights arose from its acquisition of the stock

of the street railway corporations. It had such rights as resulted from its ownership of the stock.

The complainant contends that, though the Traction Company may have been nominally and in form a holding company, investing and dealing in stocks and bonds, it was really and as matter of fact the owner and operator of the consolidated street railway properties of Providence and vicinity, and that the transaction was really a transfer of all its property to the Securities Company, etc. We are asked to ignore the existence of the railway corporations and treat the case as if the leases were made directly by the Traction Company without the complainant's assent. All this is for the purpose of obviating the defendants' contention that the leases were made by unanimous consent of all the shareholders of the railway corporations.

[2] It is true that, when one corporation owns all the stock of another corporation, the court may, in some instances and for some purposes, ignore the existence of the latter and treat the dominant company as if it alone were the owner and operator of the business of the controlled corporation. To apply that principle here, however, would be to raise very serious doubts as to complainant's rights. Only upon the theory of the separate existence of the operating companies, and by ownership of their shares, has the Traction Company acquired any rights in respect to these operating companies. How far its ownership of shares in distinct corporations would justify it in managing the entire properties as if all were directly owned by the Traction Company and merged in a single ownership and control; whether the shares in any one of the street railway corporations could be voted by the Traction Company as its sole shareholder, otherwise than in the separate interest of such corporation; whether consistently with the rights of the public the Traction Company, under its voting power as a shareholder, could manage one corporation or apply its income in the interest of, or for the benefit of, another of the street railway corporations; whether, without authority from the Rhode Island Legislature, there could be a legal consolidation of these separate companies into a single operating company—are questions that might immediately arise, were we to ignore the existence of the separate corporations and treat the Traction Company as if it were in fact an owner dealing directly with its own property.

While a court of equity may look through form to substance, it cannot disregard forms prescribed by statute for securing corporate rights, nor give corporate rights to the Traction Company, or enlarge its corporate powers.

Upon this bill to enforce the rights of a shareholder in this company we may assume for the purposes of the case the legality of the organization of the United Traction Company, and of its acquisition of the stock of the street railway companies, and also its right to exercise the voting powers incident to its stock ownership.

[3] By purchasing shares in the Traction Company, whose powers included the holding of shares of stock, the complainant assented that the rights incidental to such stock ownership should be exercised by the Traction Company, either through its board of directors or through the

regular action of a majority of the shareholders. Unanimous consent of the shareholders of the Traction Company was clearly unnecessary to enable that corporation to do any act within its corporate purposes. The holding of shares of other corporations was defined in its articles of organization as one of such purposes. If it owned all of the shares in any corporation, it could, therefore, as such sole shareholder, assent to any disposition of the assets which would be valid with the assent of all the shareholders.

Even if there were any irregularity in the action of the Traction Company whereby it attempted to authorize the stock to be voted in favor of the leases (and it is not clear that there was such irregularity), the action of the board of directors and the subsequent confirmation of the leases by all but 400 out of 80,000 shares of the Traction Company, is sufficient ground for now holding that the leases were validated by persons who had the right to authorize them, even against the dissent of a minority of the shareholders of the Traction Company.

The complainant does not question the right of the Traction Company under ordinary circumstances to vote the entire stock owned by it in each corporation, but does question its right to vote for the making of these leases.

The action of the Traction Company in respect to these leases was not taken as the owner of the properties of the street railway corporations. The Traction Company did not assume ownership, but merely exercised its rights as a shareholder, while recognizing the corporate independence of the different street railway corporations and their separate ownership of the properties leased by them respectively. In fact, in view of the outstanding obligations secured by these various properties, it is doubtful if any other course could have been taken.

The attempt to identify the Traction Company with the operating companies, and thus to transform a dissenting shareholder of the Traction Company into a dissenting shareholder in all the operating companies, must be rejected as unsound.

We may next consider whether the action of the Traction Company, in its capacity as a holding company, was such as to require unanimous consent of its stockholders.

It is urged that the Traction Company practically voted itself out of business and tied up its assets so that it could no longer do business, and that this it could not do without unanimous consent of all its shareholders. But is it true that the Traction Company practically voted itself out of business? Its business was not the operation of street railways, but included the right to hold securities, whether bonds, mortgages, debentures, notes, or shares of capital stock. These are powers of the nature of those exercised by investment companies.

It must be held, therefore, that after the execution of the leases the Traction Company still continued to carry on a business for which it was organized. R. I. Hospital Trust Co. v. Rhodes, 37 R. I. 141, 159 et seq., 161, 165, 91 Atl. 50.

I find, as contended by the defendant, that the complainant, as a minority stockholder of the Traction Company, was possessed of no rights which were violated by the fact that the Traction Company

voted its shares of stock in the operating companies in favor of leasing the property and franchises of the operating companies to the Rhode Island Company without his consent.

The allegations of the bill that complainant purchased his shares in the expectation that, with the increase of population and of the business of the Rhode Island corporations, the dividends of the United Traction Company would greatly increase, and in view of the prospective, rather than of the present, value of such investment, and the complaint that prospective values have been diverted, and complainant's expectations have thus been disappointed, do not aid his case, since all this does not affect the right of the Traction Company to make changes of investment, or even to dispose of its share holdings upon terms acceptable to the directors or a majority of the shareholders.

That the value of the complainant's shares was depreciated is not proved. On the contrary, the evidence shows that the market value of the shares was increased, and there is no evidence to support a finding that the intrinsic value of the assets of the Traction Company was in fact diminished. Nor does the complainant maintain his contention that the shareholders did not get in the increase of dividends from 4 to 5 per cent., and in such security as was provided therefor, a benefit commensurate with what they parted with in the way of future possibilities.

The contention that the transaction was unnecessary, that the Traction Company might have obtained money in other ways, and without parting with its prospects of increased receipts, becomes immaterial, since there is no charge of fraud, and no evidence sufficient to show an abuse of discretion, or an attempt by a majority of the shareholders to profit at the expense of a minority.

So far as the matter was one of business judgment and discretion, falling within the scope of the corporate business of the Traction Company, we cannot here review it. The provisions for rentals, for caring for the various obligations, and for the payment of dividends of 5 per cent. upon the shares of the Traction Company seem to be matters of this kind. It cannot be said that the matter of prospective increase did not enter at all into this part of the bargain, or that it was wholly ignored in providing for 5 per cent. on the $8,000,000 of stock.

[4] The prayer of the bill is in the alternative, that the defendants may be decreed to pay the complainant the full value of his 400 shares of stock as shown by an accounting, or in lieu thereof to issue to him the same proportional part of all the stock of the Securities Company that he holds in the Traction Company.

The complainant, however, continued to receive dividends upon his shares at the rate of 5 per cent., as provided for in the lease transaction, and delayed filing his bill for 3 years and 11 months after the transactions of which he here complains.

There appears to be no substantial reason why, so far as the stock is concerned, he should not be left in the same position that he voluntarily assumed throughout this time. There is no need of compensating him for what he has not been deprived of, even on his own showing; nor is it necessary, in order to compensate him for his sup-

posed loss, that the defendants should be required to take over his stock.

If the complainant considered himself entitled to terminate all relations with the Traction Company, and to demand his distributive share of assets in return for a surrender of his stock, he should have proceeded with diligence to do so. His delay for so long a time, and his acceptance of benefits in the form of increased dividends, amount to an election to retain his shares.

The alternative prayer of the bill is that the respondents should issue to him the same proportion of shares in the Securities Company as he held in the Traction Company.

The complainant, instead of asserting that he is unwilling to become a shareholder in the Rhode Island Securities Company, complains that the number of shares allotted to him, and which he has not applied for, is inadequate.

The theory that prospective profits properly belonging to the Traction Company were taken over by the Securities Company, and can be followed into the hands of the Securities Company, and disintegrated from its assets derived from other sources, and returned to him in the form of additional shares of stock in the Securities Company, is wholly impractical.

The offer to shareholders of the Traction Company of shares in the Securities Company was apparently by way of bonus, and was a collateral transaction. It did not enter into the leasing contracts made between the operating railway companies and the lessee, the Rhode Island Company, nor form a part of the consideration between lessor and lessee. The shares of the Securities Company were not to become assets of the Traction Company.

The complainant argues that the rentals were clearly not full compensation for the leases, since the consideration actually given included also a part of the Securities Company stock. But while the offer of those controlling the Securities Company to give to shareholders of the Traction Company a part of the large issue of its common stock may indicate a hope of increased income from the railway properties, with added capital, it affords no sound reason for a belief that the Traction Company did not in fact get full consideration for the exercise of its voting powers in favor of the leases.

The proofs are entirely insufficient to show as a fact that the complainant has been wrongfully deprived of dividends, or of any real, as distinguished from speculative, values.

The only indication that there was any value in the assets of the Traction Company over and above the return it secured under the leasing arrangement is the fact that it was contemplated, after putting additional money into the properties, to issue an amount of shares of the Securities Company greatly in excess of any new capital contributed to the Securities Company; but, while the lease part of the transaction may be regarded as principally a business proposition, and there is considerable evidence in the record that it was on that basis approved by men of good character and sound financial judgment, on the other end of the transaction it is evident that the amounts of the

stock issues and of the bond issues were of an arbitrary and speculative character.

It would not be sensible, however, to say that the proposal to add a fourth story to this three-storied financial structure, and to issue a large block of stock, is evidence which could be accepted by a court of equity to support complainant's contention that he has been unjustly deprived of property of proven existence and of substantial value. The common stock in the Securities Company was not offered as based upon definite values, or as required to make up a difference between the actual values of the Traction Company's assets and what it was to receive through the leases. It represented at the time a share in a speculative possibility.

It is impossible for this court to say whether such share was or was not too small. It is impossible for this court to apportion between the promoters of the Securities Company and the shareholders of the Traction Company the common stock of the Securities Company.

I am unable to see that the complainant has made out any case against the Traction Company. However just may be his criticisms of the mode of financing disclosed by this record, and of this mingling of business and speculation, he has, in my opinion, failed to show that the Traction Company exceeded its powers, abused his rights as a minority stockholder, or even that it made a bad bargain, having due regard to the interests of the shareholders.

That there was a speculative field of finance in which it might have got more does not prove that it did not get enough, even if others in that speculative field did get more.

Though the complainant has asked for more stock, he has consistently declined to accept the 100 shares of stock of the Securities Company to which, under the allotment, he was entitled. Ordinarily, when shares are thus offered, provision is made for paying their value to one who refuses to accept them in kind.

No proof has been presented which enables me to say what sum, if any, complainant should be entitled to in lieu of the 100 shares of Securities Company stock, though the suggestion is made that an allotment of shares has become impractical or impossible by reason of change of circumstances.

At this time no more can be said, therefore, than that the complainant seems to be entitled to such sum as will represent the value of 100 shares of stock of the Rhode Island Securities Company. In case such valuation cannot be agreed upon by the parties, the amount thereof may be determined by further proceedings.

A decree should provide for the payment on behalf of the Securities Company of such sum as may be found just, and for a dismissal of the bill as to the defendant United Traction Company.

Questions of costs reserved.

In re WILLIAM A. HARRIS STEAM ENGINE CO.

In re BOURN.

(District Court, D. Rhode Island. June 25, 1915.)

No. 1450.

BANKRUPTCY ⟸346—CLAIMS—PRIORITY—TAXES—LESSOR.

Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (Comp. St. 1913, § 9648), giving priority to taxes legally due and owing by the bankrupt to the United States, state, county, or municipality, does not entitle a landlord of the bankrupt, whose lease required the bankrupt to pay the taxes, to priority for his claim for such taxes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. ⟸346.]

In Bankruptcy. Proceedings against the William A. Harris Steam Engine Company. On petition of A. O. Bourn to review an order of the referee. Order approved and affirmed, and petition for review dismissed.

The report of Referee in Bankruptcy Nathan W. Littlefield was as follows:

To the Honorable Arthur L. Brown, United States District Judge:

The undersigned, referee in bankruptcy for said district, respectfully reports that in the course of the proceedings in said cause certain questions arose which are hereinafter more fully stated.

The facts to which these questions relate are as follows:

On the 6th day of April, 1915, Augustus O. Bourn, who was and is the owner of certain real estate leased by said bankrupt, filed a proof of claim, which was numbered 42 on the docket of claims in said cause, for the sum of $1,955.48. Said proof of claim is herewith transmitted. The consideration stated in said proof of claim is as follows: "Taxes assessed by the city of Providence on June 15, 1914, payable in October, 1914, against deponent as taxes upon premises occupied by said William A. Harris Steam Engine Company at corner of Park and Promenade streets, and which said bankrupt, under the terms of its lease between deponent and it, promised to pay. Deponent hereby avers said claim for taxes is a preferred claim against bankrupt."

On the 29th day of April, 1915, the trustee filed an objection to the allowance of said claim. Said objection is herewith transmitted.

Said claim and objection thereto were set down for hearing and heard upon the 3d day of May, 1915, and thereupon the referee entered the following order on the same day: "The objection to the claim of Augustus O. Bourn as a claim entitled to priority coming on to be heard on this 3d day of May, A. D. 1915, and being argued by counsel, thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that said claim be allowed as a claim not entitled to priority, and in so far as said claim is for a priority it is hereby disallowed." Copies of said order were immediately mailed to the counsel for the claimant and for the trustee.

On the 10th day of May, 1915, Augustus O. Bourn filed a petition in the office of the referee, praying that the referee order the trustee to pay the taxes due as aforesaid to the city of Providence.

Said petition was set down for hearing on the 14th day of May, 1915, and thereupon, upon consideration thereof, the following order was entered by the referee on the 26th day of May, 1915: "The petition of Augustus O. Bourn, filed on the 10th day of May, 1915, praying that an order may be issued to the trustee in bankruptcy of said estate to pay the taxes due to the city of Providence, coming on to be heard on the 14th day of May, A. D.

1915, it is ordered, adjudged, and decreed that said petition be denied and dismissed."

On the 14th day of May, 1915, said Augustus O. Bourn filed a motion with the referee that he be allowed to withdraw the claim filed by him under date of April 6, 1915, whereby he claimed the sum of $1,955.48, the amount of taxes for the year 1914 upon the premises occupied by the bankrupt, due him as a preferred claim, and thereupon the referee entered the following order on the 26th day of May, 1915: "The foregoing motion coming on to be heard on the 14th day of May, A. D. 1915, it is ordered, adjudged, and decreed that said motion be and hereby is denied."

On the 14th day of May, 1915, Augustus O. Bourn also filed a motion praying that the referee amend the order and decree entered on May 3, 1915, disallowing said claim for taxes, by striking therefrom the words, "that said claim be allowed as a claim not entitled to priority," which motion was heard on the same day, and thereupon, upon consideration thereof, the referee entered the following order on May 26, 1915: "The foregoing motion coming on to be heard on the 14th day of May, A. D. 1915, it is ordered, adjudged, and decreed that the same be, and hereby is, denied."

It was admitted that the taxes on which said claim is based were assessed by the city of Providence as alleged in the original proof of claim and also in the petition for an order on the trustee to pay the amount of the taxes to the city of Providence.

On the 19th day of April, 1915, said Augustus O. Bourn filed a petition with the referee setting forth that the receiver of the bankrupt estate and the trustee in bankruptcy had occupied the premises leased by him to the bankrupt from the 21st day of February, 1915, and that the trustee in bankruptcy was still occupying the same; that a reasonable and proper rental of the premises is the sum of $7,940.56 per year; and praying that he be allowed from the estate the rent of said premises at said yearly rate for the period of time the same had been occupied by the said receiver and trustee and for the time the same may be so occupied.

Said petition came on to be heard on the 26th day of April, 1915, at which time the following items on which the claim of rent of $7,940.56 was based were presented to the referee by counsel for the claimant and in his presence:

Unpaid taxes	$1,875.06
Insurance	228.00
Interest on mortgage	2,117.50
Cast payments called for by lease	3,100.00
Estimated repairs	640.00

Two of these items were questioned by the trustee—the item for repairs, which was, for the purpose of estimating the amount of rent properly chargeable, fixed at $500, and the item of interest, which had been paid in advance and was not due, and on that basis the referee authorized and directed the trustee to pay to said Augustus O. Bourn the sum of $1,000 on account of rent accrued or to accrue for the use of the premises, without prejudice, however, to the trustee or to the petitioner to claim a different amount as actually due to said petitioner for the rent as aforesaid. The sum of $1,000 was paid by the trustee as rent of the premises to Mr. Bourn, which amount is somewhat larger than the amount of rent actually due for occupation by the receiver and trustee at the time of the hearing on the basis aforesaid as in part a payment in advance.

No question was made at that hearing that the petitioner was claiming the right to receive as a part of the rent of the premises a proportionate amount of the taxes for the year, and the amount actually paid did include a part of the taxes so assessed.

No petition for review of the referee's order disallowing the original claim for taxes filed on April 6, 1915, was taken within 10 days from the entry of the order thereon, or at any time since then. The motion to withdraw said claim and the motion to amend same were filed after the expiration of 10 days from the entry thereof.

On May 28, 1915, the claimant filed a petition for a review of the order of the referee entered on May 26, 1915, denying and dismissing the petition of

Augustus O. Bourn filed on the 10th day of May, 1915, praying that an order might be issued to the trustee in bankruptcy to pay the taxes due to the city of Providence.

On the same date said Augustus O. Bourn filed a petition for a review of the order entered by the referee on the 26th day of May, 1915, denying the motion of said Augustus O. Bourn that he be allowed to withdraw the claim filed by him under date of April 6, 1915, wherein and whereby he claimed the sum of $1,955.48, the amount of taxes for the year 1914 upon the premises owned by the said Augustus O. Bourn and occupied by the bankrupt, as a preferred claim.

On the same date said Augustus O. Bourn filed a petition for a review of the order entered by the referee on the 26th day of May, 1915, denying the motion of said Augustus O. Bourn that the referee amend the order and decree entered by him on the 14th day of May, 1915, denying the motion of said Augustus O. Bourn that the referee amend the order and decree entered by him on the 3d day of May, 1915, by striking out therefrom the words "that said claim be allowed as a claim not entitled to priority."

Inasmuch as the questions raised by the various petitions for review all relate to the claim of Augustus O. Bourn that he is entitled to have the taxes assessed upon the premises owned by him and leased by the bankrupt paid in full by the trustee in bankruptcy out of the assets of the estate, the referee is of the opinion that the various petitions should be consolidated, and should be made the subject of one report.

The principal question of law involved in these various petitions is whether the owner of premises against which a tax has been levied can claim priority for the payment of such taxes out of assets of the bankrupt's estate.

The clause of the lease upon which the claimant bases his claim to such priority is as follows: "(2) In addition to the rent payable at the times and in the manner aforesaid, the lessee shall also, from time to time during the term of this lease and all extensions and renewals thereof, pay or cause to be paid all taxes, water rates, and assessments of every description which may be payable either by the landlord or the tenant in respect of said premises and the buildings and improvements thereon."

In support of this claim counsel for the claimant cited or referred to the following cases: Urquhart v. Brayton, 12 R. I. 169; Merriman v. Social Mfg. Co., 12 R. I. 175; Munroe v. Firemen's Relief Ass'n, 19 R. I. 363, 34 Atl. 149; Smith v. Union Ins. Co., 25 R. I. 260, 55 Atl. 715, 105 Am. St. Rep. 882; Gould v. United Traction Ass'n, 26 R. I. 142, 58 Atl. 624.

All these cases uphold the right of a third person to enforce a promise made by one person to another for the benefit of said third person, although the consideration does not move from said third person, and although he was not cognizant of the promise when it was made.

The present case does not seem to fall within the scope of the doctrine announced by the cases cited. This is not a case where a third party is seeking to enforce a promise made for his benefit under an agreement to which he is not a party. The city of Providence is not a party to the lease, and the city of Providence is not seeking to obtain any benefit under the contract. Moreover, no evidence has been offered that the city of Providence at any time has acceded to the promise made for its benefit, or that the city of Providence, through its constituted authorities, has had any knowledge of such promise.

In Blake v. Atlantic Nat. Bank, 33 R. I. 464–468, 82 Atl. 225, 39 L. R. A. (N. S.) 874, it is held that, until a person in whose favor such a promise is made accepts the new agreement and assents to its terms, such third person is not in a position to avail himself of any benefit under the agreement. The court holds (33 R. I. page 468, 82 Atl. page 226 [39 L. R. A. (N. S.) 874]) that:

"Before such accession on his part, his right to insist upon the performance of the promise in his favor may be lost by revocation or release between the parties to the agreement or by the intervention of the rights of others. Wood v. Moriarty, 16 R. I. 201 [14 Atl. 855]. Such assent to be effective must be given before the bankruptcy of the promisor.

"This view is in accord with the general doctrine of the Rhode Island cases as to the position of the beneficiary under such promise before his assent to it. It also agrees with the great weight of authority that the indebtedness of a bankrupt may not be increased in this manner after bankruptcy. In re Isaacs, 13 Fed. Cas. 148."

It seems clear that, bankruptcy having intervened and no assent having been shown to have been given by the city of Providence before such bankruptcy, the city of Providence could not enforce the promise contained in said lease against the trustee in bankruptcy. Such being the case, it follows that the claimant cannot compel the trustee in bankruptcy to assume an obligation of the claimant to the city of Providence which the city of Providence itself could not enforce.

The doctrine of subrogation has no application to this case. The claimant does not occupy the position of a surety, indorser, or other person secondarily liable for the payment of these taxes, and he would not be entitled to be subrogated to the right of the city of Providence to collect the taxes assessed against his property, even if the city of Providence, on the facts as they exist, had any right to collect said taxes from the trustee in bankruptcy.

Moreover, the priority of payment given by section 64a of the Bankruptcy Act to taxes expressly limits such priority to taxes "legally due and owing by the bankrupt to the United States, state, county or municipality."

The fact that a party other than the bankrupt may also be liable for the payment of taxes by contract or by statute is not sufficient to entitle such other party to priority of payment. In re Waller (D. C.) 15 Am. Bankr. R. 753, 142 Fed. 883; In re Wyoming Valley Ice Co. (D. C.) 16 Am. Bankr. R. 594, 145 Fed. 267.

Section 64a has been and should be strictly construed, and its benefit should not be extended to a creditor other than the municipality to which the tax is due and owing by the bankrupt. In re Broom (D. C.) 10 Am. Bankr. R. 427, 123 Fed. 639; In re Veitch et al. (D. C.) 4 Am. Bankr. R. 112, 101 Fed. 251; In re Hollenfeltz (D. C.) 2 Am. Bankr. R. 499, 94 Fed. 629; In re Parker, Fed. Cas. No. 10,719.

If the referee is correct in his interpretation of the law on these points, all the other questions involved in the various petitions are of no consequence. However, the referee is of the opinion that the filing of the original proof of claim by the petitioner on the 6th day of April, 1915, and the submission of the question of the right of the claimant to priority to the decision of the referee, and the failure of the claimant to file a petition for review of the referee's decision denying priority to his claim, precluded the claimant from again attempting to litigate the same question on the second petition filed on the 10th day of May, 1915, asking for an order on the trustee in bankruptcy to pay the amount of the taxes, the question involved being precisely the same in both cases.

The referee was unable to find any ground for modifying his order upon the original claim as prayed for by the claimant. When a claim is submitted for a certain amount of indebtedness, and priority is claimed for the same, and a hearing is had upon the claim, and an order and decree thereon entered, there would seem to be no reason for permitting the decision on such claim to be split into two parts and litigated as two separate and independent questions.

No authority for such a proposition has been presented to or discovered by the referee.

Herewith are transmitted:

Proof of claim of Augustus O. Bourn for the sum of $1,955.48, filed April 6, 1915.

Objection of trustee to same, filed April 29, 1915.

Order disallowing said claim as to priority, filed May 3, 1915.

Petition for order on trustee to pay taxes, filed May 10, 1915.

Order denying said petition, filed May 26, 1915.

Motion to withdraw claim, filed May 14, 1915, and order thereon, filed May 26, 1915.

Motion to amend order of May 3, 1915, filed May 14, 1915, and order thereon, filed May 26, 1915.

Petition for allowance of rent, filed April 19, 1915, and order thereon, filed April 26, 1915.

Petition for review of order of May 26, 1915, denying petition for order to pay taxes, filed May 28, 1915.

Petition for review of order of May 26, 1915, denying motion to withdraw claim, filed May 28, 1915.

Petition for review of order of May 26, 1915, denying motion to amend order, filed May 28, 1915.

Respectfully submitted,

Nathan W. Littlefield, Referee in Bankruptcy.

Barney & Lee, of Providence, R. I., for claimant.

Edwards & Angell, of Providence, R. I., opposed.

BROWN, District Judge. The opinion of the referee fully and carefully considers the principal question of the petitioner's right to priority under section 64a of the Bankruptcy Act. As I agree with his conclusion and reasoning upon this point, it becomes unnecessary to consider the other points that have been argued.

The order of the referee is approved and affirmed.

The petition for review is dismissed.

THORBURN v. GATES.

(District Court, S. D. New York. July 17, 1915.)

1. MONOPOLIES ⟸28—ANTI-TRUST ACT—CIVIL ACTIONS—SERVICE—VENUE.

The provision in Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), that any person injured in his business or property by any other person or corporation, by reason of anything forbidden or declared unlawful by the act, may sue therefor in any Circuit Court in the district in which defendant resides or is found, merely removes the existing limitations on the venue of actions between diverse citizens, and permits plaintiff to sue defendant wherever he can serve defendant with process good where executed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⟸28.]

2. EXECUTORS AND ADMINISTRATORS ⟸525—FOREIGN EXECUTOR—RIGHT TO SUE.

An executor may not, in the absence of statute authorizing it, be sued outside of the state granting his letters.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344–2349; Dec. Dig. ⟸525.]

3. EXECUTORS AND ADMINISTRATORS ⟸1—NATURE OF PROCEEDINGS—"EXECUTOR."

The subject of administration of estates of decedent is in rem, and an "executor" is only an official charged with the duties of management and distribution, regardless of whether he is vested with title, or whether the obligation to pay debts is personal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1½; Dec. Dig. ⟸1.

For other definitions, see Words and Phrases, First and Second Series, Executor.]

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4. CONSTITUTIONAL LAW ⟸305—DUE PROCESS OF LAW—JURISDICTION OF FEDERAL COURTS.

A state may, as to goods within its own jurisdiction, provide that a foreign executor shall be its own representative, and that process served on him within its borders shall be effective to determine the disposition of such goods; but since the fourteenth amendment a jurisdiction conflicting with the exclusive authority of the state appointing the executor should be disregarded at the outset, at least in a federal court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925–927; Dec. Dig. ⟸305.]

5. CONSTITUTIONAL LAW ⟸48—CONSTRUCTION OF STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY.

Where a statute may be so construed as will render it valid, such construction should be adopted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⟸48.]

6. EXECUTORS AND ADMINISTRATORS ⟸525—ACTIONS AGAINST FOREIGN EXECUTORS—JURISDICTION—STATUTORY PROVISIONS.

Code Civ. Proc. N. Y. § 1836a, providing that a foreign executor may be sued in any court in the state in his capacity of executor under like restrictions as a nonresident may be sued, must be construed as opening the courts of New York to suits against foreign executors in cases where the law of the domiciliary state allows it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344–2349; Dec. Dig. ⟸525.]

7. EXECUTORS AND ADMINISTRATORS ⟸525—ACTIONS AGAINST FOREIGN EXECUTOR—JURISDICTION OF FEDERAL COURT.

In an action at law under Anti-Trust Act, § 7, brought against the executrix of decedents jointly charged with the wrongful acts resulting in damage to plaintiff, service of summons on the executrix, a resident of Texas and appointed by the proper court of Texas, which was the residence and citizenship of the decedents, made while she was sojourning in New York, is not authorized by Code Civ. Proc. N. Y. § 1836a, authorizing a foreign executor to be sued in like manner and under like restrictions as a nonresident may be sued.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2344–2349; Dec. Dig. ⟸525.]

At Law. Action by Robert H. Thorburn against Dellora R. Gates, as executrix. On motion to quash service of summons. Granted.

Motion to quash the service of a summons in an action at law under section 7 of the Sherman Act. The defendant is executrix of two deceased persons, who are charged jointly with the wrongful acts which resulted in damage to the plaintiff. She is a resident of Texas. The two decedents were Texans by residence and citizenship. She was appointed executrix by the proper Texas courts, who had probated the wills and are assuming administration of the two decedent estates. The summons was served in New York while the defendant was actually sojourning there. Section 1836a of the Code of Civil Procedure of New York is as follows:

"An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this

state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section 2704 of the code of civil procedure; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed."

Franklin W. M. Cutcheon and A. L. Humes, both of New York City, for the motion.

John S. Wise, Jr., of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] Section 7 of the Sherman Act, in providing that the defendant may be served where "found," did not intend to extend the scope of the process of this court. It meant to remove the existing limitations upon the venue of actions between diverse citizens and to permit the plaintiff to sue the defendant wherever he could catch him with a process good where it was executed. In this respect it differs from the provisions of the Clayton Act (Act Oct. 15, 1914, c. 321) § 12, 38 Stat. 736, which gives a wider scope to the process itself. The validity of the service of this process, therefore, gains nothing from the fact that the action arises under section 7 of the Sherman Act, but is to be judged quite as though it had been an ordinary civil action before the venue of suits between diverse citizens had been limited to the districts of the parties' residence.

[2] Everybody agrees that without the aid of a statute a foreign executor might not be sued outside of the territory of the sovereign who granted his letters. This was already so well established in 1841 that Mr. Justice Story thought it unnecessary to cite much authority upon the point. Vaughan v. Northrup, 15 Pet. 1, 5, 10 L. Ed. 639; Lewis v. Parrish, 115 Fed. 285, 53 C. C. A. 77. The doctrine implies that the devolution of both rights and obligations, effected by the decedent's appointment and the grant of letters, is not regarded as intended for more than purposes of local administration and distribution. A gift causa mortis, a specific bequest after assent by the executor, an inherited freehold, a devise, each of these gives a title which will be recognized in other jurisdictions, because they are intended to have such an effect where they occur, and other states recognize the legal results within their own borders of what has taken place elsewhere. Such might have been equally well the view taken of the rights or obligations of the executor. As hæres factus of the Roman law, from whom he is descended, he might have had the same status as the heir at law actually obtained, and the title and obligation cast upon him might have been regarded as effecting a substitution to be recognized everywhere. Indeed, the executor has title, and the judgment against him was always regarded as personal (Stacy v. Thrasher, 6 How. 44, 60, 12 L. Ed. 337), even though the executor had the defense of plene administravit, and though his actual liability was upon the theory that he had assets in his hands, or had committed a devastavit. Had it not been for the interposition of the ordinary, it is possible that an execu-

tor might have become an heir somewhat as the heir at law; but since the Ordinary assumed always to grant letters of administration, the whole execution of the office became in some sense a public duty, finally conceived as resting wholly in the hands of the state which first undertook it. The unwillingness of other states to entertain such suits seems to be explicable only upon this interpretation of the grant of letters.

[3, 4] I therefore regard the doctrine as having for its necessary corollary that the whole subject of administration is in rem (Jefferson v. Beall, 117 Ala. 436, 23 South. 44, 67 Am. St. Rep. 177), and that the executor is only an official charged with the duties of management and distribution, regardless of whether he be vested with title or whether the obligation to pay debts be personal. These are perhaps concessions to his historical evolution, which have now ceased to indicate existing notions. Section 1836a of the Code of Civil Procedure of New York must be read in the light of these general ideas regarding the status of executors. No doubt the state of New York, as respects goods situated within its own jurisdiction, might provide that an executor appointed elsewhere should be its own representative, and that process served upon him within its own borders should be effective to determine the disposition of all such goods. Stacy v. Thrasher, supra; McLean v. Meek, 18 How. 16, 15 L. Ed. 277. Yet if it attempted to go further than this, to take any steps towards the disposition of decedent's goods situated elsewhere and under the existing administration of another state, it would violate the common understanding respecting such matters and expose itself to the disregard of its judgments by the state which had appointed the executor and assumed the direction of his official conduct. Moreover, since the fourteenth amendment, the assumption of such a jurisdiction which conflicted with the exclusive authority of another state over a matter within its jurisdiction would itself be disregarded at the outset, at least in a federal court; nor would the executor be left to the assertion of the invalidity of such proceedings, when it was presented for execution or as evidence. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Dewey v. Des Moines, 173 U. S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

[5, 6] Section 1836a may be construed as intended for no more than to open the courts of the state to litigation in those cases where the law of the state appointing the executor authorized a foreign action; but in that case the validity of the process would be wholly dependent upon a condition of the law of Texas, which does not in fact exist. In so far, however, as without the authority of Texas, New York should attempt to adjust the obligations of the executor as such, and to make any final determination of his obligations in the distribution of assets already in process of administration in Texas, its act would necessarily be brutum fulmen in its result, and unconstitutional in its inception. Nor, indeed, is it in this instance possible to construe the section as intended to affect only goods now or hereafter within the jurisdiction of New York, as suggested above, because the language of the act is not apt to express such a distinction, and, in the absence of

some authoritative interpretation by the Court of Appeals of New York to that effect, no such construction should be placed upon it. Since, however, an interpretation may be placed upon the statute which is consonant with its constitutionality, that interpretation should be chosen, and the statute read only as opening the courts of New York to suits against executors in those cases where the law of the domiciliary state allows it.

[7] I have found only one decision upon such a statute, and that is the case of Craig v. Toledo, Ann Arbor & North Michigan R. R. Co., 2 Ohio N. P. 64, which is to the contrary. However, this decision does not pass upon the validity of the act in respect of its extraterritorial effect, but only goes so far as to hold that the state might determine in what cases a foreign executor might be sued, leaving for further determination the extent to which the judgment would be effective. That may well be true in Ohio; yet, as I have said, I hardly think that it can be supposed in the case of the New York Code, which contains full provisions for ancillary administration, that the suit authorized against foreign executors under section 1836a was only intended as an incident to ancillary administration. In any case I do not feel disposed to follow that case, if it is to be interpreted more broadly.

Two objections may be raised to this disposition of the motion: First, it may be suggested that a federal court does assume jurisdiction over the determination of suits against executors, though it will leave to the state courts of probate the actual enforcements of the decrees which result. In answer it must be remembered that a federal court is not the court of an independent state, and that in any event it does not attempt to obtain jurisdiction outside of the state in which the executor is appointed. The Constitution, in giving to federal courts jurisdiction over controversies between diverse citizens by sovereign power, gives an authority pro tanto over domestic administration which does not exist between independent states. It might, indeed, have gone further and made effective its own decrees, assuming the total administration of decedents' estates, except for the fact that this might involve purely domestic matters, and perhaps because it had no machinery.

The second supposed difficulty is practical, and arises from the fact that an absentee executor might remain inaccessible to the control of the state which appointed him. This question, however, goes only to the power of the state, which has assumed administration of the decedent's assets, to secure an efficient administration, and cannot be the excuse for the assumption by another state of those functions. I do not forget those cases where the executor, having assets in his possession, has repudiated the authority of his own state and taken them out of its power. Bergmann v. Lord, 194 N. Y. 70, 77, 86 N. E. 828; Lewis v. Parrish, 115 Fed. 285, 53 C. C. A. 77. Those cases are to be interpreted upon the theory that the executor, having abandoned his obligations and being disposed to assume mere personal dominion over the assets, is lost to the state which originally assumed jurisdiction, and ceases to be effectively subject to any law. He becomes, as

it were, an outlaw, who may be brought to account and compelled to do justice personally wherever he may be found.

I have assumed throughout that section 1836a of the Code of Civil Procedure may give jurisdiction to a federal court. This question need not be decided, because, even assuming it to be determined in the plaintiff's favor, it will not serve to protect the process here in question.

Motion to quash is granted.

In re H. B. HOLLINS & CO.

Ex parte NATIONAL BANK FÜR DEUTSCHLAND

(District Court, S. D. New York. April 14, 1915.)

1. SUBROGATION ⟸7—RIGHTS OF SURETY AGAINST PRINCIPAL.

Where the principal debtor gives collaterals to the creditor on the understanding that they shall be used to the extent of any deficiency of the collaterals of the surety, the surety, though making full payment through the creditor's seizure of his collaterals, may not have recourse to the principal's collaterals.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21–29, 58, 77, 83, 92; Dec. Dig. ⟸7.]

2. EXCHANGES ⟸7—PROPERTY IN SEAT—REGULATIONS.

A seat in a Stock Exchange, under the constitution of which all members have recourse to its sale value according to the decisions of the committee on admissions, is a pledge to such members as may be creditors, the terms of which are found in the decision of the committee, and it may insist that members shall exhaust their recourse to all collaterals actually available before any claim on the proceeds of the seat will be allowed.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

3. MARSHALING ASSETS AND SECURITIES ⟸3—GROUNDS—NATURE OF CLAIMS.

A member of a Stock Exchange, under the constitution of which all members had recourse to the sale value of a seat therein according to decisions of the committee on admissions, was a creditor of a bankrupt member of the exchange, and had as collateral corporate stock which the bankrupt had purchased for another creditor not a member of the exchange. The creditor member sold the stock as collateral for a sum in excess of the debt due. *Held*, that the creditor member did not have two funds, the collaterals and the seat, to which it had indifferent recourse, and the nonmember creditor as to the corporate stock could only recover the proceeds on the sale of the collaterals which exceeded the amount due the creditor member.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. §§ 2, 3; Dec. Dig. ⟸3.]

4. BANKRUPTCY ⟸474—MARSHALING ASSETS—PROCEEDINGS—COSTS.

A proceeding by a creditor of a bankrupt to recover the surplus on a sale of corporate stock held as collateral by another creditor of the bankrupt, and sold for the payment of his claim, and to recover the proceeds of a sale of the bankrupt's Stock Exchange seat, on the theory that it has been subrogated to the claim of the latter creditor thereto, is not a part of the distribution of the bankrupt's estate between creditors, and on the bankrupt assenting to the claim of the petitioning creditor, the petitioning creditor is chargeable with costs, but otherwise no costs will be taxed, and the petitioning creditor is also liable for disbursements

occasioned by the contest over the proceeds of the seat, and the bankrupt is liable for so much as were occasioned by the contest over the surplus.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⊂=474.]

In Bankruptcy. In the matter of Harry B. Hollins & Co., bankrupts. Petition by the National Bank für Deutschland, to impress lien on proceeds of a stock exchange seat. Report of special master, determining the rights of the bank and Nicholas & Co., a creditor of the bankrupt, confirmed.

H. B. Hollins & Co. were bankers and brokers in the city of New York. They were members of the New York Stock Exchange through the ownership of a Stock Exchange seat held in the name of Busch, one of their firm, as board member. H. B. Hollins & Co. subscribed to all the articles of the constitution of the New York Stock Exchange, and held their seat subject thereto and incumbered with numerous conditions when purchased.

A petition in bankruptcy was filed against H. B. Hollins & Co. (and the partners individually) on November 13, 1913. There was no adjudication, a composition having been confirmed without prejudice to pending reclamation proceedings. The Stock Exchange seat in question was sold, and the net proceeds, amounting to $37,616.95, were paid over to the receiver, who holds the same subject to the determination of this court.

The facts are briefly as follows: Prior to the filing of the petition in bankruptcy herein, the National Bank für Deutschland did business with H. B. Hollins & Co. It had two accounts, one account which was conducted here, and the other account which was conducted in Germany. The transactions which are the subject of this proceeding were had in connection with the New York account. The foreign account is only important in this proceeding by reason of the fact that at the time of the filing of the petition in bankruptcy it showed a credit in favor of the National Bank für Deutschland in the sum of $26,490.96, which is applicable against the debit balance in the New York account, as hereinafter shown. On the 7th day of November, 1913, H. B. Hollins & Co. purchased for the National Bank für Deutschland 300 shares of Canadian Pacific stock, and thereafter, for and on account of said purchase, received the following certificates of said Canadian Pacific stock: Certificates Nos. T–133868, T–134315, T–134297, and T–133860, each for 5 shares; Nos. 387693, 388059, 387962, 389404, and 387840, each for 10 shares; Nos. 4983, 4739, and 4505, each for 25 shares; No. 175780, for 54 shares; No. 57647, for 100 shares; and No. 35082 for 1 share. Thereafter and on the 10th day of November, 1913, H. B. Hollins & Co. delivered 250 shares of Canadian Pacific stock, together with other shares of stock, to H. I. Nicholas & Co., a Stock Exchange firm, as security for a loan of $77,360.94 (including interest and other charges) made by said H. I. Nicholas & Co. to said H. B. Hollins & Co. The numbers of the certificates of the said Canadian Pacific stock so delivered are as follows: Certificates Nos. 388059 and 387962, each for 10 shares; Nos. 4983, 4739, and 4505, each for 25 shares; No. 175780 for 54 shares; No. 57647 for 100 shares; No. 35082 for 1 share. These are identified as the property of the claimant. At the time of the filing of the petition in bankruptcy the said H. I. Nicholas & Co. held 350 shares of Canadian Pacific stock, as security for said loan. The additional 100 shares were carried by Hollins & Co. for another customer's account. At the time of the filing of the petition in bankruptcy herein, H. I. Nicholas & Co. as members of the New York Stock Exchange, could have filed a claim with the Committee on Admissions against the seat standing in the name of Britton H. Busch, a member of the firm of H. B. Hollins & Co., arising out of the loan of $77,360.94 theretofore made by said Nicholas & Co. to said H. B. Hollins & Co. as aforesaid. H. I. Nicholas & Co. did not file a claim against the Stock Exchange seat of H. B. Hollins & Co., but sold the securities pledged with them as collateral, including 250 shares of Canadian Pacific stock claimed by the National Bank für Deutsch-

land, thus liquidating their loan in full. The amount realized on said securities was $78,271.13, the amount due on the loan, with interest, at said time, being $77,448.76. Nicholas & Co. thereupon turned over the balance in their hands, to wit, the sum of $822.37, to the receiver herein.

Edwin D. Hays, of New York City, for petitioner.

William C. Armstrong, of New York City, for alleged bankrupts.

LEARNED HAND, District Judge. In subrogation the surety who has paid the debt has only the same rights against the principal, as the creditor himself would have had. If the principal had given collaterals to the creditor, clearly those must be deemed to be specifically so devoted, and the surety may treat them as collaterals in his favor just as the principal might have done. If, on the contrary, the only collaterals are those of the surety himself, then although the creditor has applied these on the debt, the surety must take his place along with the other creditors of the principal, just as the creditor himself would have had to do without the surety's collaterals.

[1] All these statements are obvious and too elementary to need citation. The question at bar is a little different, because here the principal is in the position of one who has given collaterals to the creditor, but upon the understanding that they shall be used to the extent of any deficiency of the surety's collaterals. The result of this arrangement is that the creditor has by hypothesis no recourse whatever to the principal's collaterals until after the surety's have been exhausted. In consequence, if the surety upon making full payment through the creditor's seizure of his own collaterals attempts by right of subrogation in turn to seize the principal's collaterals, he is met at once by the difficulty that it was a condition precedent to the creditor's right of recourse to the principal's collaterals that the surety's collaterals should prove deficient, and that this necessarily precludes the surety from ever standing in the creditor's rights, which he may do only after he has paid the full debt. In other words, the principal has secured the creditor's debt only to the extent of the surety's deficiency, and obviously the surety, who must pay the debt to obtain the right of subrogation, by the very act of payment prevents the occurrence of the condition upon which alone the creditor could have had recourse to the security.

[2] The only questionable thing about this in the case at bar is the assumed analogy between a seat in the Stock Exchange and the pledge of the principal's collaterals against any deficiency in the surety's collaterals. Strictly speaking, the seat is not pledged at all; it becomes a collateral only in the sense that by the constitution of the Stock Exchange all members have recourse to its sale value according to the decisions of the committee on admissions. This is nevertheless in every sense a pledge of the seat to such members as may be creditors, the terms of the pledge to be found only in the decision of the committee so far as they may be legal. What rights have members under the constitution of the Stock Exchange against these proceeds? Their rights, like the owner's pledge to them, are measured by the rules of the Exchange and the decision of the committee. Now it is quite plain that the committee has power, if it will, to insist that the members

exhaust their recourse to all collaterals actually available before the committee must itself recognize any claim upon the proceeds. There is nothing arbitrary or unjust in this, nothing which a court would try to control. It is true that the result may be to turn over to the member or his estate a residue which will be divided among general creditors, but there is no inequity in that, because if the seat be not pledged against the whole debts of members, regardless of their other security, they have no superior equity to general creditors, whose losses are as real as theirs. To succeed, the surety must beg the question by assuming that the seat is pledged generally to all members.

Now it may be that the committee would recognize the rights of members before they had exhausted their collaterals, but, if so, it would be nothing to the point. We are concerned only with the rights of members, and if they could not have compelled the committee to pay them regardless of their other security, no merely voluntary concessions of the committee will avail them. Certainly no one can say that they could have compelled the committee to pay them dividends to the loss of unsecured members, as would have happened in the case at bar.

[3] Therefore, I agree with the learned special master that there were not two funds to which Nicholas & Co. had recourse, and that the rule does not apply which the petitioner invokes.

As to the balance of the sale price of the securities I can see no reason why the petitioner should not have it, and an order will be entered awarding that proportion of the balance, $822.37, which the value of the petitioner's securities as sold bore to the total value of all customer's securities sold by Nicholas & Co.

[4] Respecting costs, I have always regarded these proceedings as inter partes, and not in any sense a part of the distribution of the estate between creditors. Had the alleged bankrupts assented to the petitioner's claim to the balance, I should have charged it with costs. As it is, I shall award no costs. As to disbursements, the petitioner will pay so much as were occasioned by the contest over the proceeds of the Stock Exchange seat, the alleged bankrupts so much as were occasioned by the contest over the balance. The latter is probably too trivial for the trouble of ascertainment; if so, the petitioner will pay all disbursements.

Report confirmed.

J. H. DAY CO. v. MOUNTAIN CITY MILL CO. et al.

(District Court, E. D. Tennessee, S. D. July 23, 1915.)

No. 10.

1. COURTS ⟸351—EQUITY RULES—DISCOVERY—MATTERS OF INQUIRY—"ADVERSARY."

Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), providing that plaintiff, within 21 days after filing the bill, and defendant, within 21 days after joinder of issue, and either party thereafter by leave of court, may file interrogatories for discovery by the opposite party of facts and documents material to the support or defense of the cause, and that the court may make all orders appropriate to enforce answers or to effect the inspection or production of documents in the possession of either party, and containing evidence material to the cause of action or defense of his "adversary," that is, the interrogating party, merely changes the procedure in reference to obtaining discovery, and extends the right to defendant, as well as plaintiff, but does not extend the right to either beyond the matters relating to his own ground of action or defense, though if they do relate thereto, he is not deprived of right of discovery thereof because they also pertain to the case of the other party.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⟸351.]

2. COURTS ⟸351—EQUITY RULES—DISCOVERY—MATTERS OF INQUIRY—MATERIAL FACTS.

Under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), providing for discovery "of facts and documents material to the support or defense of the cause," it must be limited to an inquiry as to material facts, and does not extend to a disclosure of evidence, or of facts which merely tend to prove the material facts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⟸351.]

In Equity. Bill by the J. H. Day Company against the Mountain City Mill Company and others, for alleged infringement of patent. Written interrogatories filed by defendants after answer, for discovery by plaintiff. On objections thereto filed by plaintiff. Objections sustained.

James L. Hopkins, of St. Louis, Mo., and Cooke, Swaney & Hope, of Chattanooga, Tenn., for plaintiff.

Watkins & Watkins, of Chattanooga, Tenn., and Emery, Booth, Janney & Varney, of Boston, Mass., for defendants.

SANFORD, District Judge. The 58th Equity Rule, promulgated by the Supreme Court in 1912 (198 Fed. xxxiv, 115 C. C. A. xxxiv) provides that:

"The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause. * * * The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary."

[1] Prior to the adoption of this rule it was well settled that a complainant was entitled to a discovery of such facts and documents only as would aid in the maintenance of his own title or cause of action, and not to matters that related exclusively to the defendant's title or ground of defense; and that interrogatories which went beyond this and sought a disclosure of the defendant's title or claim, having no relation to the complainant's title or cause of action, were inquisitorial and unwarranted. Kelley v. Boettcher (8th Circ.) 85 Fed. 55, 60, 29 C. C. A. 14; McClaskey v. Barr (C. C.) 40 Fed. 559, and authorities therein cited; 2 Street's Fed. Eq. Pract. s. 1872, p. 1126. This rule did not, however, defeat the complainant's right to discovery in the case where the matter in question happened to pertain both to the complainant's title or cause of action and to the defendant's title or ground of defense. 2 Street's Fed. Eq. Pract. supra.

After careful consideration I think it clear that the 58th Equity Rule was intended merely to change the procedure in reference to obtaining discovery and to extend this right to a defendant as well as to a plaintiff, and was not intended to change the long established rule in reference to the subject matter of such discovery or to extend such right in favor of either party beyond the matters relating to his own ground of action or defense, respectively, and enable him to obtain discovery in reference to matters relating solely to the ground of action or defense of the other party. In other words, under this rule the plaintiff's right of discovery extends only to facts resting in the knowledge of the defendant or documents in his possession material to the support of the plaintiff's case; and the defendant's correlative right of discovery, only to facts and matters material to his defense; and neither is entitled to discovery of an inquisitorial character as to the ground of action or defense of the other; although, as theretofore, the right to such discovery as to matters material to the cause of action or defense of the interrogating party will not be defeated by the fact that such matters also involve the ground of defense or action of the interrogated party. This construction of the rule is, I think, emphasized by the fact that the plaintiff is given the right to file interrogatories at any time after his bill is filed, although the answer may not have yet been filed, and at a time when the interrogatories can relate only to his own cause of action; while, on the other hand, the defendant is given no right to file interrogatories until after his answer has been filed, thus indicating that the discovery to which he is entitled is to relate to the ground of defense set forth in the answer, and not to the plaintiff's cause of action, as to which the interrogatories might have been filed before the answer, if such right had been contemplated by the rule. Furthermore the concluding phrase in the language of the rule as above quoted, providing that the court or judge may make such orders as may be appropriate to enforce answers to interrogatories or the production of documents "in the possession of either party and containing evidence material to the cause of action or defense of his adversary," clearly shows, from its grammatical construction, that the matters as to which a discovery may be obtained must be material to the cause of action or defense of the interrogating party, the "adversary" clearly referred to in the rule.

This construction of the rule furthermore finds strong support, by analogy, in the fact that under state statutes authorizing the examination of parties before trial at the instance of the adverse party, operating as a substitute for discovery in equity, such examination will not be permitted to enable the examining party—

"to ascertain the evidence on which the opposite party bases his cause of action or defense, or to ascertain the names of his witnesses, or for the purpose of aiding the party in the preparation of his case for trial." 14 Cyc. 342; and cases cited in notes 37, 38 and 39.

So under statutes providing for the production of books or papers of the adverse party, production will not be permitted to enable a party—

"to ascertain the evidence on which his opponent's action or claim rests, unless the claim is made that they are forgeries and the inspection is sought to enable the party to prove that fact." 14 Cyc. 371, and cases cited in notes 59 and 60. "But where the books or documents are material to the case of the applicant, it is no objection to their production or inspection that they relate also to the case of his adversary." 14 Cyc. 371, and cases cited in note 6.

This construction of the rule is not, as I view it, in conflict with the decisions in Luten v. Camp (D. C.) 221 Fed. 424, and Blast Furnace Co. v. Worth Bros. Co. (D. C.) 221 Fed. 430, in which the discovery allowed related directly to facts and documents within the knowledge or possession of the interrogated party, which were material to the ground of action or defense of the interrogating party. And taking this view of the rule I cannot agree in the correctness of the doctrine which may apparently be implied from the opinions in Bronk v. Scott Co. (7th Circ.) 211 Fed. 338, 128 C. C. A. 17, and P. M. Co. v. Anchor Co. (D. C.) 216 Fed. 634, to the effect that under this rule either party may require discovery as to the nature of his adversary's case, the claims which he makes in regard thereto and the facts supporting it. These cases apparently proceed, in part at least, upon the implied theory that the object of the rule is to enable either party to obtain a more definite statement of the other's case and greater particularity as to the claims upon which he intends to rely; whereas I am constrained to conclude from the language of the rule itself that it was not intended to serve as a provision for requiring further particulars, which is covered by the 20th Equity Rule, but to accomplish the very different purpose of enabling either party to obtain discovery of facts and documents material to his own case which are within the knowledge or in the possession of the adverse party.

[2] It is furthermore clear that to the extent that discovery may be granted as to material matters of fact, it must be limited to an inquiry as to the material facts, and does not extend to a disclosure of evidence or of facts which merely tend to prove the material facts. P. M. Co. v. Anchor Co., supra (D. C.) 216 Fed. at page 636; Luten v. Camp, supra (D. C.) 221 Fed. at page 428.

[3] Testing the interrogatories filed by the defendants by the principles above given, I find none which relate to matters material to their defense, as distinguished either from an inquiry into merely evidential or collateral matters, or an inquiry into the plaintiff's case laying the

basis for an investigation by the defendants in advance of the trial, or which otherwise relate to any material issue in the case.

An order will accordingly be entered sustaining all the plaintiff's objections to interrogatories or parts of interrogatories filed by the defendant.

KEENEY v. DOMINION COAL CO.

(District Court, S. D. Ohio, W. D. January 26, 1915.)

No. 6791.

1. TAXATION ⟸124½—FRANCHISE TAX—LIABILITY OF RECEIVER—STATUTES.
Under Page & A. Gen. Code Ohio, §§ 5495–5521, imposing an annual franchise tax on corporations, and requiring a report of the kind of business in which a corporation is engaged and its place of business, and imposing a penalty for neglect to make such reports, and by section 5506 thereof, providing that the taxes and penalties should be a first lien on all property of the corporation, whether employed in its business or in the hands of a receiver for the benefit of creditors, the receiver of an insolvent corporation is not required to make a report or to do any of the things which the statute requires a corporation "doing business" to do, nor is the tax imposed on him, since the taxes and penalties are payable only by a corporation "doing business."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 224–226, 240–242, 260–263, 272; Dec. Dig. ⟸124½.]

2. CORPORATIONS ⟸560—RECEIVERSHIP—DUTIES AND LIABILITIES.
The assets of an insolvent corporation in the hands of its receiver do not belong to it, but to its creditors, and are in the hands of the court for distribution to creditors, and are impressed with a trust in the hands of the receiver, to be administered by a court of equity for the benefit of creditors who are, in equity, its owners.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253–2260, 2262; Dec. Dig. ⟸560.]

3. CONSTITUTIONAL LAW ⟸283—TAXATION ⟸113—DUE PROCESS OF LAW—CORPORATION FRANCHISE TAX—LIABILITY OF RECEIVER.
Under Page & A. Gen. Code Ohio, §§ 5495–5521, imposing an annual franchise tax on corporations, such tax is not collectible against the assets of an insolvent corporation in the hands of its receiver in trust for the payment of creditors, since that would take from the creditors what belongs to them, in violation of due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 891, 892, 904–906; Dec. Dig. ⟸283; Taxation, Cent. Dig. § 207; Dec. Dig. ⟸113.]

4. TAXATION ⟸113—FRANCHISE TAX—CONSTITUTIONAL PROVISIONS.
Under Page & A. Gen. Code Ohio, §§ 5495–5521, imposing an annual franchise tax on corporations, such tax is not collectible against the receiver of an insolvent corporation holding its assets for the benefit of creditors, when its franchise to be a corporation and to conduct its authorized business as such are of no value to the receiver or to creditors, since its collection would violate Bill of Rights, § 19, declaring that private property shall be held inviolate, but subservient to the public welfare, as being confiscatory and oppressive.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 207; Dec. Dig. ⟸113.]

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5. TAXATION ⊂=124½—FRANCHISE TAX—ENFORCEMENT—ESTOPPEL.
Under Page & A. Gen. Code Ohio, §§ 5495–5521, imposing an annual franchise tax on corporations, section 5509 of which provides that a corporation's failure to make a return as to its business or to pay such tax for 90 days after the time allowed therefor shall be certified to the Secretary of State, who shall thereupon cancel its articles of incorporation and notify the corporation of his action, the failure of the Secretary of State to cancel the articles of incorporation of a corporation in default so as to prevent the corporation from ceasing to exist as such estopped the state from proceeding to require the receiver of such corporation, during its insolvency, to pay the tax accumulated during his possession.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 224–226, 240–242, 260–263, 272; Dec. Dig. ⊂=124½.]

Bill by George H. Keeney against the Dominion Coal Company, a corporation under the laws of Ohio, insolvent, in which a receiver was appointed, and in which the State of Ohio intervened to charge the fund in the hands of the receiver with a franchise tax. Intervener's claim denied.

John A. Deasy, of Cincinnati, Ohio, for State of Ohio.
Aaron A. Ferris, of Cincinnati, Ohio, for receiver.

HOLLISTER, District Judge. This action is in equity for the appointment of a receiver and other relief. The bill was filed November 8, 1911, and a receiver was appointed the same day. The corporation was insolvent. The assets applicable to the payment of the claims of general creditors are, even with the addition of the sums collected by the receiver on unpaid subscriptions to capital stock, sufficient to pay only a small percentage of the debts.

By intervention, the state of Ohio seeks to charge the fund in the hands of the receiver arising from the conversion of the assets of the corporation into money, with the excise or franchise tax imposed by an act of the Legislature of Ohio, known as the "Willis Law," originally entitled, "An act to require corporations to file annual reports with the Secretary of State and to pay annual fees therefor," and now found under sections 5495 to 5521 of the General Code of Ohio. The assets of the corporation are still in process of administration by this court.

It is admitted by the receiver that the tax for 1911 was payable by the corporation before his appointment, and that the state is entitled to recover the tax for that year, although not in the amount of the state's claim that the statutory percentage of three-twentieths of one per cent. applies to the authorized capital stock; the receiver's contention being that the percentage should be figured on only the amount of the capital stock paid in.

The substantial controversy arises upon the denial of the receiver of the right of the state to impose the tax for the years 1912 and 1913 and indefinitely thereafter, upon him as receiver, or upon the insolvent corporation's assets in his hands for distribution to creditors.

It would serve no useful purpose to set out at length the several sections of the act, but, generally, it may be said to impose a franchise tax and, as a basis for its imposition, the duty upon corporations for profit to report to the tax commission of Ohio a sworn statement by

a designated officer of the corporation, containing certain information, including (section 5497, par. 7) "The nature and kind of business in which the corporation is engaged and its place or places of business." If the corporation fails or neglects to make the required report, a penalty of $10 for each day's omission is inflicted upon it.

In my judgment the claim of the state is untenable on several grounds:

[1] 1. The tax is not imposed on a receiver, nor is any duty required of him to make reports or do any of the things which in turn the statute requires the corporation "doing business" to do. The only reference to a receiver is found in section 5506, which provides:

"The fees, taxes and penalties, required to be paid by this act, shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof."

Experience shows that when a corporation is hopelessly insolvent, as is this corporation, and goes into the hands of a receiver, its business ceases, and, practically at least, the active duties of the corporation itself, and of the officers through which it acts, come to an end. All that is left is a name and a naked right to be a corporation for the purpose of engaging in the business its charter authorizes it to do. As a corporation, it may be said to be in existence, since none of the steps authorized by the laws of Ohio to dissolve it or wind it up have been taken, and it has not been declared a bankrupt under the bankruptcy act; but its assets and its business are no longer of any value to it. Its right to be a corporation to do an authorized business is no longer worth anything to it, its stockholders, or its creditors. Its assets are in the custody of a court of equity to be distributed to its creditors.

The state cannot compel the receiver to make reports. The penalties for failure to make them are not inflicted upon him. If the corporation must continue to make reports and, on failure, be subjected to penalty, then, if the receiver must pay this tax, he must also pay the penalty; but a penalty of this character could surely not be collected from a receiver if it were not imposed.

These considerations suggest another reason why the state cannot maintain its claim:

2. The Legislature of Ohio did not intend the receiver to pay the "fees, taxes, and penalties," because section 5506 refers to fees, taxes, and penalties required to be paid only by the corporation doing business, and the purpose of this section is to fix a lien for the payment of the tax by the corporation required to pay it, upon the property employed in the prosecution of its business or in the hands of a receiver, if the property has gone into the custody of a court of equity through its receiver. Hence it is that the receiver in this case recognizes the lien of the state upon the assets in his hands for the tax of 1911, imposed upon the corporation when it was doing business. Section 5506 must be construed with the other sections in order to ascertain the purpose of the act, which requires the payment of a tax by the corporation for the privilege of doing business as a corporation. The construction con-

tended for by the state results in the absurdity of imposing a tax when the reasons for the tax and its only justification no longer exist. On the other hand, the reconcilement of section 5506 with the other sections, which the court is bound to effect if possible, brings about a result not only quite reasonable and just, but also in consonance with the clear intention of the Legislature to impose a tax upon the right granted by the state to be a corporation and to continue to do business as such.

[2] 3. The Constitution of the United States forbids the collection of this tax under the circumstances of this case. The assets in the receiver's hands do not belong to the corporation. They belong to the creditors. Its assets are in the hands of the court for distribution to creditors as their respective interests may appear. The assets have become impressed, even by a narrow application of the so-called "trust-fund" doctrine, with a trust in the hands of a receiver to be administered by a court of equity for the benefit of the creditors who are, in equity, its owners. It will be sufficient to refer to the language of Mr. Justice Bradley in Graham v. Railroad Co., 102 U. S. 148, 161, 26 L. Ed. 106, that:

"When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust-fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust-funds, which, in other circumstances, are as much the absolute property of the corporation, as any man's property is his."

Referring to this case, Mr. Justice Brewer says, in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 383, 14 Sup. Ct. 127, 129, 37 L. Ed. 1113:

"All that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself."

[3] If then these assets belong to the creditors of the corporation and the tax is imposed on the corporation itself, it is clear enough that its collection would take from the creditors that which belongs to them. This is not "due process of law." It may be sufficient to refer to what is said on this subject by Mr. Justice Brown in Holden v. Hardy, 169 U. S. 366, 390, 18 Sup. Ct. 383, 387, 42 L. Ed. 780:

"Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation; * * *"

See, also, Mr. Justice Field's definition in Hagar v. Reclamation District, 111 U. S. 701, 708, 4 Sup. Ct. 663, 28 L. Ed. 569.

[4] 4. The act as sought to be applied to the facts in this case is contrary to the Constitution of the state of Ohio. The Supreme Court of Ohio, in construing section 19 of the Bill of Rights with section 1 of article 2 of the Constitution, sections 1, 2, and 3 of article 12, and section 4 of article 13, shows that the power of taxation of privileges and franchises is limited "to the reasonable value of the privilege or fran-

chise conferred originally, or to its continued value from year to year." Southern Gum Co. v. Laylin, 66 Ohio St. 578, 593, 594, 64 N. E. 564, 566. In the opinion in that case, Judge Burket says:

"These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the General Assembly, but finally in the courts."

The situation would be different if the imposition of the tax merely resulted in a hardship to a financially weak corporation carrying on its business. Such a situation might not call for the intervention of a court, if the Legislature, having the power to impose such tax, did not exclude from its operation such corporations. In such case the appeal should be to the Legislature. And so the Supreme Court of the United States, in Ohio Tax Cases, 232 U. S. 576, 589, 34 Sup. Ct. 372, 375, 58 L. Ed. 737, discussing Southern Gum Co. v. Laylin, say, with respect to the decision in that case:

"* * * It was not intended to hold that the courts as final arbiters might overthrow a law imposing a tax on privileges and franchises merely because in isolated cases such law might impose a hardship, but only that those excise laws whose general operation is confiscatory and oppressive are unconstitutional."

Inasmuch as the franchise of the Dominion Coal Company to be a corporation and to conduct its authorized business as such is of no value to the receiver and to the creditors whose property he holds and whom he represents, the language of the Supreme Court of Ohio in Southern Gum Co. v. Laylin, and of the Supreme Court of the United States in construing the decision in that case, directly apply; for the imposition of this tax upon this receiver takes property without giving anything in return, the receiver and creditors not being interested in the franchise. The franchise tax on such a receiver as this is, in its operation, confiscatory and oppressive, and hence unconstitutional.

[5] 5. The state itself, through its officers, is to blame for the accumulation of this tax while the receiver is in possession. It is claimed by the state that until the corporation is dissolved, wound up, or brought to an end through proceedings authorized by the laws of Ohio, this tax may be imposed annually upon property in the hands of a receiver and collected from him even though all the assets in his hands might, in the course of time, be appropriated to the discharge of the tax against the corporation. This is, to me, a strange claim in the light of that part of the Willis law found in section 5509. That section provides that:

If the corporation "fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the commission shall certify such fact to the secretary of state. The secretary of state shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this state, by appropriate entry upon the margin of the record thereof. * * * Thereupon all the powers, privileges and franchises conferred upon such corporations, by such articles of incorporation or by such certificate of authority, shall cease and de-

termine. The secretary of state shall immediately notify such domestic or foreign corporation of the action taken by him."

When this corporation was in default for 90 days in the payment of the tax for 1911, it was the mandatory duty of the Secretary of State to cancel the articles of incorporation and to notify the corporation. Thereupon all of its franchises would come to an end and the tax could no longer be imposed. The state of Ohio seeks to collect a tax which, if the Secretary of State had done his duty, would not, and could not, have been imposed. Of course, the officers of an insolvent corporation such as this would not be likely to institute proceedings to wind up the corporation under appropriate laws to that end, nor have the creditors and receiver any way of compelling them to do so, or of themselves putting an end to the corporation.

The result is that the Secretary of State in withholding his cancellation can, and in this case did, prevent the corporation from ceasing to exist. This neglect of duty by a representative of the state permits the state, through another representative, to claim that the corporation is still in existence and its receiver liable annually to the tax, even though by its imposition and collection all of the assets might eventually be appropriated by the state, in which event, of course, the creditors would get nothing. There is surely something wrong about this. Whether or not, under principles of estoppel as that subject is dealt with in equity jurisprudence, the state ought not be permitted to recover, may be a doubtful question. But under the principle (of frequent application both in courts of law and in equity) that no one shall be permitted to take advantage of his own wrong, and under that other principle requiring of him who seeks equity right conduct relating to the subject-matter, it seems clear that the state is not in a position to require the receiver to pay this tax.

An appropriate order may be taken.

C. F. HARMS CO. v. UPPER HUDSON STONE CO. et al.

(District Court, E. D. New York. July 1, 1915.)

1. SHIPPING ⟸58—ISSUES UNDER PLEADINGS—PARTY IMPLEADED.

In a suit by the owner of a vessel against a charterer to recover damages for injury to the vessel as for a tort, not counting on a breach of the charter party, where respondent brings in under rule 59 a third party, who is found to have been solely in fault, libelant may recover only against such third party.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. ⟸58.]

2. WHARVES ⟸20—INJURY TO VESSEL—LIABILITY OF WHARFINGER.

A wharf owner *held* liable for injury to a heavily loaded barge which by his direction was placed in an unsuitable berth where at low tide she rested on the bottom. The tug which left the barge there *held* not in fault, as the condition of the berth was not apparent.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 35–43; Dec. Dig. ⟸20.]

In Admiralty. Suit by the C. F. Harms Company, owner of scow Castor, against Upper Hudson Stone Company, charterer, Henry Crew and others, owners of the steam tug H. B. Moore, Jr., and John J. Guinan, impleaded. Decree against respondent Guinan alone.

James J. Macklin, of New York City, for libelant.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for Henry Crew and others.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for charterer.

Louis J. Somerville, of Brooklyn, for John J. Guinan.

CHATFIELD, District Judge. At the close of the trial on April 21, 1915, the following findings and statement of facts were made, subject to further consideration of testimony and argument upon the law:

I make these findings subject to argument, if you seriously combat them. The boat came in on a flood tide, when there was apparently water enough to take her to the dock, and to lay her alongside of the bulkhead without the presence of anything which would be indicated by appearances or by soundings with the pike pole as to the possible dangers of the berth itself. There was nothing which would indicate to the captain of the tug that the berth was dangerous, and his responsibility depends upon the way in which he ascertained where he was offered a berth and whether the berth was a suitable one for the particular craft.

Under those circumstances the tug, which had been chartered to take the boat from Fifty-Sixth street to Guinan's Wharf, brought the barge alongside and left her at a point within the area covered by the soundings of Mr. Winters and shown on Exhibit 1. The boat was close to the wharf, and the testimony shows that at low tide a strip of the bottom, some 2 feet in width, would actually appear out of water along the entire front of the wharf where the boat was lying.

It appears that the boat had not been leaking, and that there was nothing about her which, on superficial or ordinary examination in service, would indicate unseaworthiness or weakness. She did not contain any water when moored alongside the wharf, and the captain apparently properly ran his lines, and, upon receiving notice to breast the boat off, did as he understood in that respect. Edney testifies that he told him to breast off 10 or 15 feet. The captain testifies that he was told to breast off about 9 feet at the stern, but that he did breast off along the entire length of the vessel. And the outgoing tide would indicate that the boat was away from the wharf, when we consider what subsequently happened.

It is apparent from the testimony that somebody told the captain to fall in behind the 74, which was in a safe berth opposite the derrick, and that the captain of the tug did not put her alongside of 74, where there would have been a second safe berth. As the tide began to fall it is impossible to consider what would have happened if the boat had remained close to the dock; but the chart in the case shows that opposite the point marked 40 feet west and at a distance of 10 feet from the dock the mud is 4 feet from the estimated low-water mark of Mr. Winters. The hard bottom is 6 feet below his estimated low-water mark. At a distance of 20 feet from the dock, and opposite the 40-foot point, the mud is 8 feet from his estimated low-water mark, and the hard bottom 9 feet 5 inches. These depths would indicate a high point, which was apparently, according to the testimony of all the witnesses, under the after starboard corner of the Castor. If the tug's testimony as to the amount of the fall of the tide is correct, the hard bottom would be but 2 or 3 feet under low-water mark.

The captain's testimony is that the boat touched at just about that point, and that, in his endeavor to do what was proper, he attached a line to the boat 74 which was directly ahead, and tried to haul his boat off, but only succeeded in swinging the bow of his boat out to a point even with the outer side of 74. That left him in a position where his bow was (on the lowest figure) in 12 feet or so of water at low water and his starboard stern corner was hung on a point 8 or 9 feet higher.

All the rest of the testimony would indicate that the boat remained in that position and settled upon the bottom, and that the twist or injuries resulted from her attempting to lie in such a position with a cargo of stone on board. If she had not been breasted off at all, the actual change in depth would have been less than it was under this situation; but the captain was unable to locate this high point under his boat by any soundings which he could take, and the injuries to the boat could only be prevented by having put her in a different berth in the first place, or else having breasted her off to such an extent that she would not rest upon bottom at all; and that duty does not seem to have been a part of the obligation resting upon Mr. Anderson at the time.

The after circumstances, as to how far out the boat may have listed or settled, how long she stayed there, what happened to the cargo, are matters that have nothing to do with the cause of the accident, and the responsibility, therefore, comes down to a determination as to who took the risk of leaving the boat in that berth under the circumstances; and the only questions of fact that would seem to be in dispute are the exact conversations and transactions at the time of the landing of the boat, and whether or not Edney told the captain of the tug to put the boat here.

While it would appear that Mr. Shaw's arrangement with Mr. Guinan had to do with stone for the subway, and that this cargo for Palladino Bros. was under a separate contract between Mr. Shaw and Palladino, by which Mr. Shaw expected that Palladino would arrange with Mr. Guinan to pay the wharfage, nevertheless Mr. Shaw ordered the boat to be taken there under the same arrangement as far as he and Mr. Guinan were concerned, with reference to obtaining a berth—under exactly the same circumstances with reference to delivering the cargo f. o. b. at the face of this dock, as if Palladino and Guinan had made their arrangements. Therefore, so far as Mr. Shaw and Mr. Guinan are concerned, and the owner of the boat and the tugboat, it seems to me that the determination of the questions of fact and the determination as to responsibility will probably exclude Palladino Bros. from the case.

So that we have the same issue, even though they are not here and have not answered anything, for their responsibility would almost dwindle down to payment of the wharfage charges, if Mr. Shaw and Mr. Guinan raise any question about that. Now, with that situation, I will listen to argument, either as to any other interpretation or finding of the facts, or as to the responsibility of the parties, at some subsequent time.

In so far as Mr. Guinan had specified that he should have 24 hours' notice, that was a provision merely so as to allow him to get his own boats out of the way, so as to handle Mr. Shaw's cargoes, and does not enter into his responsibility for the treatment of the boat that did come, if his servants directed what she should do. I do not see that Mr. Ash has established any fault against the boat or her captain, and I do not see that there is any fault on the part of the Stone Company in sending the boats there.

Briefs have now been submitted, and the matter finally argued upon the questions of law presented. None of the parties have presented any question as to the facts which necessitates a reconsideration of the statement or findings. So far as the libelant is concerned, therefore, he is entitled to a decree against the party responsible for the injury.

[1] Under article 5 of the charter, the charterer was bound to return the said scow to the libelant in the same condition as when received. The charter covered the month of April, 1914, during which

the damages were received, and the charterer has brought in the alleged wrongdoers or persons responsible in its opinion for the accident under rule 59. The court has found, and it is necessary to hold, that no negligence on the part of the charterer has been shown, and therefore, as between the charterer and the parties brought in as respondents, the liability must be transferred to those parties, and their responsibility for the accident and the damages accruing therefrom treated as the issue in the case.

The libelant, however, still insists upon treating the case as if no one had been brought in under the fifty-ninth rule, and as if the issue of actual negligence had never been raised as between those physically engaged in the operations of the boat at the time of the accident. The charterer seeks to answer this by urging the question of presumption or burden of proof, which was discussed in Bartley v. Borough Development Co. (D. C.) 214 Fed. 296, and the cases therein cited. It is evident, as in that case, that a determination of the issue based upon a charge of negligence, in a case where testimony has been given by both sides, and where the fault of negligence can be fixed, will render purely academic and immaterial the legal responsibility of the charterer under the terms of the charter or his position before invoking the fifty-ninth rule.

The libelant has not alleged or shown a breach of the provision in the charter by which the boat was to be returned in good order. He has, on the contrary (while alleging the existence of a charter), charged that during the term covered by this charter an accident occurred to the boat, from which he (the libelant) has suffered damages for necessary repairs, expenses, etc., to the boat, and he alleges that this accident, which has caused damage to his boat, was through the fault and negligence of the charterer. He alleges that it was the duty of the charterer to return the scow in good condition, but he does not charge a default in the performance of that duty, nor allege any return whatever. He has therefore not brought his action upon contract, but has brought an action for negligence (a tort), and has asked to recover the amount of his damages therefor.

If the contract set forth in the charter was thereby broken, any cause of action which might have been brought strictly for a breach of the charter party has not been included in this action by the libelant, who is entitled to recover exactly the same amount of damage in the action for tort as he might have proved and recovered (if he had alleged a return of the boat contrary to the conditions of the charter) for the repairs necessary to restore her to a good condition and for loss of services, etc. The situation can be plainly seen by considering what would have happened if the charterer had excepted to the libel or answered that the boat was now in their possession and would be returned in good condition at the expiration of the charter, or if the charterer had replied that no breach of the charter was alleged or had been shown. Instead of so pleading, the charterer, apparently admitting that the circumstances alleged in the libel would give a cause of action in tort to the libelant, and admitting that the libelant has received possession of his boat in such condition as to show (if alleged)

presumptively a breach of the charter, has brought in, under rule 59, the parties whom he might sue or who should answer to the libelant if the libelant, waiving the guaranty given him by the charter, were suing directly those who injured his property, and who owe him the duty of respecting his property rights and avoiding negligence with regard thereto. If action were brought upon the charter, the libelant might be entitled to damages and costs against the charterer, and the charterer might transfer the responsibility for the damages and costs to the parties brought in under rule 59, and who actually inflicted the damage. Where, however, the libelant seeks directly to recover for damage inflicted (setting up the charter as evidence merely of the privity existing between the parties), and where the charterer accepts the issue, but transfers the responsibility for the damage and substitutes another party in the place of himself as the one answerable to the libelant, the decree must run directly against the party held responsible. The charterer will be let out of the decree, but is not entitled to costs on his own part against the parties held responsible. He has accepted the issue and admitted his own responsibility, unless another person is shown to be directly responsible for the tort.

[2] The issue as against the tug and the owner of the wharf has substantially been disposed of upon the findings previously made. The briefs and arguments subsequently presented do not alter the conclusion that negligence was shown by those acting as the servants or agents of the owner of the wharf in directing the location and placing of the barge in a berth which was not suitable for a deep, heavily laden craft with a cargo of stone. The previous use of the dock without injury by lighter draft vessels or by vessels with different cargo, and the fact that they took the bottom at low tide, was sufficient to put upon the owner of the wharf notice of the conditions which might cause injury to such a vessel as that damaged upon this occasion. As has been indicated in the findings, the accidental circumstance that the owner of the wharf contemplated the making of an additional arrangement with Palladino Bros. to pay wharfage for the loads of stone consigned to them had no effect upon the responsibility of the owner of the wharf to the stone company in case he accepted and handled their cargoes before making the supplemental arrangement with Palladino Bros.

If negligence were shown on the part of the tug or of her captain, the damages might be divided, or the circumstances might be such that the dock owner would be entirely relieved. In the case of Doherty v. Steam Tug Britannia (D. C.) 196 Fed. 553, carelessness on the part of the tug in taking a barge to the wrong dock and leaving her in a dangerous berth was held not to be relieved by a statement of workmen that the place where the barge was left was where they wished to unload her. But in the case at bar no such negligence on the part of the tug captain is shown. The dock where the boat was left was the one intended, and there were safe berths at this dock. There was nothing about the particular berth in question which could be observed or found out through reasonable inspection at the time of leaving the barge, and a direction by those conducting the work at

the place (as to which berth to use at that particular dock) would absolve the tug owner from responsibility for the actual condition of the berth, so long as that condition was not apparent or to be anticipated by reasonable forethought.

The libelant, therefore, is entitled to a decree directly against the dock owner, who has been brought in under the rule. The libel as against the charterer should be dismissed, without costs.

The petition against the tug will be dismissed, with costs against the charterer.

BROOKHEIM v. GREENBAUM.

SAME v. HARMS.

(District Court, S. D. New York. December 12, 1912.)

1. BANKRUPTCY ⟸303—VOIDABLE PREFERENCE—KNOWLEDGE OF INSOLVENCY BY CREDITOR.

Where notes paid by a bankrupt within four months prior to his bankruptcy were then more than a year overdue, during which time he had claimed his inability to pay on the ground of poor business, slow collections, and that he was "broke," and paid at last only on insistent demands, but during all such time continued his business, which was that of a retail dealer in meats, and of considerable volume, as usual, more than the mere fact that he was then insolvent is necessary to charge the creditors with having reasonable cause to believe him insolvent, and that the payments constituted preferences.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458–462; Dec. Dig. ⟸303.]

2. BANKRUPTCY ⟸166—VOIDABLE PREFERENCE—KNOWLEDGE OF INSOLVENCY BY CREDITOR.

Something more than suspicion is necessary to put a creditor on inquiry as to the solvency of his debtor, and to charge him with reasonable cause to believe that a payment to him will effect a preference over other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.]

In Equity. Suits by Charles L. Brookheim, trustee in bankruptcy of Justus H. Garthe, against Leo Greenbaum and against John Harms. Decrees for defendants.

Decree affirmed, 225 Fed. 763, — C. C. A. —.

Lesser Bros., of New York City (William Lesser and James B. Stephens, both of New York City, of counsel), for complainant.

Wesselman & Kraus, of New York City (Bertram L. Kraus, of New York City, of counsel), for defendants.

LEARNED HAND, District Judge. This is a suit in equity by the trustee in bankruptcy of one Justus H. Garthe against Leo Greenbaum, and another suit against John Harms. Each suit is to recover a payment made a few weeks before the bankruptcy by the bankrupt to the defendant in the case, upon the theory that he had reasonable cause to believe that the bankrupt was insolvent.

[1] The trustee has proved beyond any controversy, to my satis-

faction, that the bankrupt at the time the payments were made was insolvent, and for that matter, although it is immaterial in the case, that he knew he was insolvent. So the practical question is whether there was enough notice to put these two defendants upon inquiry when they received payment—an inquiry which would have led them to learn of the insolvency in question. This is a somewhat vexed question of fact, and I am not by any means free from doubt as to what actually took place.

Unfortunately for the trustee, he is obliged in the case to rest upon the testimony of the bankrupt and the two defendants. As to the bankrupt himself, he was in no sense to me a satisfactory witness, and if it was a case of dispute I should hardly accept his testimony against that of any one else. Of the two defendants, Harms impressed me more favorably; but I was not particularly satisfied with either of the witnesses. However, although these considerations are of consequence, where there is a dispute in testimony, it will hardly furnish, in the absence of more definite grounds of inquiries, actual testimony upon which a complainant may rest; and as I have said before in this case the defendant is obliged to rest upon the testimony of the two men who conducted the transaction. While, therefore, I am justified in looking at the transaction with great suspicion, I think I am still obliged to find somewhere in the testimony some evidence on which the plaintiff can base its case. I will therefore take up each transaction separately:

Harms had a restaurant in Park Row, with a hotel. He had been dealing with the bankrupt for 10 or 12 years, buying large quantities of meat and bologna monthly from him. His average purchases up to the date of the transaction in question, which was some time in January, 1911, amounted to about $600 a month. Early in January of that year he sublet his restaurant, and in that way he required much less meat of the bankrupt than theretofore he had. The loan in question that Harms made to the bankrupt was some time in the summer or autumn of 1909. It was at four months, and for $500. Harms had discounted the note given, which was protested on December 16, 1909, and which he had to take up himself. He then went to the bankrupt, or sent for him, and told him that he wanted the money. From that time, and for a whole year or more, he seems to have kept after him, dunning him and pressing him for money; but the bankrupt put him off, saying that his collections were so slow that he had all he could do to pay the dealers from whom he got his meat.

The original reason for the loan, Harms says, was because the bankrupt had told him that he had lost wagons by theft and had suffered general financial misfortune. He had also complained of bad business and of high prices. All these facts the bankrupt himself corroborates. It appears, however, that the bankrupt had continuously done business in an extremely loose way. Until September, 1910, he had never had a bank account. He was accustomed to bring in his customers' checks and pay his bills with them, and to pay cash, and in general to conduct his affairs as no ordinary business man would ever think of doing. Besides that, as appears from the fact of the protest of the note, he had been hard pressed for cash for at least

a year, and yet he had not gone under. The reason for the final payment itself was that Harms, on going out of the restaurant business, told him that he wished him to settle up at once, and said that he must have his money. About the 8th or the 15th of January he came into his restaurant and paid $500, part in checks and part in cash.

The testimony in regard to Greenbaum is somewhat stronger for the complainant than that of Harms, for his relations apparently were more intimate with him. Greenbaum was also a restaurant keeper and dealt largely with the bankrupt. His average purchases were about $1,200 a month. The bankrupt would frequently collect this account in advance by cashing checks with Greenbaum, some of them postdated. He kept telling Greenbaum that he was hard up, and once or twice that he was "broke," explaining this, however, by the statement that his ready cash was so short he couldn't spare any payment, and that he could not afford to take a chance of pressing his customers, else they would leave him. The loan in question had been made in May, 1909, and the note had run along, therefore, for a period of about 20 months, without any payment being made upon it at all. However, during all that time the bankrupt had continued to do business in precisely the same way, always being hard pressed for ready cash, never able to make any payment, although frequently pressed, and yet during the whole time he had remained doing a large business and never becoming insolvent.

There is nothing, it seems to me, in the case of either of the defendants which would justify their belief that at the time they got the money anything different had happened to the bankrupt from what had been happening during all the time they had done business with him. There was nothing to suggest to them that his situation was any different at that precise time from what it had been throughout, and this fact I think is a determining factor in the decision. In most cases of this sort there is something which draws the attention of the creditor to the fact that the bankrupt's financial condition has changed; that it is not now what it was. In this case all the facts which are supposed to put defendants upon notice were in existence at the very time when the loans were made—that is, so far as the rather loose testimony permits me to infer; and for this reason Mr. Lesser quite frankly agreed with me, when I pressed him with the point that, had the payment been made at any time after the notes became due, and had bankruptcy ensued within four months thereafter, there would have been just as much reason to set aside the payment as under the facts in the case at bar.

[2] Now, that being admitted, the longer the situation remained and the bankrupt continued to do business, the more reason had the persons who dealt with him to suppose that, although he was dealing on a very narrow margin and practically had no free capital, he nevertheless was not insolvent. It must be remembered that a man who is always short in cash is only a man who has no free capital. It does not follow necessarily, as both sides concede, that he is insolvent because he is not quick pay. However, the fact that a man in business is not able to pay up when he is pressed in many cases may well be

a ground for inquiry, and even for sufficient suspicion of insolvency to justify a suit like this, as, for example, in the case of a large business conducted with prudence and accuracy; but it does not seem to me that, in the case of a man who concededly did business in such an unbusinesslike way as this bankrupt, shortness of cash and absence of free capital, continuing for so long a period of time without any insolvency, ought to be enough to put on inquiry all those who dealt with him. It must be remembered that something more than suspicion is necessary. Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Sharpe v. Allender, 170 Fed. 589, 96 C. C. A. 104 (C. C. A. 3d Cir.); J. W. Butler Paper Co. v. Goembel, 143 Fed. 295, 74 C. C. A. 433 (C. C. A. 6th Cir.); Re Goodhile (D. C.) 130 Fed. 471. These cases all decide that it is not enough that the bankrupt is in temporary straits and the debt overdue.

Perhaps this would have protected the defendants, even had Garthe's condition been of recent origin; but surely they were entitled to suppose that he might go on for an indefinite time, just as he had gone on up till then, in a kind of hand to mouth existence, like that of so many small traders. A bankruptcy court ought not to say that it is unsafe for any one to deal with such a small trader merely because he is very slow pay, and is always complaining that his collections are slow, that he is "broke," meaning that he has no cash, and that business is bad. Such men very commonly are in that case, and are continually complaining in all those ways, especially when they are being pressed. They pay those from whom they buy, who will not furnish more unless they pay some of what they owe. Others, like these defendants, who had security of sorts in their own purchases from the trader, they put off as long as they can. No one can ever know whether such men could make both ends meet, or not, if they were sold out. Probably they very seldom could do so, but I am sure the act does not mean to say that that kind of knowledge is reasonable cause to suppose that a preference will result. They go on so for years, at times, just as this man did, and perhaps generally they go under in the end; but meanwhile they buy and sell, and evidently pay as they go, until the crash comes. Any premonition that that day is near is enough, I agree; but the mere knowledge that at some time it will probably arrive is not enough. If it is, then these men can never be in business, for no one can safely trade with them.

In the case at bar there was no such indication as far as the evidence goes, though I must confess to some suspicion of the truth of the story as given. If I had merely to guess, I think I should guess with the complainant that they knew more than now appears; but I have no right to guess without some basis. The story of all of them is reasonable enough as it reads, and under it there was no reason at all to suppose at the time of the payments that anything unusual had happened. There was no premonition whatever. Each defendant says that he insisted upon being paid before the holidays. Garthe urged that his trade was good in December, and that his collections would be good in January. This story may be false, but it is not

improbable. His business was such that a payment of $600 or $1,200 was not at all suspicious; it was a large one. He took in every day over the counter $160 or $175, besides his collections, and the defendants had considerable knowledge of his business. Any substantial increase in his collections might easily put him in funds enough to pay at once $1,200.

There is here no evidence of sudden sales, of large payments, or transfers in property, or voluntary payment by the bankrupt, of any visible change in his mode of business, in short, of any of the usual earmarks in such cases. Suspicion will not support a decree by which property is transferred from one man to another.

Decrees dismissed.

In re ATKINS.

(District Court, W. D. Kentucky. July, 1915.)

1. BANKRUPTCY ⊂=482—FEES OF ATTORNEYS.

Where an involuntary petition in bankruptcy was brief, and no contest arose on it, because the bankrupt in advance had in writing consented to the adjudication, and the schedules were brief, and there was no indication that counsel of the petitioning creditors, as such, had anything to do with the preparation thereof, an allowance of $200 to counsel for their services was excessive, and would be reduced to $100, conceded by the complaining creditor not to be excessive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂=482.]

2. BANKRUPTCY ⊂=482—FEES OF COUNSEL—LIABILITY OF FUND OF ESTATE.

The compensation of attorneys of a trustee in bankruptcy, in a contest between antecedent creditors, suing to set aside a conveyance by their debtor, and subsequent creditors, is properly chargeable against the bankrupt estate; the antecedent creditors, who alone could have set aside the conveyance, not making any claim for any allowance for the services of their attorneys.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂=482.]

3. BANKRUPTCY ⊂=482—COMPENSATION OF ATTORNEYS—AMOUNT.

Where the assets of a bankrupt amounted to a little over $16,000 and interest accumulating on the sale of bonds taken for the purchase money of property sold under judgments of a state court, and the assets were in the hands of the trustee for distribution, attorneys of the trustee, employed to litigate the question whether antecedent creditors, who had sued to set aside a conveyance by the bankrupt, were entitled to the assets to the exclusion of subsequent creditors, were entitled to a fee not exceeding $2,500.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂=482.]

4. BANKRUPTCY ⊂=482—FEES OF COUNSEL—ALLOWANCE BY COURT—CONSENT OF CREDITORS.

The court, in allowing compensation of attorneys of a trustee in bankruptcy, must fix the amount of compensation without reference to the fact that certain of the creditors consented to a specified allowance, which, under the circumstances, was excessive.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂=482.]

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5. BANKRUPTCY ⊂⊃482—COSTS—ALLOWANCE.

An order of the referee, allowing to counsel of the trustee in bankruptcy expenses in a contest between antecedent creditors, suing to set aside a conveyance by the bankrupt and subsequent creditors, will not be disturbed, where the sum had not been taxed as costs and paid by the subsequent creditors appealing from an order of the District Court adjudging that the rights of the antecedent creditors were exclusive of any right of the subsequent creditors to share in the assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂⊃482.]

In Bankruptcy. In the matter of Thomas J. Atkins, bankrupt. There was an order of the referee making allowances to attorneys, and the First National Bank petitions for a review. Modified and affirmed.

See, also, Globe Bank & Trust Co. of Paducah, Ky., v. Martin, 236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583.

W. A. Berry, of Paducah, Ky., for claimants.

Wheeler & Hughes, of Paducah, Ky., for First Nat. Bank and others.

EVANS, District Judge. It would be somewhat difficult to state with accuracy and at the same time with brevity what might be a satisfactory history of the litigation in this case, but for present purposes it will suffice to say that in August, 1908, the Globe Bank & Trust Company, then a creditor of the bankrupt, brought this suit in equity in the McCracken circuit court to set aside as voluntary and fraudulent a deed the bankrupt had a short time previously made to his son and the son's children, whereby he conveyed to them practically all of his property. In that suit the plaintiff sued out an attachment, which was levied upon the property conveyed. Soon afterwards the First National Bank of Paducah, and the Old State National Bank of Evansville, Ind., also brought similar suits and obtained attachments therein, which were also levied upon the same property. The amounts due to the three banking institutions was about $20,000, and their claims were the only debts that were created before the conveyance to the son of the bankrupt. In amount they exceeded the value of the estate conveyed.

The situation being thus, Mary Lee Owen, the Mechanics' & Farmers' Savings Bank, and the American-German National Bank, three creditors of the bankrupt, instituted a proceeding in involuntary bankruptcy, in which they stated the nature of their claims, the aggregate of which was $2,458.80. The earliest creation of either of the debts was April 5, 1908, which was after the conveyance referred to. The only act of bankruptcy alleged was that within four months next preceding the date of filing the petition, to wit, December 19, 1908, the said Atkins committed an act of bankruptcy, in that he did theretofore, on the 17th day of December, 1908, admit in writing his inability to pay his debts and his willingness on that ground to be adjudged a bankrupt. A copy of the written admission is attached to the petition in bankruptcy. There was no contest, and on the 28th day of December,

1908, after the subpœna had been served, pursuant to the consent of Atkins, the adjudication was made.

A. Y. Martin, Esq., was chosen and qualified as trustee. Some time afterwards, the matter having been presented to this court in due form, it authorized the trustee to appear in the state court and seek to become a party to the litigation there. Instead, Martin seems to have filed in the state court a suit of his own, and furthermore sought to dominate the litigation there. This latter effort seems to have resulted in failure; but, conceding the right of this court to administer whatever assets might be obtained, the state court, when it entered its final decree in the cases, all of which had been consolidated, appointed Martin as commissioner of the court to sell the property, which the state court had adjudged should be sold. The sale was made, $16,146.58 was obtained for the property, and practically all of it, largely increased by interest on the sale bonds, was ultimately turned over to the trustee in bankruptcy in this case. The amount thus obtained was obtained through the suits that had been instituted by the antecedent creditors of the bankrupt, the benefit of whose attachments had been duly saved under the Bankruptcy Act for the benefit of creditors.

After this was done through the litigation in the state courts, such as has been described, a sharp contest arose in this court between the three banks referred to, who were the only antecedent creditors, and the creditors whose debts were created subsequent to the making of the deed by Atkins which had been set aside in favor of the antecedent creditors by the decree of the state court. The contest in this court resulted in our acquiescing in the views of the state court as to the respective rights of the antecedent and the subsequent creditors; but upon appeal to the Circuit Court of Appeals (29 Am. Bankr. Rep. 935, 201 Fed. 31, 119 C. C. A. 363) that view was overruled, and all the bankrupt's creditors were permitted to share equally. On February 23, 1915, the Supreme Court of the United States (236 U. S. 288, 35 Sup. Ct. 377, 59 L. Ed. 583, 34 Am. Bankr. Rep. 162) affirmed the judgment of the Circuit Court of Appeals. So that it will be seen that the subsequent creditors succeeded in overturning the claims of antecedent creditors to exclusive rights in the fund arising from the sale of the property, and the result was that all creditors (antecedent and subsequent) share equally.

After this result was finally achieved the trustee filed a petition before the referee for the allowance of certain counsel fees, and Messrs. Bradshaw & Bradshaw, who had been the counsel also for the petitioning creditors who secured the adjudication in bankruptcy, filed their claim for a fee in respect to that service. The referee allowed what he thought were proper fees in both aspects of the case, and the First National Bank, by its petitions, has sought a review of all the orders of the referee in that regard. All will be disposed of in one opinion.

[1] Preliminary to the decision of the questions arising on the petitions for review, we may state that Atkins and all counsel in the case resided at or near Paducah, Ky., but the proceeding in involuntary

bankruptcy was instituted at Louisville, Ky. The bankruptcy petition was a very brief one. No contest arose upon it, because in advance Atkins, in writing, had consented to the adjudication. Nothing could have been simpler than this. The schedules also were very brief, and there is no indication, and probably could be none, that Messrs. Bradshaw & Bradshaw had anything to do with the preparation of the schedules of the bankrupt, and after the adjudication there was nothing further for the counsel of the petitioning creditors, as such, to do. Nevertheless, they claim for that service a fee of $500. Several lawyers at Paducah, who probably never saw the record in the involuntary proceedings at Louisville, testified as to the value of the services of the attorneys for the petitioning creditors, and their views widely differed. Two of them estimated a reasonable fee for that service to be $500, another put it at $250, and another put it at $200. The referee, as we have seen, fixed it at $200. With much experience in such matters, I strongly incline to think that the average fee for services of that character does not exceed $50; but in this case the creditor who seeks a review of the allowance concedes that $100 fee would not be extravagant. For that reason I will fix the allowance at $100, and think it is quite liberal.

[2] The question remaining to be determined is whether or not the fee allowed to Messrs. Bradshaw & Bradshaw and J. D. Mocquot of $3,500 was reasonable. They had claimed $5,000, besides over $500 for expenses. It will be observed that several of the witnesses who testified as to the fees upon this phase of the case were the same as those who testified in respect to the fee for filing the petition in bankruptcy. While their estimates varied widely, none of them fixed it at less than $4,000. We have carefully examined the testimony, and find the estimates quite speculative and unsatisfactory.

It cannot be doubted that the services of counsel for the trustee were laborious, extending intermittently over several years, and in four or five different courts. They were valuable particularly to the subsequent creditors of the bankrupt, whose claims probably amounted to three-fifths of the bankrupt's indebtedness; but it cannot be doubted, on the other hand, that those services were not valuable to the antecedent creditors, though we give that fact no weight in reaching a conclusion.

The contention of the trustee's counsel is that the whole amount should be paid out of the fund, the antecedent creditors bearing their proportion of it. It is objected by the antecedent creditors in their petitions for a review that this would be inequitable, inasmuch as it was their suits and attachments in the state court and the efforts they and their counsel made there which created the fund and rescued the estate of the bankrupt from those to whom he had voluntarily conveyed it. It is insisted that the subsequent creditors, acting alone, could not have maintained a suit for the setting aside of the conveyance, and that only the antecedent creditors could have accomplished that result by their suits and the attachments they obtained. There is force in these contentions; but the antecedent creditors have not made claim for any allowance for the services of their

attorneys, and consequently we cannot directly deal with that phase of the case. On the contrary, as the case now stands, we must hold that only the trustee's counsel can be compensated out of the fund. It might possibly be a hardship to compel the antecedent creditors to pay any part of the counsel fees of their adversaries under the circumstances developed here, although the main contentions in the litigation out of which the present claims for fees arise were in this court and the courts superior to it over the question of whether the antecedent creditors were entitled to be paid in full. In that litigation the subsequent creditors were victors. But these considerations apart, and taking a comprehensive view of the situation, I am constrained to conclude from the testimony that the allowance of $3,500 was excessive from any point of view.

[3, 4] Without being advised at the hearing of the pending petitions for review, or in any detail by the record before us, of the real facts respecting the services of the trustee's counsel in the cases in the state courts, nor as to what would have been a reasonable fee for those services in those courts, we understand that in this court no testimony was necessary for the preparation of the case between what we have called the antecedent and the subsequent creditors. In the litigation in this court only questions of law appear to have been involved. And not only so, but the bankrupt's estate, amounting to $16,146.58 and certain interest, which without the aid of counsel accumulated on the sale bonds taken for the purchase money of the property sold under the judgment of the state court, was securely in the hands of the trustee for distribution as the court might order.

Stated generally, the assets being in safe hands, the legal question was whether the antecedent creditors, so called, of the bankrupt should get all of them, or whether all the creditors should participate ratably in those assets. We cannot agree that even the repeated argument of such a question in respect to an estate of that amount calls for a fee of $3,500, even including in the estimate a reasonable fee for what services were rendered by the trustee's counsel in the state courts. There, it is true, services were rendered by the attorneys of the trustee; but probably even more fruitful services were rendered by counsel for the antecedent creditors, for it was the suits prosecuted by the latter which resulted in setting aside the voluntary conveyance made by the bankrupt.

These matters should be taken into account in estimating the extent, at least, of the services of the trustee's attorneys in the state court stages of the litigation. As we have intimated, the testimony is most vague and unsatisfactory, and certainly so variant as to negative any claim that there had been established in Paducah, Ky., any standard of counsel fees. We have not regarded as particularly important the fact that certain of the witnesses were interested in the result; but it appears to be quite obvious that the consent manifested by certain of the subsequent creditors to the allowance of the fee of $3,500 is unimportant, as the consent of any individual should not affect the rights of any other creditor.

In this situation we remember that the Supreme Court in Harrison v. Perea, 168 U. S. at pages 325, 326, 18 Sup. Ct. at page 135, 42 L.

Ed. 478, in speaking upon the question of amount of fees to be allowed, said:

"The amount was within the judicial discretion of the court, and in fixing that amount the trial court could proceed upon its own knowledge of the value of the solicitor's services. Trustees v. Greenough, 105 U. S. 527 [26 L. Ed. 1157]; Fowler v. Equitable Trust Co., 141 U. S. 411–415 [12 Sup. Ct. 7, 35 L. Ed. 793]."

Acting upon this suggestion of the Supreme Court, and being quite well acquainted with the general characteristics of this case and of the services of counsel therein, after careful consideration of the testimony, and with a disposition to allow what is fairly reasonable, and even liberal, for the services of counsel, the court is nevertheless of opinion, in a case involving only $16,147, that, instead of $3,500, the allowance to Messrs. Bradshaw & Bradshaw and J. D. Mocquot should not exceed $2,500, and the amount will be reduced accordingly.

[5] Another order of the referee is complained of, to wit, that one of them which allows Messrs. Bradshaw & Bradshaw and J. D. Mocquot $529.24 for certain expenses. It has been seriously objected to by the antecedent creditors upon the ground that such expenses should not to any extent come out of them. The equity of this contention possibly in some particulars may not be altogether without force. Assuming that such expenses as that of $43 deposited with the clerk, and $70.30 paid to the clerk for preparing the record, and $25 deposited with the clerk of the Supreme Court of the United States, have not been taxed as costs and paid by the appellants in the case of Globe Bank & Trust Co. v. Martin, Trustee, and assuming that, *if* the appellant in the case referred to had paid those items as part of the costs taxed against it, its attorney would have brought that fact to the attention of the referee, we are not disposed to interfere with the action of the referee upon that phase of the case, although the right to certain other of the expenses charged is not entirely clear.

It results that the order of the referee allowing to Bradshaw & Bradshaw $200 for their services for the petitioning creditors should be modified to the extent of making that allowance only $100, that the order of the referee which allows to Messrs. Bradshaw & Bradshaw and J. D. Mocquot $3,500 as their compensation for services rendered the trustee of the bankrupt should be modified to the extent of making that allowance $2,500 only, and further that the order of the referee allowing to Messrs. Bradshaw & Bradshaw and J. D. Mocquot $529.24 should be and it is affirmed.

THE ALASKA.

(District Court, W. D. Washington, N. D. July 21, 1915.)

No. 3021.

ADMIRALTY ⊂=28—JURISDICTION IN REM—ACTION FOR WRONGFUL DEATH.

Rem. & Bal. Code Wash. § 1182, which makes vessels liable "for injuries committed by them to persons or property within this state," and gives a lien therefor, does not extend to actions by the heirs or representatives of a decedent to recover damages for his wrongful death, but is limited to cases of direct injury to the person or property of the plaintiff or libelant, and does not vest a court of admiralty with jurisdiction of a suit in rem based on such statute.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 278–288; Dec. Dig. ⊂=28.]

In Admiralty. Suit by Elfrida Furu and Hjordis Furu, an infant, by her guardian ad litem, Elfrida Furu, against the gas schooner Alaska; Nels Hansen, claimant. On exceptions to amend libel. Exceptions sustained.

Daniel Landon, of Seattle, Wash., for libelants.

Willett & Oleson, of Seattle, Wash., for claimant.

NETERER, District Judge. Libelants have commenced an action against the gas schooner Alaska, in which they seek to impress a lien for $6,000 damages occasioned to Elfrida Furu by reason of the death of her husband through the negligence of the schooner, and also $4,000 as guardian ad litem for the minor child of the deceased, and allege, in substance, "that on the 21st day of April, 1915, about seven miles southwest of Cape George, in the waters of the Pacific, Nels Furu was drowned by the gas schooner 'Alaska' carelessly and negligently running into and capsizing the fishing dory which Nels Furu was in"; that at the time of his death he was 30 years of age, healthy and able-bodied, and capable of earning $125 a month—and pray that the schooner, her tackle, apparel, furniture, engines, etc., be attached, condemned, and sold to pay the claim of libelants, together with costs and disbursements. The claimant has filed exceptions, stating:

"That the cause of action so set forth is not a cause of action cognizable by proceedings in rem in admiralty, and is not a maritime cause of action, and is not within the jurisdiction of this honorable court."

The issue in this case was determined by Judge Cushman, of this district, in The Starr (D. C.) 209 Fed. 882, in which he held the remedy not available. But for the vigorous suggestion of proctors that the issue was not fully presented at the time, and the fact that Judge Hanford, also of this district, in The Willamette (D. C.) 59 Fed. 797, held to the contrary, which was affirmed by the Circuit Court, I would content myself with the holding in The Starr, supra, without giving the matter further consideration.

Neither the general admiralty law nor the common law give a right of recovery for the death of another as the result of negligence. No lien is given by admiralty; neither can admiralty create one. While

admiralty has jurisdiction of such an action primarily because of the place where the act complained of occurred, the right of a proceeding against the offending thing is a right which is controlled and governed by local law. The right of recovery is therefore predicated upon the local law, and unless a lien is given by the local law there is no lien to enforce by proceeding in rem in a court of admiralty. The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727. Reference to the Washington statute discloses the following provisions:

Section 183, Remington & Ballinger's Code:

"* * * When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. * * *"

Section 194, supra:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children. * * *"

Section 1182, supra:

"All steamers, vessels and boats, their tackle, apparel and furniture, are liable: * * * (5) For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamers, vessels and boats, and their tackle, apparel and furniture, and have priority in the order of the subdivisions hereinbefore enumerated, and have preference over all other demands; but such liens continue in force only for a period of three years from the time the cause of action accrued."

In The Willamette (D. C.) supra, Judge Hanford, in 59 Fed., at page 800, said:

"Upon the authority of the decision of Judge Deady, in the case of The Oregon [D. C.] 45 Fed. 62, and the apparent approval thereof by the Supreme Court of the United States in the case of The Corsair, 145 U. S. 335, 12 Sup. Ct. 949 [36 L. Ed. 727], I hold that the rights conferred by these statutes are available to the representatives of the deceased passengers above named in this suit."

It is apparent that Judge Hanford based his conclusion upon the holding of Judge Deady in The Oregon (D. C.) supra, in which (45 Fed. at page 77), the Oregon statute is set out as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission."

And on the same page:

"Every boat or vessel used in navigating the waters of this state * * * shall be liable and subject to a lien * * * for all * * * damages or injuries done to persons or property by such boat or vessel."

A comparison shows that the law of Oregon differs from the law of Washington with relation to the right of action, in this: That it

places the representatives of the deceased in the same status and gives them the same right of action as the deceased would have, if living, while the Washington law gives a right of action for damages which were actually sustained. The law of each state gives a lien for damages or injuries sustained to *persons or property.* It is clear that under each law damages to the person injured, recoverable by himself, are a lien, and under the Oregon law the representatives succeed to the same right of lien as the injured party would have had, and Judge Deady so held, and the same construction was given the Washington statute in Re Willamette, supra. The Circuit Court of Appeals, in reviewing The Willamette, supra, while recognizing the instant issue an open question, at 70 Fed. 874, at page 878, 18 C. C. A. 366, at page 370 (31 L. R. A. 715), through Circuit Judge McKenna, said:

"The question presented in the second assignment of error—that is, the power of a court of admiralty to entertain jurisdiction of suit by the representatives of a deceased person when the right of action survives by the local law—has not been passed on definitely by the Supreme Court, though it has come up incidentally in several cases. Whenever it has arisen in the District Court, with but few exceptions, the jurisdiction has been entertained, and by a few eminent judges it has been asserted without the aid of local law. The reasoning of the latter has been left unsubstantial by the decision of the Supreme Court in Insurance Co. v. Brame, 95 U. S. 754 [24 L. Ed. 580], but it shows the disposition of judges. The research of other courts has made it unnecessary to review or especially cite these cases. This has been ably and accurately done in Steamboat Co. v. Chase, 16 Wall. 552 [21 L. Ed. 369]; The Harrisburg, 119 U. S. 199 [7 Sup. Ct. 140, 30 L. Ed. 358]; Ex parte Gordon, 104 U. S. 515 [26 L. Ed. 814]; The Corsair, 145 U. S. 335, 12 Sup. Ct. 949 [36 L. Ed. 727]; and no disapproval is expressed of the cases reviewed. It may not be unnecessary repetition to refer to the case of The City of Norwalk [D. C.] 55 Fed. 98, in which Judge Brown, of the Southern district of New York, comments on previous decisions, and vindicates the jurisdiction of the District Court with great strength of reasoning; and the cases of Holmes v. Railway Co. [D. C.] 5 Fed. 75, and The Clatsop Chief [D. C.] 8 Fed. 163, in which Judge Deady, in the Oregon district, sustained, respectively, an action in personam and an action in rem, a statute in Oregon giving the right of action; and In re Humboldt Lumber Manuf'rs' Ass'n [D. C.] 60 Fed. 428, decided by Judge Morrow, of the Northern district of California, following and approving Judge Brown's reasoning. The case of The City of Norwalk was affirmed on appeal by the Circuit Court of Appeals, and the conclusion and reasoning of Judge Brown approved [McCullough's Adm'x v. New York & N. Steamboat Co.] 20 U. S. App. 570, 9 C. C. A. 521, 61 Fed. 364. * * * If a collision is culpable, it is undoubtedly a marine tort, and the Supreme Court said in The City of Panama, 101 U. S. on pages 453–464 [25 L. Ed. 1061]: 'Injuries of the kind [the case was of injuries not resulting in death] alleged give the party a claim for compensation, and the cause of action may be prosecuted by a libel in rem against the ship; and the rule is universal that, if the libel is sustained, the decree may be enforced in rem as in other cases where a maritime lien arises. These principles are so well known, and so universally acknowledged, that argument in their support is unnecessary.' If a claim for compensation, if the party die, can be made to survive by statute to his [personal] representatives, it would not be very complete reasoning to hold that the remedy cannot also be made to survive. Indeed, there is language of Justice Grey in the case of The H. E. Willard [D. C.] 52 Fed. 387, which supports the view that, the right being created, the admiralty courts of the United States will enforce it by their own rules of procedure. The learned justice said: 'When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right according to their own rules of pro-

cedure'—citing a number of cases among which is The Corsair 145 U. S. 335 [12 Sup. Ct. 949, 36 L. Ed. 727]. In the case at bar, however, it is enough to say that, the tort being a maritime one, it would seem on principle and authority, if the local law is competent to preserve the right of action, it is competent to give it the efficiency of a lien to be enforced in the appropriate federal tribunal. The Lottawanna, 21 Wall. 558, 581 [22 L. Ed. 654]."

Judge Wolverton, in The Aurora (D. C.) 163 Fed. 636, and The General Foy (D. C.) 175 Fed. 590, in which the Oregon statute, supra, was considered, held that a lien existed, and at page 596 of the latter decision, says:

"From the specific reading of the lien or privilege statute involved in The Albert Dumois Case [177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751], the reasonable construction thereof was that it gave a right only to the party injured—the language being: 'Where any loss or damage has been caused to the person or property of any individual * * * the party injured shall have a privilege.' Not so with the Illinois, Wisconsin, California, and Oregon statutes, for in each instance it is declared, in effect, that every vessel shall be subject to a lien for all damages arising for injury done to persons or property by such boat or vessel. Statutes more general and comprehensive in terms could hardly have been framed, and they would seem sufficient to comprise such damages as the heirs of the decedent would suffer by reason of such decedent having been wrongfully cut short of his existence. But, however this may be, I feel bound by the decisions of the Circuit Court of Appeals in the cases of The Willamette and The Oregon, supra, standing, as I construe the decision in The Dauntless, unreversed or in any way modified."

The Circuit Court of Appeals, in The Dauntless, 129 Fed. 715, at page 716, 64 C. C. A. 243, at page 244, in considering the California statutes which are set forth in the opinion, said:

"This court, in The Willamette, 70 Fed. 874, 878, 18 C. C. A. 366, 31 L. R. A. 715, and in Laidlaw v. Oregon Ry. & Nav. Co., 81 Fed. 876, 879, 26 C. C. A. 665, in construing the statute of Oregon which reads as follows: 'Every boat or vessel used in navigating the waters of this state * * * shall be liable and subject to a lien * * * for all * * * damages or injuries done to persons or property by such boat or vessel' (Hill's Ann. Code, par. 3690)—held that an action of this character in rem could be sustained. The question involved in this case is whether or not such actions can be maintained under the statutes of California. * * * The statute of California (section 377, Code Civ. Proc.) provides: 'When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death.' Section 813, Code Civ. Proc., provides: 'All steamers, vessels, and boats are liable * * * (5) for injuries committed by them to persons or property. * * *'"

The court, then, without expressly referring to The Willamette, at page 719 of 129 Fed., at page 247 of 64 C. C. A., says:

"We are of opinion that no substantial difference can be drawn between the statutes of the different states upon which The Albert Dumois and The Onoko were based, and the statutes under consideration. If any distinction exists, it must be conceded that the language of section 813 of the Code of Civil Procedure of California is stronger in favor of appellants' contention than the others; and in the light of these opinions, and in view of the language used in the California statute, we feel compelled to hold that in the Doane Case this court has no jurisdiction."

In The Onoko, 107 Fed. 984, 47 C. C. A. 111, the Circuit Court of the Seventh Circuit was considering the Wisconsin and Illinois water

craft laws. 1 Starr & C. Ann. St. (2d Ed.) c. 12, par. 1, of the laws of Illinois provides that:

"Every * * * vessel, steamboat, steam dredge, tugboat, scow, canal boat, barge, lighter, and other water craft of about five tons burthen, used or intended to be used in navigating the waters or canals of this state, or used in trade or commerce between ports and places within this state, or having their home port in this state, shall be subject to a lien thereon: * * * Fifth—for all damages arising from injuries done to persons or property by such water craft. * * *"

The statute of Wisconsin (2 Sanb. & B. Ann. St. 1898, § 4255) is stated by Circuit Judge Jenkins, in The Onoko, to be practically the same as paragraphs 1 and 2, chapter 70, of the Illinois statute, but contains a proviso "that such action shall be brought for a death caused in this state." Section 3348 of the Wisconsin statutes, supra, provides that:

"Every ship, boat or vessel used in navigating the waters of this state shall be liable for and the claims or demands hereinafter mentioned shall constitute a lien on such ship, boat or vessel, which shall take precedence of all other claims or liens thereon: * * * (4) For all damages arising from injuries done to persons or property by such ship, boat or vessel."

The court, in this case, at page 987 of 107 Fed., at page 113 of 47 C. C. A. said:

"Undoubtedly, in this country, since the decision in The Corsair, the general trend of opinion in the lower courts has been to the effect that the water craft laws of the various states give a lien upon the vessel for injuries occasioning death. * * * In all these cases, with the exception of The Glendale, the act supposed to grant the lien is an independent act, and in no way connected with the act giving the action for the death. In The Glendale the provision granting the lien is part of the very act giving the right of action. * * * It is also to be said that the water craft law contemplates a lien for direct injuries done by the inanimate thing negligently navigated, and would not seem to comprehend such injury as is contemplated by the act granting a right of action for a death. The injury for which a lien is given is a direct injury by the negligently navigated craft to person or property. By reason of the faulty navigation and consequent collision, no injury was done to the person of the libelant, or to the person of those he represents. Nor was injury done to his or their property. They had no property right in the person of the deceased. The right of action arose only upon and because of his death. The recovery is allowed as compensation for the supposed support and education which they would have received had he survived. This right of action, arising only upon death, cannot, within the meaning of the water craft law, be property which could be injured by an inanimate thing negligently navigated. In view of the ruling of the Supreme Court, we are not permitted to follow the decisions * * * by the Circuit Courts of Appeals rendered before the decision in The Albert Dumois, and are constrained to hold that no lien upon the vessel is created by the acts considered for the cause declared in the libel."

The statutes of Washington (section 1182, supra) and California (section 813, supra), relating to water craft liability of vessels for injury to persons or property, are the same. The provisions of section 183, Rem. & Bal. Code, supra, and section 377, Code Civil Proc. Cal., are identical. The decision in The Willamette, supra, by the Circuit Court, was rendered in 1895; The Onoko, supra, in 1901; The Dauntless, supra, in 1904; and in 1900, The Albert Dumois, 177

U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751, was decided. In this case the Supreme Court held that the provisions of the Louisiana water craft law (subdivision 12 of article 3237), which provides, "Where any loss or damage has been caused to the person or property of any individual by any carelessness, neglect or want of skill in the direction or management of any steamboat, barge, flatboat, water craft or raft, the party injured shall have a privilege to rank after the privileges above specified," were not intended to apply to actions brought by the representatives of a deceased person for damages resulting in death. Justice Brown, for the court, at page 259 of 177 U. S., at page 602 of 20 Sup. Ct. (44 L. Ed. 751), said:

"The object of article 3237 was not to extend the cases in which damages might be recovered to such as resulted in death, but merely to provide that, in cases of damages to person or property, where such damage was occasioned by negligence in the management of any water craft, the party injured should have a privilege or lien upon such craft. We deem it entirely clear that the article was not intended to apply to cases brought by the representatives of a deceased person for damages resulting in death."

There is no question in my mind but that the Supreme Court in this case clearly limited the lien privilege in paragraph 5, § 1182, Rem. & Bal. Code, supra, as a right accruing to the injured party only, and not a lien which passes to his representatives; and similar provisions having been considered by the court in The Onoko, supra, and by the Circuit Court of this circuit, in The Dauntless, supra, there is, in my judgment, no escape from the conclusion that this action is not within the jurisdiction of this court.

The exceptions are therefore sustained.

In re AGNEW et al.

(District Court, N. D. New York. August 27, 1915.)

1. BANKRUPTCY ⊜25, 402—DEATH OF ALLEGED BANKRUPT—EFFECT.

Under Bankr. Act July 1, 1898, c. 541, § 8, 30 Stat. 549 (Comp. St. 1913, § 9592), declaring that the death of a bankrupt shall not abate the proceedings, but the same shall be conducted in the same manner, so far as possible, as though he had not died, bankruptcy proceedings, once begun, do not abate on the death of the alleged bankrupt, whether the proceedings be voluntary or involuntary, and whether adjudication has been had or not at the time of the death, and the administrator of the deceased bankrupt may file an application for a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 134, 680; Dec. Dig. ⊜25, 402.]

2. BANKRUPTCY ⊜410—DISCHARGE—APPLICATION—EXTENSION OF TIME IN WHICH TO FILE APPLICATION.

The court, for cause shown, may extend the time, not exceeding 18 months from the adjudication of bankruptcy, in which an application for a discharge may be filed by the administrator of the bankrupt, dying pending bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. ⊜410.]

3. BANKRUPTCY ⟸410—EXECUTORS AND ADMINISTRATORS ⟸29—DISCHARGE IN BANKRUPTCY—APPLICATION BY ADMINISTRATOR OF DECEASED BANKRUPT—COLLATERAL ATTACK.

Where an application for a discharge in bankruptcy is presented by an alleged administrator of the deceased bankrupt after one year from the adjudication, an objecting creditor and trustee may not collaterally attack the regularity of the appointment of the administrator, or the order granting an extension of time in which to file the application; and the production of the letters of administration is sufficient to establish the fact of appointment, unless the letters are shown to have been revoked, and the objecting creditor and trustee can only by motion attack the regularity of the letters of administration, or the order granting the extension.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. ⟸410; Executors and Administrators, Cent. Dig. §§ 177–182, 1411; Dec. Dig. ⟸29.]

4. BANKRUPTCY ⟸408—OFFENSES BY BANKRUPT—FRAUDULENT CONCEALMENT OF PROPERTY—STATUTORY PROVISIONS.

To constitute the offense of knowingly and fraudulently concealing, while a bankrupt, property from the trustee, in violation of Bankr. Act July 1, 1898, c. 541, § 29, 30 Stat. 554 (Comp. St. 1913, § 9613), the concealment must have been by the bankrupt after the filing of a petition or after his discharge, and the property must have been concealed from the trustee, and must have belonged to the estate in bankruptcy, and the concealment must have been knowingly and fraudulently made, and a bankrupt transferring property in fraud of creditors prior to bankruptcy proceedings is not within the statute, though a bankrupt, commencing to conceal his property prior to the filing of a petition, and continuing to conceal the same thereafter and pending bankruptcy proceedings, and failing to disclose the facts to his trustee, but aiding in the concealment by transfer to or through others, knowingly and fraudulently conceals his property while a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. ⟸408.]

5. BANKRUPTCY ⟸414—OFFENSES BY BANKRUPT—FRAUDULENT CONCEALMENT OF PROPERTY—EVIDENCE.

Evidence that a bankrupt knowingly and fraudulently concealed, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy, in violation of Bankr. Act, § 29, must be clear.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720–722; Dec. Dig. ⟸414.]

6. BANKRUPTCY ⟸413—DISCHARGE—SPECIFICATIONS OF OBJECTIONS—SUFFICIENCY.

Specifications of objections to a bankrupt's discharge, on the ground that he had knowingly and fraudulently concealed, while a bankrupt, from his trustee, property of his estate, should point out or specify what property was concealed, and when, with some reasonable degree of certainty.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. ⟸413.]

7. BANKRUPTCY ⟸413—DISCHARGE—SPECIFICATIONS OF OBJECTIONS—SUFFICIENCY—"INTENTIONALLY"—"FRAUDULENTLY."

Specifications of objection to a bankrupt's discharge, alleging the making of a false oath by the bankrupt "knowingly and intentionally" including in the schedule of assets a worthless note for $5,000 held as collateral only, with knowledge that it was worthless, and including another note of $9,000, on which $750 had been paid, as worth $9,000, when the same was worthless, or believed so to be by him, and stating the value of a warehouse to be $6,000, when in fact worth only half that sum, and

known to the bankrupt to be worth only half, are insufficient to charge the bankrupt with having "knowingly and fraudulently" made a false oath in relation to any proceeding in bankruptcy, within Bankr. Act, § 29b, for the specifications must state that the oath was "knowingly and fraudulently made," and it must appear that the oath was as to a material matter, and the requirement that the false oath must have been, not only knowingly made, but fraudulently made, is of the essence, and "intentionally" is not the same as "fraudulently," and the meaning of the two is not the same.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. ⊂⊃413.

For other definitions, see Words and Phrases, First and Second Series, Intentionally; Fraudulently.]

In Bankruptcy. In the matter of John Agnew and Maude A. Sherman, individually and as composing the firm of Agnew & Co., bankrupts. On objections to application of discharge. Specifications of objection in part adjudged insufficient, and in part adjudged sufficient, and the latter specifications referred to a special master.

Adjudication of the above-named bankrupts having been had, and thereafter, and within 18 months thereafter, said John Agnew having died before his application for a discharge, and an administratrix of his estate having been duly appointed, such administratrix applied for the discharge of said John Agnew after one year, but within the 18 months succeeding such adjudication; leave so to do having been granted by this court. Fred H. Justin, trustee, and the Plattsburgh National Bank, a creditor, filed specifications of objection to such discharge, and the administratrix by exceptions and motion challenges their sufficiency. The question here is as to the sufficiency of such specifications of objection to the discharge in bankruptcy of said John Agnew, now deceased.

Weeds, Conway & Cotter, of Plattsburgh, N. Y., for trustee and objecting creditor.

Agnew & Agnew, of Plattsburgh, N. Y., for administratrix.

RAY, District Judge (after stating the facts as above). The specifications of objection filed to the discharge of John Agnew challenge the validity of the order of the judge permitting the filing of an application for a discharge after one year and within the 18 months succeeding the adjudication, and also the right of the administratrix of a deceased bankrupt, duly adjudicated in his lifetime, to file or present a petition for his discharge, and also deny that Amy C. Agnew, who filed the application for discharge, is administratrix. These specifications of objection also present the following grounds for refusing a discharge, but whether sufficiently or not is the question, viz.:

That said John Agnew, while a bankrupt and unable to pay his debts, committed offenses punishable by imprisonment, as specified in section 29b of the Bankruptcy Act, in that he knowingly and fraudulently concealed and withheld from his trustee certain books, property, etc., and that said John Agnew made a false oath in relation to this bankruptcy proceeding, and on matters material therein, know-

ingly and intentionally, and then sets out details thereof; also that John Agnew, with intent to conceal his financial condition and the condition of the firm, destroyed, concealed, or permitted to be destroyed or concealed, records, vouchers, books, and papers of his said firm, and failed to keep or cause to be kept books of accounts and records from which the true financial condition of himself and his firm might be ascertained, etc.; also that said John Agnew obtained money, credit, and property upon materially false statements in writing made by him to various persons, firms, and corporations, for the purpose of obtaining money, credit, and property, etc.; also that at a time subsequent to the first day of the four months immediately preceding the filing of the petition in bankruptcy said John Agnew transferred, removed, destroyed, or concealed, or attempted to do so, his property, etc., with intent to hinder, delay, and defraud their creditors.

The grounds for refusing a discharge, so far as involved here, may be summarized thus:

Offenses Punishable by Imprisonment. (See section 29.) The bankrupt:

(A) Must have knowingly and fraudulently concealed, while a bankrupt, from his trustee, *property* belonging to his estate in bankruptcy.

(B) Must have made a false oath or account in, or in relation to, some (any) proceedings in bankruptcy. (This bankruptcy proceeding.)

Other Grounds. (See section 14.) The bankrupt:

(C) Must have, with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such financial condition might be ascertained.

(D) Must have obtained money or property *on credit* upon a materially false statement *in writing* made by him to any person or representative for the purpose of obtaining *credit* from such person.

(E) Must have, at some time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed, or concealed, or permitted this to be done, some of his *property,* with intent to hinder, delay, or defraud his creditors.

[1-3] Bankruptcy proceedings, once commenced, do not abate on the death of the alleged bankrupt, whether the proceeding be voluntary or involuntary, and whether adjudication has been had, or not, at the time of such death. Bankr. Act, § 8. "The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane." In re Hicks (D. C.) 6 Am. Bankr. Rep. 182, 107 Fed. 910; Shute v. Patterson (C. C. A., 8th Circuit) 17 Am. Bankr. Rep. 99, 147 Fed. 509, 78 C. C. A. 75; In re Parker, 1 Am. Bankr. Rep. 615; In re Miller (D. C.) 13 Am. Bankr. Rep. 345, 133 Fed. 1017; Collier on Bankruptcy (10th Ed.) 249, 250. Therefore the administratrix, if there be one, properly filed the application for a discharge, and the judge had the right, on cause shown, to extend the time in which to file same, but not exceeding 18 months from the adjudication. If it be shown that no letters of administration issued to the person who, as administratrix, filed the application

for a discharge, the proceedings for a discharge will fall, of course; but such appointment, as to its regularity, etc., cannot be attacked in this proceeding. The production of the letters will be sufficient, and establish the fact, unless it be shown they have been revoked. If it be shown that no reason whatever was presented to the judge for extending beyond one year the time for filing the application for a discharge, the order might be void, and vacated on motion. The objecting creditor and trustee have the right to present these questions, however; but the order granting the extension cannot be attacked in this proceeding before the special master or judge, nor can the regularity or validity of the letters of administration. If, as alleged, Amy C. Agnew, who applied for the extension, was not a person entitled to apply for such an order, it can be vacated on motion, but cannot be attacked collaterally; the order having been made and acted upon. It will be incumbent on her to produce and put in evidence the letters of administration. As to the other specifications of objection, they must point out and allege facts, not mere conclusions.

[4-6] To constitute the punishable offense of having knowingly and fraudulently concealed while a bankrupt from his trustee *property* belonging to his estate in bankruptcy, such concealment must have been by the bankrupt after the filing of a petition against him, while a bankrupt, or after his discharge, and the property must have been concealed *from the trustee,* and such property must have belonged to the estate in bankruptcy. The concealment must be knowingly and fraudulently done. The evidence must be clear. It is evident that the specifications of objection should point out or specify what property was concealed, and when, with some reasonable degree of certainty. In re Meyers (D. C.) 5 Am. Bankr. Rep. 4, 105 Fed. 353; In re Hyman (D. C.) 3 Am. Bankr. Rep. 169, 97 Fed. 195; In re Webb (D. C.) 3 Am. Bankr. Rep. 386, 98 Fed. 404. If a person, *before a petition in bankruptcy* is filed by him or against him, in contemplation thereof, puts property out of his hands, intending to put it beyond the reach of his creditors and retain title, so that at some future time he may obtain it or reclaim it, and he commences such concealment prior to the filing of a petition, and continues it thereafter and during the pendency of such bankruptcy proceedings, failing to disclose the truth to his trustee, and then aids in its concealment by transfer to or through others, I am of opinion he has knowingly and fraudulently concealed, while a bankrupt, from his trustee, property belonging to his estate in bankruptcy. These specifications, in substance and somewhat in detail, charge this, and I think them sufficient in these regards. In re Quackenbush (D. C.) 102 Fed. 282; In re Bemis (D. C.) 104 Fed. 672; U. S. v. Cohen (C. C.) 142 Fed. 983; In re Jacobs et al. (D. C.) 147 Fed. 797; In re James (D. C.) 175 Fed. 894; James v. Stone, 181 Fed. 476, 104 C. C. A. 224. It cannot be material that the property really owned by the bankrupt was transferred in fraud of creditors for the benefit of the bankrupt himself prior to the institution of the proceedings. The trustee may reclaim such property, even if the bankrupt himself could not have done so.

[7] The proof may fail to establish the charge; but, if all the facts

and acts alleged are *proved,* the conclusion will inevitably follow. It is expressly alleged that the acts specified were done by John Agnew himself, and that they were fraudulently done. Coming to the specifications of objection that the bankrupt John Agnew made false oaths in relation to some proceeding in bankruptcy, the facts alleged are that, in his schedules filed of the assets and liabilities of the firm of Agnew & Co., he listed as worth $5,000 a note dated June 15, 1908, made by one William Marshall, for $5,000, payable to the order of one Yerrington; that such note had not been protested, or protest waived; that the indorser was not liable thereon, and the maker of such note had been dead several years, and was and had been insolvent for some years prior to his death, and left no estate sufficient to pay such note; that such note was worthless, and known so to be for years by Agnew; that Agnew & Co. held same as collateral security to a note given Agnew & Co. by Yerrington and unpaid; also that said Agnew included in said schedules, verified by said John Agnew, as worth $9,000, a note dated September 15, 1909, due on demand, made by one Yerrington for $9,000, payable to the order of Agnew & Co., on which $750 had been paid; that when such schedules were made said note was worthless, *or* believed so to be by said John Agnew and his said firm; also that in the schedules was included the warehouse of Agnew & Co., valued at $6,000, and that said warehouse was not worth that sum when the schedules were sworn to, and that "John Agnew well knew it was not, and that he was giving it a false and fictitious valuation; that said warehouse was not at that time worth one-half the valuation placed thereon in said schedules."

The sum and substance of these specifications of objection, charging the making of a false oath, is that Agnew "knowingly and intentionally" included in the schedules of assets of the firm a worthless note for $5,000 held as collateral only, knowing it to be worthless; that he also included another note of $9,000, on which $750 had been paid, as worth $9,000, when same "was worthless, or believed so to be by said John Agnew and his said firm," and that he also stated in such schedules the value of the warehouse of the firm to be $6,000, when in fact worth only half that sum, and known to said Agnew to be worth only half the sum of $6,000. The requirement of the statute (section 29b) is that the bankrupt must have "knowingly and *fraudulently*" made "a false oath or account in, or in relation to, any proceeding in bankruptcy." This, of course, refers to the pending proceeding, and not some other bankruptcy proceeding. The specifications of objection must state that the oath was "knowingly and *fraudulently*" made. In re Mayer (D. C.) 195 Fed. 571, 28 Am. Bankr. Rep. 342; In re Bryant (D. C.) 104 Fed. 789, 5 Am. Bankr. Rep. 114; In re Salsbury (D. C.) 113 Fed. 833, 7 Am. Bankr. Rep. 771; In re Cohen (D. C.) 149 Fed. 908, 18 Am. Bankr. Rep. 84; In re Beebe (D. C.) 116 Fed. 48, 8 Am. Bankr. Rep. 597. This must be the *charge* in the specifications, and the oath made must be as to a material matter, which must appear from the specifications of objection. Says Collier (10th Ed., page 343):

"The analogy of this objection to a crime usually compels strict pleading and even stricter proof."

The requirement that the false oath must have been, not only knowingly made, but "fraudulently" made, is of the very essence of the objection. "Intentionally" is not the same as "fraudulently." The meaning of the two words is not the same. The one word is not a synonym of the other. See Soule's Revised Dictionary of Synonyms, "Fraudulent" and "Intentional."

Says Remington on Bankruptcy, vol. 3, 2d Ed., p. 2405, § 2596, discussing opposition to discharge:

"When the act alleged is the commission of one of the offenses prohibited by the Bankrupt Act, it must be alleged to have been done knowingly and fraudulently."

Many cases are cited. In short, there must have been an intent or purpose to mislead, deceive, and defraud the creditors or some of them. See, also, In re Patterson (D. C.) 121 Fed. 921, 10 Am. Bankr. Rep. 371; In re Pierce (D. C.) 103 Fed. 64, 4 Am. Bankr. Rep. 554; In re Kaiser (D. C.) 99 Fed. 689. Errors or mistakes in making up schedules are not infrequent, and so errors in estimating values are of frequent occurrence.

I think the specifications of objection, so far as they charge or attempt to charge the taking of a false oath, are clearly insufficient, and the objections to the sufficiency thereof are sustained. The other specifications of objection are held sufficient and same will be referred to a special master under the rule.

So ordered.

UNITED STATES v. NOPOULOS.

(District Court, S. D. Iowa, Davenport Division. September 15, 1915.)

1. ALIENS ⊂⊃71½, New, vol. 7 Key-No. Series—NATURALIZATION—VACATION—JURISDICTION OF COURT.

Under Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (Comp. St. 1913, § 4374), declaring that it shall be the duty of the United States district attorneys, upon affidavits showing good cause, to institute proceedings, in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or illegality, the federal District Court has jurisdiction of a proceeding to set aside a certificate of citizenship issued by a state court, even if the right of appeal exists, which is negatived.

2. ALIENS ⊂⊃71½, New, vol. 7 Key-No. Series—NATURALIZATION—PROCEEDINGS TO SET ASIDE.

On petition to the District Court to set aside a certificate of citizenship issued by a state court, there is a presumption that the findings of fact by the lower court were correct, which presumption is not conclusive, but any errors of law will be reviewed.

3. ALIENS ⊂⊃68—NATURALIZATION—RIGHT TO.

Under Act June 25, 1910, c. 401, § 3, 36 Stat. 830 (Comp. St. 1913, § 4352), declaring that any person belonging to the class of persons authorized and qualified to become a citizen of the United States, who has resided constantly therein for five years next preceding May 1, 1910, who, because of misinformation in regard to his citizenship or the requirements of the law concerning naturalization, has labored under the impression that he

was or could become a citizen in good faith, and has exercised the right of a citizen or intended citizen, may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization, be granted a final certificate of naturalization, a subject of a foreign sovereign, who entered the United States in 1895, but did not understand that declaration of an intention to become a citizen was necessary, is not entitled to naturalization under the act, which applies only to special cases, as where a child in good faith believes his father was naturalized, and such alien's rights are not enlarged because he was advised by counsel that he was entitled to naturalization under the act.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂⊃68.]

4. ALIENS ⊂⊃71½, New, vol. 7 Key-No. Series—NATURALIZATION—ESTOPPEL.
That the Bureau of Naturalization was represented in the state court when defendant was granted citizenship does not estop the government from having the certificate of naturalization canceled; it not being authorized under the law.

Petition by the United States against John Nopoulos to set aside the order admitting him to citizenship. Order vacated.

Claude R. Porter, of Centerville, Iowa, for the United States.
M. V. Gannon, of Davenport, Iowa, for defendant.

WADE, District Judge. On November 15, 1911, John Nopoulos, a subject of the king of Greece, was admitted to citizenship by the district court of Scott county, Iowa. On September 7, 1912, a petition was filed by the district attorney to set aside the order admitting him to citizenship, upon the claim that said order was procured by fraud and illegality, that he had not prior thereto declared his intention to become a citizen of the United States, and for other reasons.

Defendant admits that he never filed any prior intention to become a citizen of the United States, but claims that he never made application or declaration of intention, because of misinformation in regard to citizenship, or the requirements of the law concerning the naturalization of citizens, and has labored and acted under the impression that he was or could become a citizen of the United States, and has in good faith exercised the rights and duties of a citizen or intended citizen of the United States, because of such wrongful information, and for this reason he claims that he was entitled to citizenship by reason of the provisions of section 3 of the act of Congress approved June 25, 1910. He also pleads as defenses that the court has no jurisdiction, that the proper remedy is by appeal, and that no appeal was taken. He also relies upon an estoppel, because he alleges that the application for citizenship was heard before a court of competent jurisdiction, in the presence of representatives of the government, who examined witnesses, and were heard by the court in opposition to the order made.

[1] The first question to be determined is whether or not this court has jurisdiction. It is contended by defendant that the sole remedy is by appeal. Section 15 of the Act of June 29, 1906, is as follows:

"That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute

proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate * * * was illegally procured. In any such proceeding the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States. * * *"

Speaking of this section, Mr. Justice Pitney, in the case of Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066, said:

"Whether the judicial review of a certificate of naturalization should be conducted in one mode or another is a matter plainly resting in legislative discretion. Section 15 of the act of June 29, 1906 (34 Stat. 601), provides for a proceeding in a 'court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit,' upon fair notice to the party holding the certificate of citizenship that is under attack. No criticism is made of this mode of procedure."

In the case of Luria v. United States, 231 U. S. 24, 34 Sup. Ct. 10, 58 L. Ed. 101, Mr. Justice Van Devanter, speaking for the court, says:

"* * * The section makes no discrimination between the rights of naturalized and native citizens, and does not in any wise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled. Johannessen v. United States, 225 U. S. 227 [32 Sup. Ct. 613, 56 L. Ed. 1066]. See, also, Wallace v. Adams, 204 U. S. 415 [27 Sup. Ct. 363, 51 L. Ed. 547]."

In United States v. Dolla, 177 Fed. 104, 100 C. C. A. 521, 21 Ann. Cas. 665, the court says:

"As the act of 1906 is silent with regard to any appeal or writ of error, while sedulous in placing guards and restrictions around the proceedings and fully protecting the United States by authorizing a suit to annul any certificate fraudulently obtained or improperly granted, it is not to be supposed that it was the intention of the said act to make a reviewable case of every application for naturalization. The mischief to be remedied was not in that line, but was the hasty and improvident way in which many of the courts under the prior laws naturalized aliens without examination and proper proof. Naturalization of aliens is an act of grace, not right, and it is not necessarily a business of the courts. It is lodged in the courts for convenience, and, at the pleasure of Congress, can be taken entirely away and lodged in the Bureau of Commerce and Labor, which is now charged with the supervision of the operations under the act, or with any executive officer, as is now lodged the right and power to determine whether certain aliens shall be permitted to come into the country at all. See Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108. If naturalization is a judicial act, it is because done by judges. We therefore conclude that the action and proceedings of the District Court on Abba Dolla's petition for naturalization did not constitute a 'case' within the meaning of the sixth section of the Judiciary Act of 1891, and this court is without jurisdiction to review the same.

"The same conclusion may be reached on another line. The admission of an alien to citizenship is not only a political act of grace, but the power vested

in the court to grant or order the same is on proof to the satisfaction of the court, with the petitioner and witness as necessary exhibits; that is to say, the question of admission is committed to the discretion of the courts, and discretionary rulings of courts are not reviewable on error or appeal, except, perhaps, when the discretion is shown to have been abused, and abuse of discretion in naturalization cases is provided for in section 15 of the act of 1906, not by error or appeal, but by a direct suit to annul and cancel."

The foregoing case is followed by the Circuit Court of Appeals for the Third Circuit in United States v. Neugebauer, 221 Fed. 938, — C. C. A. —. See, also, State v. Court, 75 Wash. 239, 134 Pac. 916; United States v. Kolodner, 204 Fed. 240, 124 C. C. A. 1; United States v. Cantini, 212 Fed. 925, 129 C. C. A. 445; United States v. Nisbet (D. C.) 168 Fed. 1005.

In United States v. Simon (C. C.) 170 Fed. 682, it is said:

"The respondent contends that this court is without jurisdiction to vacate an order or decree of naturalization granted by another court which had jurisdiction of the subject-matter. But the language of the statute explicitly contradicts this contention. The act gives jurisdiction to cancel the naturalization certificate, not to the court which granted it, but to any court of naturalization in the district of the residence of the naturalized person."

From the language of the act, and the foregoing cases, it cannot be questioned that this court has jurisdiction to entertain this application, regardless of the question as to whether an appeal from the original order would lie or not. So that, even if it were conceded that the government had the right to appeal from an order admitting an alien to citizenship, such appeal, under the language of the act, is not exclusive.

There are cases holding that the right of appeal does exist; but, if it were necessary to decide this question, I should have to hold that the right of appeal does not exist. This court, therefore, has jurisdiction to determine the issues in this case.

[2, 3] The petition filed in this action alleges both "fraud" and "illegality." It is not necessary to determine whether there was actual fraud or not; it is sufficient if the facts show that the applicant was not at the time entitled to citizenship. Of course, in a proceeding of this kind, this court, upon all questions of fact, would indulge in the presumption that the findings of the lower court were correct; but in this case there is no dispute in the facts. It appears conclusively that the defendant was not entitled to naturalization.

That it is the duty of this court to review an error of law by the lower court is clearly established by a number of cases. In United States v. Meyer (D. C.) 170 Fed. 985, it is said:

"Jurisdiction is expressly conferred by section 15 of the act of 1906 to entertain a suit to cancel and set aside a certificate of citizenship procured through fraud or illegality. The superior court of Benton county acted upon the theory that as a matter of law the widow was entitled to admission as a citizen without declaring her intention. But clearly this was an erroneous construction. There was no authority of law for such procedure. It was void for want of it. The court exceeded its jurisdiction, and, having done so, this court, by virtue of the act of Congress, is empowered to cancel the certificate for illegality."

In United States v. Plaistow, 189 Fed. 1010, the court says:

"The term 'illegally procured' is not limited to irregularity, * * * but also denotes the determination by the court contrary to law of the matter submitted to it." Tiedt v. Carstensen, 61 Iowa, 334, 16 N. W. 214.

To the same effect, see United States v. Schurr (D. C.) 163 Fed. 648; United States v. Wayer (D. C.) 163 Fed. 650; United States v. Van Der Molen (D. C.) 163 Fed. 650; United States v. Johnson (C. C.) 181 Fed. 429; United States v. Cantini (D. C.) 199 Fed. 857; Mansour v. United States, 226 U. S. 604, 33 Sup. Ct. 217, 57 L. Ed. 378.

In this action the defendant was born in Greece in 1874. He came to the United States about March, 1895, and has continued to reside here ever since. On August 14, 1911, he filed his petition for naturalization. He never filed any previous declaration of intention to become a citizen. He was admitted to citizenship, because the court held that he was a person entitled to be admitted without previous declaration, under the provisions of section 3, Act June 25, 1910, which is as follows:

"Provided further, that any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States, and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief, may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens." 36 Stat. pt. 1, p. 830.

In order to be admitted under this section without previous declaration, it was necessary that defendant be a person "who because of misinformation in regard to his citizenship, or the requirements of the law governing the naturalization of citizens, has labored and acted under the impression that he was or could become a citizen of the United States, and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States, because of such wrongful information and belief."

The defendant in this case did not come within the intent and meaning of this amendment to the act. This amendment was intended for special cases, which may be illustrated by those cases, which are not uncommon, where a man for years has exercised the rights and duties of citizenship, voting and serving upon juries, and holding office, believing himself to be a citizen, basing such belief upon the assumption in good faith that his father was naturalized, and that by reason of such naturalization his children, under 21 years of age at the time of such naturalization, thereby became citizens, and who then ascer-

tains that his father never was in fact naturalized. This erroneous belief as to naturalization of the parents frequently has its origin in the laws of certain states, which permit an alien, after filing declaration of intention to become a citizen, to exercise the privilege of voting; and his children, knowing that he is voting and exercising the rights of citizenship, assume that he has been naturalized.

But the statute certainly contemplates that the person who claims the right of naturalization under this provision must have exercised "the rights and duties" of citizenship. There is no claim in this case that the defendant ever exercised any of the rights and duties of citizenship. His life has been the life of the ordinary alien. There is no claim of the existence of any fact, or belief, based upon any fact, that he had the right to exercise the duties of citizenship.

Reliance is placed upon the fact that, before filing his petition for naturalization, he was advised by counsel that he had the right to be naturalized under the facts; but the advice of counsel cannot be of greater force than the decision of the court before whom the facts were presented. Under the law, the decision of the court, if erroneous, confers no rights. It would be unjust to assume that there is not ambiguity and uncertainty about the construction of this statute; but, under the authorities and under the facts, I am compelled to hold that the defendant was not a person entitled to naturalization without previous declaration, and that the judgment of the district court of Scott county, admitting him to citizenship, was erroneous, and therefore it becomes my duty to set aside and annul the order of said court admitting the defendant to citizenship, and to set aside and cancel the certificate of citizenship granted to the defendant.

Did any doubt exist in my mind as to my duty in the case, I should resolve that doubt in favor of the ruling of the court granting the naturalization; but I have no doubt, and, though I am reluctant to review the act of the district court of Scott county, my view of the law and the facts leaves no other course open.

[4] I have given consideration to the estoppel pleaded by the defendant, based upon the fact that a representative of the Bureau of Naturalization was present at the time of the hearing before the district court. The statute requires certain conditions to exist in order to entitle a person to naturalization, and no person, and no bureau, and no court, can waive these conditions; therefore the government cannot be estopped by anything shown in the record in this case.

THE JAMES P. McGUIRL.

(District Court, E. D. New York, at Brooklyn. April 15, 1915.)

1. COLLISION ⊂⊃96—VESSEL COMING FROM SLIP AND CROSSING VESSEL—MUTUAL RIGHTS AND DUTIES.

A boat coming out of a slip, blowing a slip whistle, must not only give a proper warning by the slip whistle to everything which is not visible to the lookout of the boat, but must also so conduct itself that it can avoid running down any boat which may be in a position to be misled, or not able to protect itself, at the warning of the slip whistle; also, if in coming out it encounters a boat coming from the right, so as to make the starboard hand rule applicable, it must accept the burden imposed by such rule, and avoid injury to the crossing vessel. On the other hand, the same rule imposes the burden on a vessel coming from the left and near the pier heads of keeping out of the way of any vessel coming out which gives a slip whistle and is properly navigated.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203–205; Dec. Dig. ⊂⊃96.]

2. COLLISION ⊂⊃96—VESSEL LEAVING SLIP—STARBOARD HAND RULE.

The steam vessel Reickert, coming out of a slip after giving the proper slip whistle, came into collision with the tug McGuirl, which was coming up from the left against an ebb tide and within 75 feet of the ends of the piers. On seeing the Reichert, or hearing her whistle, the McGuirl gave a two-whistle signal, and kept on until the Reichert gave alarm signals, and reversed when it was too late to avoid collision. *Held*, that the McGuirl was the burdened vessel, and was in fault for giving the signal she did, and for the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203–205; Dec. Dig. ⊂⊃96.]

In Admiralty. Suit for collision by Jacob C. Reichert against the steam tug James P. McGuirl. Decree for libelant.

Foley & Martin, of New York City (Wm. J. Martin, of New York City, of counsel), for libelant.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for claimant.

CHATFIELD, District Judge (orally). [1] I have two or three ideas about this case that perhaps are worth stating. As a general proposition, a boat coming out of a slip, blowing a slip whistle, must give a proper warning by the slip whistle to everything that is not visible to the lookout of the boat, and also it must so conduct itself that it can avoid running down any boat which may be in a position to be misled, or not able to protect itself, at the warning of the slip whistle. If a slip whistle is blown, and the boat coming out finds a vessel in the way coming from the right, or the starboard, then all the rules of navigation, including the starboard hand rule, put upon the vessel coming out the burden of using the proper maneuver, or choosing the proper course, to avoid any injury that cannot be prevented by the mere giving of the slip whistle.

In the case under discussion the accident happened just after dark, but it was clear weather and lights could easily be observed. The Reichert was coming out of the slip, and apparently blew a slip

whistle. Mr. Swain, who was standing on the open end of the dock, expected the Reichert to come over to the dock and get orders. It appears that the captain of the Reichert was not anticipating receiving orders then, but did hear Mr. Swain, and received the order to lie over night in the Hudson river, and thence proceeded out of the slip to go down the river, just as he would have done if Mr. Swain had not hailed him. Mr. Swain's call was after the whistle had been blown, and Mr. Swain's testimony that the whistle was blown when the boat was part way in (at least 100 feet in the slip), is convincing, because he was watching the boat. That would be one of the things which he could not help but observe, if he were waiting to hail the boat just after the whistle was finished; that is, if he had to wait for the whistle in order to give the hail. The captain of the Reichert, by his testimony that the whistle was given when the boat was within 50 feet of the end of the slip, and that then Mr. Swain delivered his message, and that he saw the McGuirl, all at the same time, and was proceeding at such speed that he ran a boat length beyond the end of the pier, after having blown an alarm and reversed, makes out a worse case for the Reichert than almost anything else in the testimony.

I am compelled to feel, or to hold, that his inclination to put the whistle as close as possible to the time of leaving the slip, and his present explanation of the occurrences, seem to me exaggerated, and I think the facts must have been, on all the testimony, that the whistle was blown further back in the slip, and that a very short time elapsed between the blowing of the whistle and the time when the Reichert reached a point where she could observe the McGuirl; but nevertheless that it was more than 50 feet inside of the end of the slip at the time the whistle was blown. Under those circumstances, if the Reichert had found a boat coming down the river that she could not avoid, and she was in a position where the slip whistle did not give time for that boat to get out of the way, there could be no question that the Reichert was bound to proceed under such control that she could have kept out of the way of that boat. That is exactly the case which Mr. Martin litigated in the matter of McAllister v. The Columbia, 205 Fed. 898, 124 C. C. A. 230.

When, on the other hand, the boat is coming from the left, so that the boat has the craft which is emerging from the slip on her starboard hand, and when she is proceeding so close to the pier heads, particularly against the tide, that an accident may occur, because the slip whistle will not give opportunity for the boats to change their position, and unless the boat coming out is not under control, or proceeds in some way to violate the other boat's rights, then all the rules of navigation (including the starboard hand rule) would determine that the boat which is navigating close to the pier heads has the additional duty of respecting the rights of the boat coming out, and can not rely entirely upon the ability of that boat to control its movements, so as to avoid an accident, if the slip whistle and the other actions of the boat coming out are properly conducted. So I think there is a radical difference between the cases where the starboard hand rule

has no bearing at all, and where the matter is entirely one of special circumstance, and those cases where the starboard hand rule (if it has any bearing) puts the obligation upon the vessel passing along the docks.

[2] In the present case the speed of the vessels does not seem to have had much to do with the accident. The McGuirl was moving up against the tide; but her captain, by giving the jingle bell and seeking to cross the Reichert's bow, did not endeavor to give the Reichert the right of way, and did not assume that the Reichert would seek to avoid the McGuirl by going across the McGuirl's bow. It is apparent, from the fact that the Reichert struck the McGuirl as far aft as the rear of the cabin, that the McGuirl almost cleared the Reichert; therefore, if the McGuirl gave the signal to the Reichert by blowing two whistles, and at the same time went ahead under a jingle bell, and then upon receiving the alarm signal of the Reichert (which was an indication that the Reichert would stop and back, and thus give the McGuirl the greatest possible opportunity to get by, or to get away, if she could do so), if under those circumstances the McGuirl then answered the alarm signal and stopped and backed, that would not be a reason for finding the McGuirl at fault in the ultimate move of stopping and backing; but it would indicate that she did not take the risk of completing a maneuver which she thought would save her, even if it was contrary to rule, and which apparently would have prevented the accident. That leaves her standing strictly upon the question as to whether she did the right thing in the first place; and it seems to me that in every respect she was the burdened vessel. She was coming out from the end of Pier 49. She never reached a point more than 75 feet from the pier end line. She was turning to port at all times after sighting the Reichert, and therefore must have been quite close to Pier 50 when she began to pass that pier, and when the Reichert came in sight. She ran about the same distance—namely, 175 feet—to the point of collision as the Reichert ran; and the movements of the McGuirl against the ebb tide would indicate that she had at least as much speed as the Reichert, which was coming out in slack water, but did not have the jingle bell to overcome when the engines reversed.

I have a strong feeling that when the Reichert started to come out of this slip, and was intending to pass down the river, her first appearance to the McGuirl gave the captain of the McGuirl the impression that the Reichert was intending to turn down the river, and that he therefore assumed that the Reichert would pass inside, and that he could go across her bow, and that he acted accordingly. The positions of the boats and the movements of the Reichert, under the circumstances, and the signals which she gave, were entirely within her rights; and I think the misinterpretation of the captain of the McGuirl as to what the Reichert was intending to do is the real explanation of the collision; that when he started ahead under the jingle bell he was taking a risk which he should not have taken, unless his expectation of the Reichert's movements was correct; and when the Reichert went ahead, and treated the McGuirl as the boat

obligated by the starboard hand rule, by the rule prohibiting navigating close to the pier heads, and by the rule requiring respect for a slip signal, it was too late for the captain of the McGuirl to change his mind, and by beginning to respect the rules remain in the very situation which he thought was dangerous, and which he had tried to run away from.

I think the libelant should have a decree.

In re SILBERSTEIN.

Ex parte W. L. DOUGLAS SHOE CO.

(District Court, S. D. New York. April, 1915.)

1. BANKRUPTCY ⟸384 — COMPOSITION — CONFIRMATION — FAILURE TO KEEP BOOKS.

Confirmation of a composition will not be denied, on the ground that the bankrupt failed to keep proper books, unless an intent to conceal his condition is shown.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. ⟸384.]

2. BANKRUPTCY ⟸384—COMPOSITION—CONFIRMATION—KEEPING BOOKS.

A bankrupt, who did a cash business, kept a merchandise ledger, showing his accounts with all those from whom he purchased on credit. His check book and bank book were practically the only other books kept, and he kept no record of personal loans from friends or connections. *Held* that, as the bankrupt could have determined his condition from the record of his indebtedness and stock and cash on hand, confirmation of a composition offered will not be denied on the ground that he failed to keep books with the intent to conceal his condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. ⟸384.]

3. BANKRUPTCY ⟸384—COMPOSITION—CONFIRMATION—TRANSFERS IN FRAUD OF CREDITORS.

Where a father made payments to his wife and to his daughter for her marriage trousseau, and it appeared that some of the payments at least were made after he knew of his bankruptcy, but it was not shown whether the daughter was not at that time an infant, or that the father did not suppose that he was bound to make provision for her, such payments, being reasonable, will not be held in fraud of creditors, and hence an offered composition will not be denied, on the ground that the bankrupt had made transfers in fraud of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. ⟸384.]

4. BANKRUPTCY ⟸384—COMPOSITION—RIGHT TO.

Where there is no ground for suspicion of collusion, the will of the majority of the creditors governs, and a composition desired by them will be confirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. ⟸384.]

In the matter of the bankruptcy of Isaac Silberstein. On motion to confirm a report of the master, overruling objections to a composition by the W. L. Douglas Shoe Company, and recommending confirmation. Report and composition confirmed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Leopold Freiman and Samuel J. Rawak, both of New York City, for the motion.

Lesser Bros., of New York City (William Lesser, of New York City, of counsel), opposed.

LEARNED HAND, District Judge. [1] The chief emphasis of this opposition lies in the failure to keep certain definite books, from which the creditor insists that the intent to conceal necessarily follows. I agree that the bankrupt need fail to keep only one book in order to lose his discharge; it is enough if he omits it with specific intent, yet that intent, though, of course, it always lies in inference, must nevertheless be proved to exist. It is not enough, however, to show that the necessary consequence of the omission will be to conceal his condition, any more than it is enough to show in a trial for murder that the necessary result of the defendant's act was to kill his victim. In all cases of specific intent, an actual conscious state is one of the elements of the case. This is a distinction more frequently forgotten than one might suppose from its simplicity, and there are undoubtedly authorities which forget it.

[2] In the case at bar the bankrupt did keep a merchandise ledger, which showed his accounts with all those from whom he purchased on credit. He kept very little else, nothing but his check book and his passbook, and it is said that we must infer that he omitted to keep others, because he intended concealment. I cannot agree that the case is like Re Weston (C. C. A., 2d Cir.) 30 Am. Bankr. Rep. 647, 206 Fed. 282, 124 C. C. A. 345, or Re Linker (D. C., N. Y.) 33 Am. Bankr. Rep. 709, 222 Fed. 173, in each of which the bankrupt kept no record comparable with the merchandise ledger, and in one of which he was a broker with complicated relations with many customers. In the case at bar the most important transactions, which were the purchases on credit, were properly recorded. The sales were for cash and paid over the counter; there were no accounts to keep with customers. The purchases from auctioneers were for cash; no account resulted from them. The only thing which to my mind gives any color whatever to the specification is the failure to record the loans from friends or connections, aggregating about $2,000. All these loans were what traders in a somewhat mysterious phrase sometimes call "personal" indebtedness. There is no evidence that at the time of borrowing the bankrupt expected that his books would ever be examined by anybody, or that his failure to make entries was against such future inspection. No motive can be suggested which would have led him to omit them from his records, unless from the outset he was contemplating failure.

I confess I do not see why the bankrupt should have kept more books than he did, or how they would have practically helped him, if he had. Of course, they would tell more about his condition now; but the law does not compel a man to keep for his creditors books that he does not need for himself. There is no such implication when one gets credit. The law does say that, if the debtor omits to keep records for the purpose of concealment, he is at fault; but that is a very different thing. Silberstein had in the ledger all he needed to tell

where he stood; he had his deposit book, the stock on his shelves, his merchandise debts in the ledger, and this "personal" indebtedness in his memory. The last item alone might have needed a record; but his omission I attribute to neglect, as he says.

[3] The next specification relates to the payments of $300 to the wife and $100 to the daughter Anna, in January. It is a little uncertain whether the $100 payment was a single sum or not. On this hearing it appears to have been given in driblets, but when first stated it read like one payment. I cannot see that the payment of $200 in October was shown to be with intent to defraud creditors, because, though business had been bad for the year, and he had paid out much money to Heimlich, we cannot say that he had lost all hope, and that he did not think it would relieve him substantially to get Anna safely off his hands and fastened upon one who could support her.

At the time of the January payments, however, he must have known himself to be at the end of his rope, and the payments must rest upon his right to make them. A father who assigns on the day after his daughter's wedding we can hardly suppose had no premonitions of his position. Was this payment, after he had learned that all hope was gone, a transfer in fraud of creditors? This depends upon whether the payment was upon any existing obligation. Even an insolvent has his duties to his family, and must support them, though his creditors suffer. If it is part of a father's obligation to see his daughter decently married and give her a reasonable outfit, I cannot say that the outlay is in fraud of creditors. One may expect more of a nicer sense of honor, but one may not call it fraud.

The question whether such a payment lies within the father's obligation is the same as whether the infant would have been responsible for it as for a necessary. I have been able to find only two cases of wedding clothes as infant's necessaries, but they both favor the bankrupt here. Sams v. Stockton, 14 B. Mon. (Ky.) 232; Jordan v. Coffield, 70 N. C. 110. The same rule applies to mourning. De Moss v. Giltner, 5 Ky. Law Rep. 691. If an insolvent father keeps within measure, he is not guilty of fraud, when he gives his daughter a trousseau. No one suggests that the amount here given was too large, or that he seized the opportunity as a pretense for giving the girl more than she needed. It is true that on April 22d, Anna was 21 years old; but it does not appear that when married she was not still a minor, or that the bankrupt supposed his duties to her to be different from those of a minor.

[4] The other specifications need little attention. As to the third, it seems enough to say that the sales of 1912 of $40,000 had dropped to $25,000 in 1913, and may well have dropped to $12,000 in 1913, when business was very bad. As to the fourth, it is quite impossible to attribute perjury to such a valuation of property put in bankruptcy schedules. Any one familiar with bankruptcy sales knows that the sale values at auction may easily be 50 per cent. of the purchase price. The only valuable estimate of such values would be an auctioneer's estimate. Besides, the stock was there for any one to estimate for himself. The fifth is trivial. The sixth is answered in my judgment by

the great preponderance of creditors who favor the composition. If there be no ground for suspicion of collusion, the will of the majority ought ordinarily to control upon the wisdom of accepting the offer in composition.

I can see little merit in any of the specifications, except the second; had it not been for that, I should have taxed the disbursements upon the creditor. As it is, I will follow the usual custom and let the bankrupt pay the expense of the reference; no costs.

Report confirmed; composition confirmed.

THE IMP.

(District Court, S. D. New York. June 16, 1915.)

MUNICIPAL CORPORATIONS ⊂=849—WHARVES—SUPERVISION BY CITY—NEGLIGENCE OF WHARFINGER—NOTICE GIVEN BY THIRD PERSON.

The city of New York *held* not liable for injury to other vessels from the capsizing of a sand barge lying in the inner end of a slip by reason of the shallowness of the water at low tide and the presence of stones on the bottom, where the master of the barge was duly notified of the danger at night by an employé of the consignee of the cargo, and advised not to move to the position until high tide in the morning, but disregarded the warning. One of the injured vessels also *held* in fault for moving in and making fast to the barge, although her master knew the danger, and entitled to recover only half damages from the barge.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1806; Dec. Dig. ⊂=849.]

In Admiralty. On petition by Louis J. Schussler, owner of the scow Imp, for limitation of liability, the City of New York was impleaded. On determination of liability for injury to the vessels Governor Hill and Clearfield. Decree against the Imp, and in favor of the City.

The Governor Hill and her master, McDermott, and the Clearfield, each filed a libel against the city of New York and against the barge Imp. The Imp limited its liability and has brought in the city. All proceedings came up for trial on the following state of facts:

The northwest corner of the East River slip formed by the bulkhead and Piers 60 and 61 is shallow. At low water it is nearly uncovered and the bottom has stones. This was known to the city and to several former masters of the Imp, employés of the Phœnix Sand & Gravel Company. It has been the custom for that company to consign cargoes of sand to Keating at the bulkhead of the slip close to the Sixty-First street pier, and the masters had seen to it that the cargo was discharged at high water, so that, if the scow remained at low water, she was light. The Imp's master on his first voyage to Keating's made fast alongside a brick barge, which itself lay on the south side of Pier 61, and well out from the bulkhead. Later he moved in alongside the pier side and about 17 feet from the bulkhead. The Clearfield was alongside of him, further out from the bulkhead and in a place of safety. The Governor Hill lay alongside the bulkhead, but too far south to be in danger from shallow water. As the tide fell the Imp took the ground forward, probably on a stone close to the pier, and slowly heeled to port, being bows in; finally, at about dead low water she turned turtle, dumping her load of sand. As she upset she damaged the Clearfield and the bows of the Governor Hill.

As already stated, the former masters of the Imp had known of the danger and never lay there on a falling tide. On the evening in question one of Keating's men told the master of the Imp, then lying safely alongside the brick barge, not to pull in to the bulkhead till morning, when a gang would be there to unload her on the rising tide, because it was unsafe to lie at low water. The master of the Clearfield, when he left his boat, told the captain of the Imp not to pull in closer; but at that time he had already moved in along with the Clearfield from the brick barge to the pier side. McDermott, the master of the Governor Hill, also says that he told the master of the Imp that the bottom was dangerous; but it may be somewhat questioned whether he did.

James A. Martin, of New York City, for the Imp.

T. C. Jones, of New York City, for the Clearfield.

George R. Allen and Chauncey I. Clark, both of New York City, for McDermott and the Governor Hill.

George P. Nicholson, of New York City, for the city of New York.

LEARNED HAND, District Judge. I find that the Imp got notice from Keating's man, while she lay off the brick barge, that it was dangerous to move in, because the bottom was not safe. Disregarding this, she moved in within 15 or 17 feet of the bulkhead and so got caught. I find that the warning so given by Keating's man was clear enough to exonerate the city, if the city had given it, and that it need have been given in no other terms. These being the facts, I think that the city is not liable, under Schoonmaker v. New York, 167 Fed. 975, 93 C. C. A. 227. In that case the court said that if Cockery, the stevedore, not a city employé, had actually given a warning of the berth's danger, the city would not have been liable at all.

The Clearfield and the Governor Hill urge that the city and the Imp are both liable; the Imp for disregarding the warning, and the city for failing to give warning. In Schoonmaker v. New York, supra, the decree below had been for the city; it had not been for divided damages. When the Circuit Court of Appeals held that they would have affirmed, but for the question of fact already noticed, they therefore said that, if the notice had reached the barge, the city was not liable. Nor is the explanation far to seek, because although the city's breach of duty remains as well, though notice reaches the barge from elsewhere, as though it does not, yet the mere breach of duty will not make the city liable unless it contributes to the injury. If the notice actually received was as full and explicit as it was the city's duty to give, then plainly the city's breach of duty did not contribute to the injury at all, because a second notice in similar terms would not have influenced the Imp's movements. Therefore, as I find that the Imp had the fullest notice necessary, I find that, within Schoonmaker v. New York, supra, the city is not liable.

In Union Ice Co. v. Crowell, 55 Fed. 87, 5 C. C. A. 49, it did not appear that any one had vicariously performed the wharfinger's duty. It did appear that the ship had been somewhat careless in examining the berth, but not that she had got any notice that there was any danger. The case was one where the wharfinger's duty had been performed by no one, and where the ship's negligence had not been such that any one could say that a warning would have been ineffec-

tual. Yet, there being some negligence, the court divided the damages. The Dave & Mose (D. C.) 49 Fed. 389, is almost identical.

It is true that Hartford, etc., v. Hughes (D. C.) 125 Fed. 981, suggests that the notice of a stone in the bottom ought to be more express than to say that, if injured, the owner must be responsible. It may be that this is quite true, but that in no wise affects the question whether it is not ample notice to say that the bottom is dangerous and must not be used at low water. It cannot be necessary to say that the danger consists of stones. Therefore, while I find that the city did not perform its duty as wharfinger, I do find that that duty was performed for it, and that, as its breach did not contribute to the injury, it is not liable.

This results in confining the recovery of McDermott, the Clearfield, and the Governor Hill to the value of the Imp. However, the Clearfield must divide her damages, because she was at fault as well as the Imp. I find as a fact that the Imp did not change her position after she was once tied up beside Pier 61 for the night. My reasons are that she capsized about 15 to 17 feet away from the bulkhead, and that when the Clearfield's master left he says she was about 20 feet away. That she should have been moved forward to the bulkhead and then back I do not believe. McDermott was not a persuasive witness. The master of the Clearfield no doubt thought the berth was safe as the Imp lay, when he left; but he knew of old that the berth was too shallow at low water, and that boats would go aground if too near the bulkhead. Though he warned the Imp not to pull in any closer, he was content himself to leave his boat for the night alongside where she was. In doing so, with the knowledge he had, it seems to me that he shared in risk of her position, and, as he was moored to her, of his own position in consequence. His position is like that of the ship in Union Ice Co. v. Crowell, supra, and The Dave & Mose, supra. He shared in the carelessness of the Imp. This is especially true, as he says that he knew boats that got too near the bulkhead would list as the tide fell. By consenting to the movement of the Imp away from a place of safety and towards a place of danger, he took his chance.

The libels against the city are dismissed, with costs. The claims of McDermott and the Governor Hill against the Imp are allowed in full; that of the Clearfield is allowed to one-half the damages. The city is dismissed from the limitation proceedings.

THE THEMISTOCLES.

(District Court, E. D. New York. July 10, 1915.)

SEAMEN ⊂=29—LIABILITY OF VESSEL FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.

Libelant, who was employed by an agent of a ship in cleaning her after unloading, and was working under a foreman provided by the vessel, by direction of such foreman went upon a hatch cover which was partially open, and by reason of its slippery condition, owing to the use of a hose, he fell through the hatchway and was injured, without negligence on his part. *Held*, that the injury was due to the unsafe place where he was required to work, and that the vessel was liable therefor.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. ⊂=29.]

In Admiralty. Suit by Sidoro Vaccarino against the steamer Themistocles. Decree for libelant.

Cohen Bros., of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for libelant.

Convers & Kirlin, of New York City (John M. Woolsey and Mark W. Maclay, Jr., both of New York City, of counsel), for claimant.

CHATFIELD, District Judge. The libelant in this action was injured by falling through a hatch opening upon the steamer Themistocles then lying at the pier in New York Harbor. He was taken to the hospital and there given what seems to have been proper treatment for his injury, which consisted of a compound fracture of the right femur. While at the hospital, although not delirious, he caused a great deal of trouble to those taking care of him. He was unable to speak the English language and tore off or tampered with his bandages. Infection seems to have occurred after the operation upon the bone of his leg. This infection has caused the wound to be slow in healing and has left a condition which may yet require further operation.

The testimony of the physicians as to the condition of the man would indicate that he was not intelligently responsible, in the usual sense, for his efforts to scratch or get at the wound. If the infection did not occur through his own conscious actions, but was occasioned by accident after operating, it would follow as a natural consequence of such a wound.

The plaintiff was working as one of a gang of men cleaning the steamship Themistocles, after her cargo destined for the United States had been removed. Some of the stores of the vessel, including certain sacks of flour, had been piled upon the hatch covers on the after two-thirds of the hatchway, leaving a clear space, about the width of one hatch cover, between the pile of flour bags and the open forward third of the hatchway. A canvas or rubber tarpaulin which belonged to the ship was on the hatch, but had been folded back from that portion of the hatch which was open.

After the day's work of unloading had been completed, the captain of the vessel, as was customary on such occasions, obtained from the

stevedores a boss, who had done this work before, and who secured some six or eight other men to clean up the vessel. These men were hired by the direction of the captain, and were not working for the contract stevedore. They were set to work upon the vessel, under the immediate direction of the man who obtained them, having been brought by him from the shore, where he went to get them for the work of cleaning up the vessel.

In so far as the evidence indicates the nature of their employment, it would seem that they were working for the vessel and were subject to the directions of the man put in charge of the cleaning by the captain, or of the stewards, whose work had to do with the operations then going on, although the man who employed them received from the ship a total sum greater than the amount of their wages and distributed to them the net amount for which they were hired. In other words, these men seem to have been employés of the ship, and not of an independent contractor.

The accident occurred after the gang of men had led a short hose, fastened to a pipe on one side of the vessel, across the hatchway, over the pile of bags containing flour, and to the gangway upon the other side of the steamer. This hose had been in place for some time, and water was turned on when needed. The testimony shows that the hose sweat, or that the water ran (seeped) back through the outside fabric of the hose. The light in this part of the vessel was not strong, and there was some testimony that more light should have been furnished for the general purposes of cleaning the decks. Two lamps were given, although six were requested.

The amount of light desired for the general work seems to have nothing to do with the charge of negligence involved in the matter of the accident. The libelant was not absolved in any way, by the lack of more lanterns or lamps, from proper care for his safety in performing work with which he was familiar. But the dim light did prevent him from realizing the slippery place where he was ordered to go. In the same way, testimony proved that a chain usually kept around the hatchway had been taken down; but this, again, had nothing to do with what happened after the libelant went out upon the hatch covers.

It appears that the water ceased coming, or did not come readily, through the hose which lay across the hatch, and the boss of these cleaners directed the libelant to go out on the hatch and straighten out a kink which he assumed would be found in the hose. The libelant was familiar with vessels, and knew that the hatch covers, if properly in place, would support him, so that he stepped over the coaming and on the hatch cover nearest where he was standing, and walked up this hatch cover toward the middle, where he says he leaned over to lift up the hose and attempted to straighten out the kink. He remembers nothing more, except that he went down and later awoke in the hospital.

The boss of the cleaners testifies that he saw the man reach over to take the hose in his hands, although one of the witnesses for the claimant testifies that upon a previous interview this boss said that the

libelant kicked at the hose. The slippery condition was the result of accumulated dirt and the moisture from the hose in question, although there is a dispute as to whether this accumulated dirt came from the removal of cargo or from the sacks of flour then present upon the hatch.

The libelant had no warning from any person as to this slippery condition, but must be held to such knowledge as he would appear to have had of the presence of water or dampness upon the tarpaulin, and he plainly knew that there was but the width of one hatch cover between the pile of flour and the open space. If the boss of these cleaners had undertaken the work as an independent contractor, and if the ship had not employed them, the plaintiff could not recover, for no condition imputing negligence to the vessel is shown, except that created by the use of water while the men were at work.

If the libelant had known of the slippery condition, or of the presence of dirt and water, and, without ascertaining the safety of the position in which he stood, kicked at the hose, the accident would have been his own fault. If the libelant did not use reasonable care in a situation with which he was generally familiar, so as to see where he was standing before attempting to pick up and unkink the hose, and if he slipped because of his own failure to use care in what he was doing, then he could not recover. But the facts indicate no such negligence on his part. The plaintiff was working for the vessel, and the person in charge of the vessel for the owners did his work in such a way that an unsafe place was created through the use of this hose. The libelant, without warning or opportunity, by way of lantern or inspection, to ascertain the nature of the place in which he would have to work, was sent to do a particular work which the person representing the owner should have known would be dangerous to do.

Considering his average earnings, his injuries, and his present condition, he will be allowed a recovery of $4,800.

UNITED STATES ex rel. DAVIS v. WALLER.

(District Court, E. D. Pennsylvania. September 1, 1915.)

No. 71.

ARMY AND NAVY ⇐44—NAVAL COURT-MARTIAL—JURISDICTION.

Under Rev. St. § 1621 (Comp. St. 1913, § 2948), providing that the Marine Corps shall be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President, and when so detached they shall be subject to the rules and regulations of war prescribed for the government of the Army, a private in a brigade of the Marine Corps is not, while the brigade is detached for service with the Army by order of the President, subject to the laws and regulations of the Navy, and a naval court-martial has no jurisdiction over him, based on an act constituting an offense both by the rules and regulations of war prescribed for the

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

government of the Army and the laws and regulations established for the government of the Navy.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 90-92; Dec. Dig. ⊂⊃44.]

Habeas corpus by the United States, on the relation of Tonkin S. Davis, against Colonel L. W. T. Waller, United States Marine Corps. Hearing on return to writ, replication and proofs. Conditional relief to relator granted.

John Doyle Carmody, of Washington, D. C., for relator.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. This case comes before us as in effect a case stated to have section 1621 of the Revised Statutes (Comp. St. 1913, § 2948) judicially construed. We dispose of it as a case in which the facts appear of record by the pleadings. There is no controversy over the facts. We state them as presented by counsel for the United States.

The relator belonged to the Navy, serving in the Marine Corps. The brigade in which he was a private was detached for service with the Army by order of the President. While the brigade was on this detached service he was charged with having committed an act which is made an offense both by "the rules and articles of war prescribed for the government of the Army" and by "the laws and regulations established for the government of the Navy." For this he was placed under guard by military order. The next day the brigade to which he belonged was "by executive order withdrawn from the detached service of the Army." Subsequently he was brought "before a naval court-martial for trial," and was tried, convicted, and sentenced for an offense against the laws and regulations of the Navy. When arraigned for trial he entered a plea to the jurisdiction of the court. The plea was based upon the fact that at the time the offense was charged to have been committed he, as a private in a brigade of the Marine Corps, was serving with the Army, his brigade being on detached service with the Army by order of the President, and on the proposition of law that the Marine Corps, when on such service, is not subject to the laws and regulations of the Navy. The plea was overruled. He is now seeking to raise the same question through the present proceedings.

The fact is admitted. The legal conclusion is denied. The officials of the Army and Navy Departments, who have considered and passed upon the question, agree only in this: That it is one of doubt and difficulty, and that it turns upon the meaning of R. S. § 1621. That section is as follows:

"The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army."

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The question is:

"Was the relator subject to the laws and regulations established for the government of the Navy, or to the rules and articles of war prescribed for the government of the Army?"

The arguments presented in support of the opinions given during the court-martial proceedings, and since the finding, are so full and exhaustive that nothing of value can be added, unless perhaps it be this trite observation: The question is one the answer to which must be found by a resort to the statute. The moment one goes outside of the statute, and into the general considerations which surround the subject, there is evoked at once a flood of conflicting arguments of almost equal plausibility, which serve only to produce doubt and confusion of mind. We have stated the question. What answer does the statute give? It is that the relator was subject to the Naval Code unless he was on service with the Army, in which latter event he was subject to the Army Code. There is really nothing to be added to this clear answer. Some aid might possibly be gained by a view of the answer from another angle. This is afforded by transposing the clauses in the sentence quoted from the act. If we do this, we have this as the result:

"The Marine Corps is subject to the articles of war while on service with the Army by order of the President. At all other times it is subject to the laws and regulations of the Navy."

We were impressed with this as the true meaning of the statute at the hearing. At the request of counsel for the United States a decision was withheld awaiting the submission of paper books. These have been submitted. As we interpret that on behalf of the United States, it is an admission that the argument at bar against the above construction of the act of Congress was unsound, but that the jurisdiction of the naval court-martial can be upheld by the distinction between laws which define the offense and laws which constitute the tribunal by which the offense is to be tried. The logic of this is that it admits the relator could not be tried for an offense against the navy regulations and drives us to the position that, although he could be tried only for an offense defined by the articles of war, he might be tried by either a navy or army court-martial.

The argument has more plausibility than convincing power. The distinction between the offense defined by a law and the court constituted by the same law to try the offender is clear enough and is recognized. The argument concedes, however, that the offender cannot be tried for any act not made an offense by the body of laws and regulations to which he is subject. The same laws and regulations which define the offense constitute and designate the court which is to try the offender. By what token, then, can it be said that the offender is subject to some of these laws and regulations, but not to others?

The reference to prior legislation gives no comfort of aid to the argument. Granted that the status of the Marine Corps was at first doubtful. It rendered service at times with the Navy and at times with the Army, without being definitely or permanently attached to

either department. Its "primary" relation was finally settled to be with the Navy, but it had special and temporary army relations when on service with the Army. The early statutes gave recognition to this by providing that it should be subject to the laws and regulations of the Navy, except when detached by order of the President for service with the Army. The present statute added the clause that when so detached it should be subject to the articles of war. This does not weaken, but confirms, the inference that Congress has expressed the meaning above given to the statute. The conclusion reached is that the relator was not subject to the laws and regulations of the Navy, and that a court established by these laws was without authority of law to impose or enforce the sentence pronounced.

This conclusion indicates the disposition which should in the usual course be made of this proceeding. A very practical feature of the case, however, is that through the remission of a part of the sentence imposed it is about to expire. The relator has already undergone imprisonment while his case was under consideration. He was charged with the commission of an act which was an offense under the articles of war. For this he was arrested by being placed under guard by the military authorities. The conclusion reached involves the thought that this restraint of his liberty was in accordance with law. The relator, rather than submit himself to an order of the court, might prefer to await the time of his release by expiration of his sentence. We have therefore concluded to dispose of the question submitted to us as has been done, and grant leave to relator to move for such order as he may ask to have made.

In this connection, also, we wish to add that we have not considered the question of the power of the District Courts to issue writs of habeas corpus in cases of this general character. When the cause was argued at bar, we understood that no such question was raised; but a ruling on the question we have discussed was desired by the authorities of both the War and Navy Departments, as well as the relator. We have therefore disposed only of the question raised at the argument.

NORTHERN PAC. RY. CO. v. FINCH et al.

(District Court, D. North Dakota. August 30, 1915.)

1. STATUTES ⊂=176—TWENTY-EIGHT HOUR LAW—CONSTRUCTION—QUESTION FOR COURT.

The court must construe proviso in Twenty-Eight Hour Law (Act June 29, 1906, c. 3594) § 3, 34 Stat. 607 (Comp. St. 1913, § 8653), providing that, when animals are carried in cars in which they can and do have opportunity to rest, the provisions as to unloading shall not apply, and it is error to submit the meaning of the proviso to the jury.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 255; Dec. Dig. ⊂=176.]

2. CARRIERS ⊂=211—TRANSPORTATION OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—ROOM IN CARS—"OPPORTUNITY TO REST."

The proviso in Twenty-Eight Hour Law, § 3, that when animals are carried in cars in which they have opportunity to rest the provision as

to unloading shall not apply, deals with the structure of a car in which animals are transported, without taking into account the habits of animals, and where a car is so constructed that animals transported therein have no opportunity to rest by lying down, the carrier must unload them, for "opportunity to rest" means opportunity to lie down.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926–928; Dec. Dig. ⊂⊃211.]

At Law. Action by the Northern Pacific Railway Company against J. P. Finch and another. On motion for new trial after verdict for defendant. Granted.

E. T. Conmy, of Fargo, N. D., for plaintiff.
John G. Pfeffer, of Fargo, N. D., for defendants.

AMIDON, District Judge. Finch Bros. are engaged in importing and selling high grade stallions. They shipped 18 horses in an Arms palace horse car from East Joliet, Ill., to Fargo, N. D., over the Chicago, Burlington & Quincy and Northern Pacific Railroads. When the 28-hour period was about to expire, the Burlington Company unloaded the animals, and fed them, and gave them an opportunity to rest, incurring an expense of $27, which is conceded to be reasonable. This charge accompanied the shipment, and was presented by the Northern Pacific Railway Company to Finch Bros. for payment. They refused to comply with the demand, upon the ground that the service was unnecessary, and that the car in which the horses were shipped afforded them "space and opportunity to rest," within the meaning of section 3 of the Act to Prevent Cruelty to Animals. 34 Stat. at Large, p. 607 (Comp. St. 1913, § 8653). The company brings this action to recover the $27.

The car was specially constructed for the shipment of such horses. It contained 18 stalls, 9 fronting towards one side of the car, and 9 towards the other. In the center of the car was a space 5 feet broad, extending the entire width of the car. In this an extra supply of feed was kept, and it was also used for any horse that was taken sick in transit, and was wide enough for a horse to lie down. The stalls were 30 inches wide. The horses were from 24 to 26 inches wide. The partitions of the stalls came up to the lower ends of the horses' ribs, so as to prevent the horses getting together, and yet not prevent their bodies touching each other, and acting as cushions and supports against the jolts incident to the moving of the train. These partitions were padded, so as to protect the horses from abrasion. It is conceded that the horses could not lie down in these stalls. Evidence was offered and received, over plaintiff's objection, that horses would never lie down in transit unless they were sick. This was the case regardless of the character of the stalls. Mr. Finch testified that he had accompanied many shipments of such horses across the ocean, requiring from 11 to 17 days, and that he never knew a horse to lie down during the journey unless it was sick. He also testified that many horses take their rest standing. Testimony of similar import was given by a veterinarian. It was argued, therefore, that the car in question

afforded the horses the only "opportunity to rest" of which they would avail themselves, and for this reason the unloading of the horses was a wholly gratuitous service. The court submitted the case to the jury, saying:

"I am going to submit it to you as practical men, in the light of the evidence as it has been given here, to say, having in view the humane basis of this statute, whether these horses, shut in as they were, conceded to be so confined that they could not lie down, whether they did have proper opportunity for rest, considering the strain of the wear and weariness of the journey. If they did not have proper opportunity for rest, then the carrier was justified, and it was its duty to unload the horses, and it is entitled to recover the $27 in this case. On the other hand, if the horses, owing to the structure of the car, did have proper opportunity for rest, so that there was no justification for unloading them, then the railroad company performed a gratuitous and unnecessary service, and is not entitled to recover."

The jury found for the defendant, and the case is now before the court on motion for new trial.

[1, 2] I think it was error to receive the evidence objected to, and to submit to the jury the question whether the horses had a proper "opportunity to rest." That was in effect submitting to the jury to determine the meaning of the act of Congress. The proviso in section 3 of the statute here involved takes no account of the habits of animals. It deals wholly with the structure of the car. If the car is such that "they can and do have proper space and opportunity to rest," then the requirement in regard to unloading does not apply. It is for the court to say what Congress meant by this language. That question cannot be properly left to the jury. Otherwise there would be as many rules as there are verdicts. In one case the carrier would be held not entitled to expenses incurred in unloading stock. In the next case it would be held subject to a fine for violating the law by failing to unload. The only opportunity to rest that is possible while animals are in transit is the opportunity to lie down. The animals, while they are in transit, have no opportunity to rest standing up. Congress, having in view the muscular and nervous strain to which animals are subjected while on cars, passed the law requiring them to be unloaded at stated intervals. It is too plain for debate that such animals, while they are in the unusual situation in which they are placed on cars in rapid motion, subject to the jolts and jerks of such cars, are subject to a severe nervous and muscular strain, such a strain as they never experience in the stable or field. The only rest possible from that strain while the animals are on the cars is for them to lie down. It is plain, therefore, that the phrase "opportunity to rest" means opportunity to lie down. It may be that horses, owing to their high nervous temperament, would not embrace such an opportunity. Congress, when it passed the statute, evidently thought they would. If it were brought to the attention of Congress that horses would not embrace such an opportunity, I think it quite clear that Congress would then require them to be unloaded for rest. When they are off the car they certainly have an opportunity to be free from the peculiar strain to which they are subjected. Whether they would lie down or not is quite immaterial. In any case it is the duty of the court to ascertain the meaning of the statute as it is framed by Congress. It

deals wholly with the structure of the car, and not with the habits of animals. If the car in which animals are transported is not so constructed that they can have proper space and opportunity to rest, then the law requires them to be unloaded, and in my judgment "opportunity to rest," as used in the statute, means opportunity to lie down. Erie R. R. Co. v. U. S., 200 Fed. 406, 118 C. C. A. 558.

The motion for new trial will be granted.

THE SYLVAN DELL.

(District Court, E. D. New York. April 22, 1915.)

MARITIME LIENS ⊂⊃11, 12—REPAIRS AND SUPPLIES—VESSEL UNDER CHARTER.

Repairs and supplies furnished by libelant to a vessel *held* of a kind which might properly be and which were furnished on the credit of the vessel, and for which libelant was entitled to a lien, although the vessel was being operated by a charterer.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 15, 16; Dec. Dig. ⊂⊃11, 12.]

In Admiralty. Suit by the W. & A. Fletcher Company against the Sylvan Dell. Decree for libelant.

Robinson Leech, of New York City, for libelant.

Burlingham, Montgomery & Beecher and Roscoe H. Hupper, all of New York City, for claimant.

CHATFIELD, District Judge. There is no dispute that the items charged for were furnished, and there seems to be no issue that the amounts are reasonable and correct. The items themselves fall in four classes: First, those relating to the crosshead and piston, which seem to have been at the time undertaken by Mr. Fletcher as a rush order, as to which he did not seem entirely ready to proceed merely upon the authority of the man in charge, but attempted to get in communication with the owner. As to the repairs to the boiler, that seems to be a situation where the person in charge of the boat (in this case the engineer) had the authority, and Mr. Fletcher acted upon the necessity for the repairs and the direction of the engineer. As to the collision, in the same way, the repairs seem to have been necessary, and credit could be extended to the boat upon the authority of the person in charge. As to the fourth item, the supplies, some of the articles would seem to be—or a considerable portion of the items would seem to be—matters as to which, if there was anything to give notice of the fact that the boat was not being operated by the owners, a question might be raised as to whether they were supplies to the boat or merely to the charterers; but, as has been indicated, those items were apparently treated as all the others, both before the charter was terminated and the boats returned, at the bankruptcy of the Glen Island Company, and afterward. So I think that all four bills of items stand in exactly the same category, so far as the case is concerned.

As to the crosshead and the piston, Mr. Fletcher did communicate with the owner, and it appears, according to the charter, that the owner was obligated to make such repairs as that. The owner was also obligated to make such repairs as those to the boiler, and there was certainly ratification to the extent of approving of Mr. Fletcher's going ahead and making the repairs immediately, leaving the question of responsibility unaffected by the choice of the Fletcher Company, for the job.

Before the charter party was surrendered, specific claim was made to the owners for all four sets of items. The owners seem at that time to have recognized the fact that the credit was furnished to the vessel, and that whether or not the Glen Island Company was bound to them, under the charter, for any or all of these items, were questions between the owners and the Glen Island Company.

After the Glen Island Company went into bankruptcy, we have exactly the same situation presented as would have existed if Mr. Fletcher had then libeled the vessel and the ferry company had been confronted with the situation of claiming the vessel away from the possession of the Glen Island Company and from the process under the libel. If that situation had existed and the ferry company claimed the boat, took it subject to the liens that existed against the boat, and then made no claim against the Glen Island Company for anything except the rent—that is, hire—under the charter party, they would certainly estop themselves from any claim that the items in the bills were not furnished on the credit of the boat. So at the time of this conversation in November, the Glen Island Company being in bankruptcy, and no question then being raised, except as to the method of payment, it would seem that Mr. Mingey's statement that, if the Glen Island Company had paid these items out of the back hire for the boat, they would have had no dispute as to the items with the Fletcher Company, is further evidence that the ferry company was unfortunate because the Glen Island Company went into bankruptcy, so that they cannot reimburse themselves under their charter for any portion of the items that the Glen Island Company should pay; but I see no evidence in any of this that the ferry company did not recognize the obligation for the supplies furnished to the vessel, and there is an apparent admission that all the supplies were furnished to the vessel, and that the Glen Island Company was only a contract guarantor for such of them as were, within the terms of the charter, to be paid by the Glen Island Company.

The only other question is whether a notice was given to the Fletcher Company of the existence of a charter, so that any of these items were taken out of the category of being supplied on the credit of the vessel. I think that even under the charter (as I indicated at the beginning) the credit of the vessel might have been relied upon, and that the testimony does not show credit extended to either the chartering party or the owner, except in so far as Mr. Fletcher consulted with Mr. Waters about the crosshead and the piston. I therefore see no reason why the obligation, in the form of a lien against the vessel, is not valid for the entire amount, and why the ferry company should

not be left to such rights as they have against the Glen Island Company, if those have not been affected or lost in the course of the bankruptcy proceeding. So it seems to me to work out that it is a case of misfortune, rather than legal responsibility, so far as the charter affects the case.

I think the libelant may have a decree.

In re LEHFELDT.

(District Court, D. Montana. September 3, 1915.)

No. 1113.

BANKRUPTCY ⊂=400—EXEMPTION—DECLARATION OF HOMESTEAD.

A bankrupt, to whom personalty claimed as exempt from the operation of the Bankruptcy Law has been set apart, may thereafter execute and file for record a declaration of homestead, as required by state law, and have the same set apart to her as exempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⊂=400.]

In Bankruptcy. In the matter of Julia Lehfeldt, bankrupt. There was an order allowing the bankrupt to claim exemption of homestead, and a creditor seeks a review. Affirmed.

Nichols & Wilson, of Billings, Mont., for bankrupt.

Johnston & Coleman, of Billings, Mont., for petitioner.

BOURQUIN, District Judge. Originally the bankrupt claimed exemption of only wearing apparel, and it was set apart. Later she executed and filed for record a declaration of homestead, and by order the referee allowed amendment to claim exemption of the homestead, and directed that it be set apart to her. A creditor seeks review.

In principle the case is indistinguishable from In re Mayhew, 218 Fed. 422, 134 C. C. A. 210, to which as the decision of a superior tribunal it is the duty of this court to conform. But it is believed the dissenting opinion in the Mayhew Case, quoting from In re Youngstrom, 153 Fed. 98, 82 C. C. A. 232, is the better doctrine; and diversity of opinion in respect to the question may justify brief reasons for this belief.

Construing the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), the Supreme Court says the time when the bankruptcy petition is filed is the "line of cleavage with reference to the condition of the bankrupt estate"; that all property then passes to the trustee, but he is then vested with title to only nonexempt property and property to which exemption is waived; that exempt property is that which at the time said petition is filed is not subject to levy and sale under state law; and that all property that at said time is so subject to levy and sale upon judicial process is nonexempt, and title thereto vests in the trustee. Andrews v. Partridge, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929; Railway Co. v. Hall, 229 U. S. 515, 33 Sup. Ct. 885, 57

L. Ed. 1306; Smalley v. Langenour, 196 U. S. 97, 25 Sup. Ct. 216, 49 L. Ed. 400; Security Co. v. Hand, 206 U. S. 425, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789.

There is nothing in the Bankruptcy Act providing for divestiture of the trustee's title by subsequently created exemptions, or at all, save in the instances of composition and of dower and allowances fixed by state law for widows and children of decedents, in case of the bankrupt's death. If the exemption does not exist when the bankruptcy petition is filed, title to the property vests in the trustee for the benefit of creditors, and its status then controls its disposition throughout, save as last aforesaid. "Expressio unius," etc. Montana's statutes in respect to homesteads are like California's, and provide that a married person or head of a family residing upon premises may convert them into a homestead by executing and filing for record a declaration of homestead, from and after which filing the premises constitute a homestead, exempt from levy and forced sale save in satisfaction of judgments obtained before said declaration was filed and which are liens upon the premises.

Marriage or headship of a family and residence are conditions or qualifications that authorize a homestead exemption to be created by statutory acts, viz., by execution and filing for record a declaration of homestead upon the premises. Although a person is qualified therefor as aforesaid, there is no homestead—no exemption until declaration filed; and the homestead takes effect only from such filing. Vincent v. Vineyard, 24 Mont. 207, 61 Pac. 132, 81 Am. St. Rep. 423. Since in the instant case no declaration of homestead had been filed when the bankrupt petitioned for adjudication, the premises involved were then open to levy and sale under state law, and so were not then exempt. Title then vested in the trustee, creditors' rights then attached thereto, and the subsequent filing of the declaration was impotent to create a homestead exemption, to change the status of the property and the condition of the estate, and to divest the trustee's title to the prejudice of creditors whose rights had theretofore vested. If a homestead exemption can be created by a declaration executed and filed for record subsequent to petition for adjudication, then on principle it ought to be created by marriage or headship of a family and residence subsequent to such petition; for if one indispensable statutory condition or qualification or requirement can be supplied after petition, why not another, or all of them? It is not, as assumed in the Mayhew Case and those cited by it, a mere matter of an exemption existing when petition for adjudication was filed, and thereafter perfected, nor is it simply time and manner of claiming a pre-existing exemption, nor is it merely subsequent determination by the bankruptcy court of claim of pre-existing exemption; but it is a case of creation, after such petition filed, of an exemption not theretofore existing.

In so far as the amendment of 1910 to section 47, Bankruptcy Act,[1] is concerned, it is not perceived that it is material. Certainly, if all the bankrupt's title vested in the trustee by section 70[2] of the act does not serve to prevent subsequent creation of exemptions, the mere lien

[1] Comp. St. 1913, § 9631. [2] Comp. St. 1913, § 9654.

created by said amendment cannot render such service. By the Bankruptcy Act it is property of exempt status when the petition for adjudication is filed, and not property that then might have been, but was not, given such status, that is allowed to the bankrupt; and neither liberality of construction nor the condition of a bankrupt warrants the court to depart from the terms of the act to create for a bankrupt a homestead exemption he was too indolent and neglectful to create, as he easily might have, for himself.

But to conform to the Mayhew Case, as in duty bound, the order of the referee is affirmed.

In re BERLIN DYE WORKS & LAUNDRY CO.

(District Court, S. D. California, S. D. July 6, 1915.)

No. 1367.

BANKRUPTCY ⇐315—CLAIMS—"FINAL JUDGMENT."

Under Code Civ. Proc. Cal. § 942, providing that an appeal from a judgment directing the payment of money shall not stay execution unless a supersedeas bond is given, a judgment for damages for personal injuries, from which an appeal had been taken without bond, is a final judgment, on which a claim against a bankrupt's estate can be based.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 488, 491; Dec. Dig. ⇐315.

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

In Bankruptcy. Proceedings against the Berlin Dye Works & Laundry Company. On claim of C. K. Douglas against the bankrupt for the amount of a judgment recovered by him. Claim allowed.

E. B. Drake, of Los Angeles, Cal., for plaintiff.

W. T. Craig, Carroll Allen, Dave F. Smith, Benjamin E. Page, and A. Henderson Stockton, all of Los Angeles, Cal., for trustee.

TRIPPET, District Judge. C. K. Douglas brought suit against the Berlin Dye Works & Laundry Company, in the superior court of California, for injuries to his person resulting from a tort. He obtained judgment against the defendant, and the defendant appealed therefrom without giving a supersedeas bond. Thereafter an involuntary petition in bankruptcy was filed, and the defendant was declared a bankrupt. Douglas presented a claim against the bankrupt estate for allowance, based upon said judgment, while the appeal was pending. Whether the claimant's judgment is provable depends upon whether or not it is a final judgment.

Section 942 of the Code of Civil Procedure of California provides that, if the appeal be from a judgment or order directing the payment of money, such as this judgment is, it does not stay the execution of the judgment unless a bond is given for said purpose. It has been held by the Supreme Court of California that, during the time allowed

for an appeal, and while an appeal is pending from a judgment, it cannot be introduced in evidence, and the statute of limitations does not run against a suit thereon. Feeney v. Hinckley, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290. This case was decided by a divided court. The great weight of authority is to the effect that the pendency of an appeal will not deprive the plaintiff of his right to sue on the judgment, unless there has been a stay of proceedings. 23 Cyc. 1504, 1563; 2 Cyc. 974; Taylor v. Shew, 39 Cal. 536; Dowdell v. Carpy, 137 Cal. 338, 70 Pac. 167; Rogers v. Superior Court, 126 Cal. 183, 58 Pac. 452; Cook v. Rice, 91 Cal. 668, 27 Pac. 1081; Dore v. Southern Pacific Company, 163 Cal. 195, 124 Pac. 817.

The case of Taylor v. Shew, supra, was an action upon a judgment obtained in New York, from which an appeal had been taken without a supersedeas bond. The Supreme Court of California said:

"In the absence of any proof to the contrary, the presumption is that the effect of the alleged appeal by the laws of New York is the same as in this state; and in this state such appeal would not stay execution or proceedings for the collection of the amount of the judgment appealed from, pending the appeal, nor destroy or weaken the force and effect of the record of the judgment as evidence of the facts or matters necessarily determined thereby."

This opinion of the Supreme Court of California has never been reversed or criticized. It has been cited with approval in many jurisdictions, and the Supreme Court of California has approved it. The case is in conflict with the decision in Feeney v. Hinckley, supra, and the cases relied upon in that decision. To say that an action may be brought upon a judgment from which an appeal has been taken without a supersedeas bond, but that such judgment could not be introduced in evidence, would be a paradox. It would be keeping the word of promise to the ear and breaking it to the hope.

The matter, however, was before the Supreme Court of California in a more recent decision than Feeney v. Hinckley. In Dowdell v. Carpy, 137 Cal. 338, 70 Pac. 167, the court said:

"On the appeal taken from that judgment no bond staying execution had been filed, and, treating it as a deficiency judgment in accordance with the stipulation, there was, then, nothing to prevent an action being brought on such judgment at any time after it was rendered. Taylor v. Shew, 39 Cal. 536 [2 Am. Rep. 478]; Clark v. Child, 136 Mass. 344. The judgment was a proper basis for an action; and as it arose out of the same transaction and is connected with the subject of this action, it was clearly the proper basis for a counterclaim herein. Code Civ. Proc. § 438."

The judgment rendered in favor of the claimant was final, and created an absolute liability of the bankrupt. Notwithstanding the appeal from the judgment, it could not be reversed or modified. This is necessarily so because the judgment contained no error or infirmity upon which the Supreme Court could predicate a reversal or modification. The question is asked, however: How is this court to know whether or not it would be reversed or modified until the appeal is finally disposed of? That can be ascertained by an inspection of the record, or by postponing the matter until the Supreme Court acts. The referee pursued the latter course in this matter. This practice was approved in Bank of America v. Wheeler, 28 Conn. 433, 73 Am.

Dec. 683, Dawson v. Daniel, Fed. Cas. No. 3,668, and by the Supreme Court of California in Dore v. Southern Pacific Company, 163 Cal. 195, 124 Pac. 817.

The claim will be allowed.

THE COROZAL.

(District Court, D. Massachusetts. April 15, 1914.)

No. 670.

SHIPPING ⊂=84—LIABILITY OF VESSEL—INJURY TO STEVEDORE'S MAN.

While a barge, loading ties on a steamer, lay alongside, the ends of projecting ties on the barge caught under some protruding hinges on the side of the vessel, and libelant, a stevedore's employé, working on the barge, was injured. He was not working under the officers of the ship, which had nothing to do with the loading, except that a mate, at the request of the stevedore, directed the placing of the barge, which was not dangerous in itself, if she was handled with proper care. The steamer was properly constructed. *Held*, that she was not chargeable with any negligence which rendered her liable for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. ⊂=84.]

In Admiralty. Suit by Clinton Moffett against the steamship Corozal. Decree for respondent.

Russell, Moore & Russell, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimants.

MORTON, District Judge. The libelant was hired and controlled by Smith, the stevedore, and had no contractual relations with the Corozal or her owners. He was engaged at the time of the accident solely on the business of his employer.

Nothing belonging to the steamer broke, or was unusual or improper in construction. The accident did not occur on board her. The negligence which caused it consisted in placing the barge alongside the Corozal without taking any precautions to protect the men on the barge—of whom Moffett was one—against the danger of the projecting ends of the ties catching under the hinges on the steamer as the barge rose on the waves. These hinges were not in themselves defective or dangerous, and were perfectly obvious. The barge ought not to have been brought and kept close to them, under the existing conditions, until they had been properly guarded. The accident was thus caused by improper management of the barge.

The barge was in the general control of her captain and Smith. It was Smith's duty to see that it was safe for his men to work on it. The steamer apparently had nothing to do with the ties until they were put on board her by the stevedore. Her officers did not exercise any control over Smith's men on the barge, nor undertake to give orders as to the management of the barge, except at Smith's sugges-

tion, and in order to assist him. Smith says that the mate of the Corozal placed the barge at Smith's suggestion and according to his convenience. Both the steamer and the barge were concerned in having the latter properly placed alongside, so that neither should be injured. Mundy, the captain of the Corozal, and Smith, both testify, in substance, that the master of the barge was looking out for her, and that Mundy was looking out for his steamer. I think this is a substantially accurate description of the situation. The action of the mate of the Corozal in superintending the placing of the barge seems to have been unpaid, voluntary assistance to Smith, rather than anything which the steamer or her crew was obligated to do. The mate acted as a volunteer in forwarding the work in hand.

If the Corozal is liable, it must be solely because of this conduct of her mate, acquiesced in by her master, in undertaking to place the barge alongside for the stevedore, and at the stevedore's request. Of course, the steamer might have contracted to perform the work of bringing the barge into position alongside. If she had done so, and on that account had taken control of placing the barge, she would have been bound to do the work in a proper and careful manner, and any person who was injured by negligence in doing it could recover from the steamer; but that is not this case. The evidence, as a whole, fails to establish any agreement by the steamer to place the barge, or such assumption of control over it by the steamer as to make the latter responsible for the proper management of the barge and for the safety of those on board it.

It is also true that one who does an act which necessarily involves great and obvious peril to another cannot excuse himself by saying that he acted at the request of a third party. But laying the barge alongside created no danger to the men on it, unless the ends of the ties struck the projecting hinges. It was the business of those in charge of the barge to see that danger from this source was properly guarded against. It therefore does not seem to me that bringing the barge alongside the steamer was, in and of itself, so imminently dangerous to the men on the barge as to justify holding that the officers of the Corozal were negligent for having anything to do with it. Even if they were, that would not make the Corozal liable, unless it were found that she had undertaken to manage the barge in bringing and keeping it alongside.

The decisions cited for the libelant, of which Pioneer S. S. Co. v. McCann, 170 Fed. 873, 96 C. C. A. 49, and The Rheola (C. C.) 19 Fed. 926, are typical, relate to defects in the structure or appliances of the loading vessel, and are clearly distinguishable from this case. No decision holding the loading vessel responsible under facts similar to those here shown has been called to my attention. See The Clan Graham et al. (D. C.) 163 Fed. 961; The William F. Babcock (D. C.) 31 Fed. 418; The Thyra (D. C.) 114 Fed. 978; The Auchenarden (D. C.) 100 Fed. 895.

That the plaintiff's injury was due to negligence, and that he did not assume the risk of it, are clear; but, for the reasons stated, I conclude that neither the Corozal nor her owners are responsible.

Libel dismissed.

UNITED STATES v. MARSHALL et al.

(District Court, S. D. New York. April 28, 1914.)

UNITED STATES ⊂=67—ACTION ON BOND OF CONTRACTOR FOR PUBLIC WORK—INTERVENTION.

The provisos in Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), limiting the time within which suit may be brought on the bond of a contractor for public work, and requiring notice of such suit to be given to all known creditors, apply only to suits brought by creditors as therein authorized, and do not limit nor affect the right of creditors to intervene in a suit brought by the United States.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. ⊂=67.]

In Equity. Action by the United States against Edward G. Marshall and others, impleaded with the Illinois Surety Company and others, intervening defendants. Decree for interveners.

Decree affirmed, 225 Fed. 760, —— C. C. A. ——.

H. Snowden Marshall, U. S. Dist. Atty., of New York City.

Nelson L. Keach, of New York City, for defendants.

LEARNED HAND, District Judge. Upon final hearing precisely the same record appears as before, and there is no reason to change the rulings made at the time. The objection that the claims, except Fehr's, were not filed in time, seems to me clearly to be unsound under the language of the second proviso, which limits intervention to a period of one year only when the suit is instituted by creditors.

The objection that the interveners should have given notice under the last proviso seems to me also to be bad, though not so certainly. Judge Witmer has held that this proviso is a necessary condition to a valid suit by a creditor (United States v. Stannard [D. C.] 206 Fed. 326), and Judge Veeder has held that the only period within which such a suit can be brought is the two months and one week immediately following the first six months after completion. Judge Bourquin (United States v. Bailey [D. C.] 207 Fed. 782) has apparently held otherwise. On the other hand, Judge Philips has held (United States v. McGee [C. C.] 171 Fed. 209) that the last proviso does not apply to suits brought by the United States, and I agree with that ruling.

If the last words of the proviso, "before the time limited therefor," mean before one year is up, then clearly the proviso does not apply to such suits, because the United States certainly may sue more than nine months after completion; there being no limitation of time upon its rights, except the general statutes of limitation. As I pointed out before, it would be impossible in such a case to publish "before the time limited therefor." If, on the other hand, these words mean "before the time limited therefor in the notice," it is possible to say that the United States is subject to that proviso, though it may sue more than a year after completion.

In that case it would be obliged, like a creditor who began suit, to advise all other creditors, so that they might be able to intervene. Now,

it is scarcely likely that Congress meant so to limit the right of the United States to sue for its own benefit upon its own bond. Such a suit did not require any act of Congress; it arose at common law, and Congress would hardly have intended to subject the United States to the duty, as a condition precedent, of bringing in all creditors. Besides, the very words of the proviso are limited to suits "instituted under this act," and if, as I have suggested, this suit lay at common law on the bond, these words are not applicable. Some clearer intention than this should be found to limit the rights of the sovereign.

It is true that the right of creditors to intervene in suits brought upon the bond by the United States does depend upon the statute; but the proviso does not touch intervention. If it touches the suit at all, it requires the plaintiff to begin with notice (United States v. Stannard, supra); not the interveners. It has been decided that, if the suit be faulty at the outset, a subsequent intervention will not save it (United States v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893 [April 6, 1914]):

"These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms."

If an intervener has not the power to cure by giving notice, he can hardly have the responsibility. There is nothing in the act which suggests that any notice should be given by a subsequent intervener. Justice Day, on the contrary, in the case quoted says:

"No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors."

This implied that such notices are only required in creditors' suits and only when begun. I believe that the right to intervene is untrammeled by all the provisos when the suit is by the United States.

In view of the fact that the suit is upon the bond at common law, and not under the act, it should be remembered that I have not decided that the defendant was entitled to sue in equity, but only that, since the point was raised, it was simpler with the consent of the interveners to avoid any question by acceding to the demand of the surety.

A decree may pass for the interveners, with costs.

NICHOLS v. ELKEN et al. SAME v. FARMERS' & MERCHANTS' NAT. BANK OF HATTON, N. D. SAME v. HEGGE.

(Circuit Court of Appeals, Eighth Circuit. August 23, 1915.)

Nos. 4372–4374.

1. BANKRUPTCY ⊂⊃166—PREFERENCES—INSOLVENCY—NOTICE.
Mere suspicion that a debtor was insolvent is not sufficient to charge creditors with notice of insolvency and make the debtor's payments a preference; but there must be evidence of facts sufficient to put a prudent person on inquiry, which, if pursued would show insolvency.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⊂⊃166.]

2. APPEAL AND ERROR ⊂⊃1009—REVIEW—FINDING OF CHANCELLOR.
When the chancellor has considered conflicting evidence, and made his findings and decrees thereon, they are presumptively correct, and unless an obvious error of law or some serious mistake in the consideration of the evidence appears the findings must stand.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⊂⊃1009.]

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Separate suits by George E. Nichols, as trustee in bankruptcy of Irving Tilden, a bankrupt, against M. L. Elken and another, a copartnership, against the Farmers' & Merchants' National Bank of Hatton, N. D., and against O. M. Hegge. In each case the bill was dismissed, and complainant appeals. Affirmed.

These are separate suits by the appellant in each case as trustee in bankruptcy of Irving Tilden, a bankrupt, to recover from the several defendants a preference alleged to have been paid by the bankrupt to each in violation of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544. The cases are substantially the same in their facts, except in the amount of the alleged preferences. In each case the bill was dismissed on final hearing at the complainant's costs for want of equity, and he prosecutes separate appeals to reverse such decrees.

Watson & Young and E. T. Conmy, all of Fargo, N. D., for appellant.

F. W. Ames, of Mayville, N. D., for appellees.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

REED, District Judge. As each case involves substantially the same questions, they may be disposed of in one opinion.

Irving Tilden was adjudicated a bankrupt by the District Court of the United States for the District of North Dakota, November 29, 1909 (whether upon his own petition or the petition of creditors does not appear), and the plaintiff, George E. Nichols, was in due time appointed trustee of his estate. At the time of his adjudication the bankrupt lived in Fargo, N. D., and previously lived in Hatton, that state, not far from Fargo. He was a building contractor, and for some

time had been engaged in buying real estate at or near Hatton and Fargo and building thereon, or otherwise improving the same, and selling it. In such dealing he had incurred liabilities to banks for borrowed money, and to others for building material and other purposes, to the amount of some $85,000, which he was unable to pay, and was insolvent, and had been for some time prior to the adjudication in bankruptcy. Among the banks to whom he had become indebted in quite large amounts was the Farmers' & Merchants' National Bank of Hatton, N. D., the defendant in one of these cases, and to the defendants M. L. Elken and G. L. Elken, a copartnership doing business under the name of Elken Bros., one of whom was an officer of said bank, and to the defendant O. M. Hegge, of Hatton. He also became indebted to the First National Bank of Fargo for nearly $7,000, beginning in July, 1909, of which bank the appellant trustee is, and was when such indebtedness was incurred, the cashier; also to other banks in Fargo and nearby cities.

About November 1, 1909, the bankrupt paid from his estate to the defendants Elken Bros. some $2,000 to apply upon his indebtedness to them; and to the defendant Farmers' & Merchants' National Bank $1,571 upon his liabilities to that bank, and to the defendant Hegge $450. The trustee, by proper petition or bill of complaint in each of the cases, alleged these several payments to be voidable preferences under the Bankruptcy Act, and asks judgment or decree against them, respectively, for the amount of the payment to each. Each defendant admits the adjudication of Tilden as a bankrupt and the payment by him to them respectively of the amounts and at the time as alleged, but denies that it was a preference or otherwise in violation of the Bankruptcy Act, denies knowledge of or reasonable cause to believe that Tilden was insolvent when such payments were made, and each alleges that it was received by him or it in good faith as a payment upon the indebtedness of Tilden to them respectively.

That Tilden was insolvent when these payments were made to the several defendants cannot be successfully controverted under the testimony. The only question for determination therefore is: Did the several defendants, or the person acting for them in the receipt of such payments, know or have reasonable cause to believe that Tilden was insolvent, and that a preference to the respective defendants would be the result of such payments? This is a question of fact, which must be determined from the evidence applicable to the respective cases.

It was agreed that the testimony taken should apply as far as applicable to all three of the cases, the same as though taken in each case separately. George E. Nichols, the complainant, testified that he was appointed trustee in bankruptcy of Irving Tilden December 16, 1909; that the schedules showed his liabilities to be about $85,000; that from his assets he had collected some $3,400, and had paid upon claims allowed against his estate some $2,100; that aside from the claims involved in these suits he knew of no other assets; that it is pretty hard to state for how long the bankrupt had been insolvent, but he would say six or eight months before his adjudication; that a large part of the assets turned over to him as trustee were equities

in lands which the bankrupt had bought on contracts and made small payments thereon; that the balance due was so large that the bankrupt could not raise money enough to take up the contracts; that the taxes even had not been paid; that, acting for the bank of which he (the trustee) was cashier, he had made loans to Mr. Tilden, the first $1,200 on July 7, 1909; the second $2,400 on October 26, 1909, and the next $3,200 November 1, 1909, for which Tilden gave him nothing but forged notes for security; that the larger part of Tilden's indebtedness grew out of these land deals, probably within a year or a year and a half prior to the bankruptcy; that Tilden moved to Fargo some six or eight months before the adjudication. Outside of his liabilities on these lands he knew of no other large indebtedness. In addition to those liabilities was his indebtedness to the defendants in these suits and to banks in Portland, Mayville, Northfield, Hatton, and Fargo.

The plaintiff took the deposition of Tilden in Texarkana, Tex., in February, 1914, where he was then residing, and therein he testified that in 1908 and 1909 he resided at Hatton and Fargo, N. D.; that on and prior to November 1, 1909, he resided at Fargo, and was then insolvent, and remained so until he was adjudicated bankrupt on November 29th; that he owed the Farmers' & Merchants' National Bank a note for $2,700, which was not due until November 10th; that he then owed M. L. Elken individually $1,100, and Elken Bros. two notes for $1,100 each, and one for $1,200, that were past due. He also owed the defendant Hegge a balance of about $450; that he placed as collateral to the note of $2,700 to the defendant bank, about $1,800 of forged notes, that is, notes of third parties whose names to them he had signed without their authority; among these was one purporting to be signed by C. J. Storkson, to mature November 1, 1909. The notes given to M. L. Elken and Elken Bros. were also secured by notes, some of which were forged. He also testified, in substance, that the defendants Elkens and the cashier or assistant cashier of the defendant bank and Hegge knew of his insolvency at the time the payments were made to them respectively. It was admitted on the hearing that Tilden had been convicted of the offense of forging these notes, or some of them. The officers of the defendant bank, Elkens, and Hegge testified that they did not know of Tilden's insolvency when the payments were made to them, respectively, or know of the forged notes until after such payments were made. The forgeries were discovered about the 1st of November. There was a sharp conflict in the testimony. If that in behalf of the trustee in each case is to be believed the decree should have been for the plaintiff, and the cases should be reversed; if that in behalf of the defendants is to be believed, the decrees are right and should be affirmed. It would serve no useful purpose to further state or review the testimony, for it is such as not likely to become a precedent for future cases, and would be of interest only to the immediate parties interested in these suits.

[1, 2] Mere suspicion, of course, is not sufficient to charge the defendants with knowledge of, or reasonable cause to believe, Tilden's insolvency at the time of these payments; but there must be evidence

of facts sufficient to put a reasonably prudent person upon inquiry, which, if pursued, would show that Tilden was insolvent and that a preference would be the result of making these payments. Tilden had been convicted of forging some, at least, of the notes deposited by him with the defendant bank and the Elkens as security for the loans made to him by them, and his testimony is in conflict with the testimony of the defendants. The testimony of defendant Hegge, who acted for himself in his own transactions with Tilden, and to some extent at least for the defendant bank and the Elkens in the matter of the payments to them, respectively, was taken by deposition in the fall of 1913, but was read by the defendant as cross-examination only under the statute of North Dakota. He was also examined orally in open court. He testified that he acted as agent for Tilden in his building dealings at or near Hatton. The testimony of the other defendants was taken orally in open court. The trial court was therefore in a better position to determine the weight of the testimony of the respective parties and witnesses in these suits than this court is. The rule is firmly established by the Supreme Court and has been repeatedly applied by this court: That when the chancellor has considered conflicting evidence, made his findings and decree thereon, they will be held by appellate courts to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, the findings must stand. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; De Laval Separator Co. v. Iowa Dairy Separator Co., 194 Fed. 423, 114 C. C. A. 385.

The trustee testified that he, acting for the First National Bank of Fargo of which he was cashier, personally loaned to the bankrupt July 7, 1909, $1,200, and on October 26 and November 1, 1909, $3,600. This was about the time that Tilden made the alleged preferential payments to the defendants. It is incredible that he would then have made such loans, if Tilden was generally known to be insolvent, or there was reasonable cause in business circles in Fargo or Hatton for believing him to be. This is a circumstance well worthy of consideration in determining whether or not the defendant bank and Elken Bros. knew or had reasonable cause to believe that Tilden was insolvent at the time of such payments. A careful reading and consideration of the entire evidence fails to convince that any error of law or mistake of fact intervened in the decision of the trial court of the questions presented in either of these cases. If the testimony of Tilden was not considered by the court, as it well might not have been, there is nothing of substance to sustain the contention of the trustee as to the defendant bank and Elken Bros.

There is less reason for upholding the decree in favor of Hegge than in either of the other cases, for upon his own testimony which is quite evasive and in many instances inconsistent, there is much reason for holding that he knew or had reasonable cause to believe that Tilden was insolvent and that the payment to him would result in a preference; but as the trial court upon all the facts found in his favor we will not under the rule just announced, disturb the

finding in the case against him. In fact, if the decree in either of the cases had been the other way we would not feel disposed to disturb it. The decree, therefore, in each of the cases should be affirmed.

And it is accordingly so ordered.

MELLON v. ST. LOUIS UNION TRUST CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. July 7, 1915.)

No. 4402.

1. MECHANICS' LIENS ⊂=5—STATUTE CREATING—CONSTRUCTION.

Mechanics' liens, although unknown to the common law, are not for that reason to be strictly construed, but liberally, to carry out the intention of the Legislature to protect workmen, contractors, and materialmen.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. ⊂=5.]

2. COURTS ⊂=366—FEDERAL COURTS—STATE DECISIONS.

In construing a state statute, the federal courts will follow the construction placed thereon by the highest court of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⊂=366.

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

3. MECHANICS' LIENS ⊂=184—PROPERTY SUBJECT—INTEREST OF LESSEE—STATUTE.

Under Rev. Laws Okl. 1910, § 3862, providing that, if the title to land is not in the person, with whom a contract for the erection of a building thereon is made, but it is leased and unimproved, a lien shall be allowed on the buildings and improvements separately from the real estate, where unimproved land was leased, the lessee building thereon, the lessor's fee in the premises was not subject to the liens arising under the building contract, since the language of the statute clearly showed that a mechanic's lien, when the realty was leased and unimproved, should be allowed only on the buildings.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 323; Dec. Dig. ⊂=184.]

4. MECHANICS' LIENS ⊂=198—PRIORITIES—LESSOR'S LIEN UNDER LEASE.

Where land was leased, the instrument giving the lessor a first lien on a building to be erected to secure unpaid rents, etc., and the contractors for such building had notice that the party with whom they dealt was merely lessee, and not owner of the land, the lien of the lessor on the building under the lease was superior to the contractors' lien, since, when they contracted to erect the building, they had notice of the lease, and so were chargeable with knowledge of all facts that they might have ascertained by the exercise of reasonable diligence, as by inquiry of the lessor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348–355; Dec. Dig. ⊂=198.]

5. MECHANICS' LIENS ⊂=216—ESTOPPEL TO CLAIM—EXECUTION OF BOND.

Where contractors for a building to be erected on leased land by the lessee gave bond to the lessor, lessee, and their mortgagee conditioned that they would pay off and discharge any claims against the building and the real estate, and save the parties to whom the bond was given

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied October 22, 1915.

harmless from any claims for material and labor, such contractors were not estopped thereby from claiming a lien on the leasehold and building, since the mere execution of the bond did not waive their potential lien, but only in effect agreed that before payment could be claimed by them the building should be free of liens.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 400–402; Dec. Dig. ⊂⊃216.]

6. MORTGAGES ⊂⊃151—PRIORITY OVER LANDLORD'S LIEN.

Where land was leased, the lease providing that the lessor should have a lien upon the building to be erected by the lessee for rents and certain disbursements, of which lease the trust company to which the lessee mortgaged the building to secure funds for its completion had actual notice, the lien of the lessor on the buildings under the lease was entitled to priority over the mortgage debt of the trust company.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309–311, 314–329, 332–336; Dec. Dig. ⊂⊃151.]

7. MORTGAGES ⊂⊃151—PRIORITY—MECHANICS' LIENS.

Where a trust company, loaning money on mortgage for the completion of a building on leased land, knew that a large amount of work had been done thereon before its mortgage was taken, its mortgage debt was subject to lien claims for the previously performed work.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309–311, 314–329, 332–336; Dec. Dig. ⊂⊃151.]

8. MORTGAGES ⊂⊃151—PRIORITY—LIEN FOR RENT.

Where a lease, providing for the erection of a building by the lessee, gave the lessor a lien on the lessee's rents from the building for rent due the lessor, such lessor, upon foreclosure of a mortgage against the building, was entitled to rents in the hands of a receiver.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309–311, 314–329, 332–336; Dec. Dig. ⊂⊃151.]

9. MORTGAGES ⊂⊃146—MORTGAGE LIENS—PROPERTY SUBJECT—RENTS.

A mortgage given on a building erected on leased ground, without providing for a lien on the rents in case of default, gives the mortgagee no lien on the rents produced as against the lessor, who under the lease had a lien on the building and the rent thereof during the term.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309–311, 314–329, 332–336; Dec. Dig. ⊂⊃146.]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by the St. Louis Union Trust Company against Mary E. Mellon and others. Decree for plaintiff, and the named defendant appeals. Reversed and remanded, with directions.

The appellant, Mary E. Mellon, was the owner in fee simple of two lots in Oklahoma City, Okl. On November 1, 1909, she leased the same to Miss Dora Patterson, one of the defendants and appellees in this cause, but who neither appealed nor filed a brief at the hearing in this court. The lease was for a term of 99 years, for the yearly rental of $6,000, payable in monthly installments of $500, payable in advance. That rental was to begin on July 1, 1910. For the period between November 1, 1909, and July 1, 1910, she paid the sum of $1,000 as a rental. By the provisions of the lease the lessee obligated herself to pay, in addition to the $500 a month rental, all rates, taxes, general or special, of every nature, levied or imposed on the premises and buildings thereon, the first tax to be paid by her for the year 1910. She also obligated herself to erect, finish, and complete upon the premises a modern building, constructed of brick, concrete, or steel, not less than three stories high in addition to the basement, to cover the lots, except what might be necessary for

light and air. The building was to cost not less than $40,000, and the erection of the building was to be commenced within one year; and the building to be constructed was to be free from all mechanics' liens and free from any and all claims likely to ripen into mechanics' liens. During the demised term no mechanics' liens for improvements should be put upon the demised premises, and in the event liens should be filed thereon the lessee was to pay the same off within 30 days after final judgment, and if she failed to do so the lessor should have the right to pay the same off, and the amounts thus paid should be added to the rent, and if the default in the payment of such sums and the rent continues for three months after they become due, the lessor has the option to declare the lease terminated, and if the forfeiture is on account of any mechanics' liens, the improvements shall also be forfeited without compensation therefor. The lessee also obligated herself to keep the building insured, the loss, if any, to be made payable to the lessor and any mortgagee who may hold a mortgage on the premises for money loaned, for the purpose of rebuilding the premises destroyed either by fire, lightning, or tornado; but in such case the lessee is not required to erect any better building than the one destroyed. If the building is destroyed within 24 months of the termination of the lease, then she need not rebuild, and the insurance money is to be paid to the lessee, except what she may owe to the lessor.

Paragraph 9 provides, among other things, that, should the lessee desire to borrow money upon said real estate and the buildings thereon to pay for the building, the lessor hereby agrees to join the lessee in the execution of a mortgage on said real estate for an amount not to exceed 60 per cent. of the actual cost of said building, provided that said mortgage, as originally negotiated upon said premises, shall not run for a longer period than 10 years; but the lessor hereby agrees, if the said lessee is unable to pay off and discharge said mortgage at the end of said period of 10 years, to consent to a renewal thereof for a period not to exceed 5 years additional after the expiration of said period of 10 years. Paragraph 11 provides for a forfeiture upon noncompliance with certain of the covenants contained in the lease. Paragraph 12 provides that upon the expiration of the term of the lease the lessor will purchase from the lessee the improvements and buildings then remaining on said premises, and will pay to the lessee a sum of money therefor, equivalent to 75 per cent. of the value of said improvements then standing upon said premises. There is also a provision in that paragraph for an appraisement of the improvements at that time, and an arbitration in case the parties cannot agree as to the value, and a further provision that in the event the lessor fails to pay for the improvements, when ascertained, for the period of one year, then the amount due the lessee for the improvements shall be a mortgage on the premises, including the lot and building, for the sum due her. Paragraph 15 provides that in case the lessor shall, without any fault on her part, be made a party to any litigation commenced by or against the lessee, then the lessee shall pay all costs and attorney's fees incurred by or against the lessor in connection with such litigation, and that such costs and attorney's fees, if paid by the lessor, and the rent reserved in the lease, and all taxes and assessments, and the payment of all moneys provided in this lease to be made to the lessor, shall be and they are hereby declared to be a first lien upon all the buildings and improvements placed upon said demised premises at any time during the term of this lease, and upon the leasehold estate hereby created, and upon the rents of all buildings and improvements situated upon said premises at any time during said term.

The lease was duly acknowledged by both parties at the time of the execution and was filed for record in the proper office of the register of deeds on March 21, 1911. On February 14, 1911, Miss Patterson entered into a contract with Campbell & O'Keefe for the erection of a building on the leased premises, whereby she agreed to pay them in installments, as certified by the architects in charge, the sum of $130,000 for all the work and material, and liens or claims for which the contractors were liable were to be deducted as an indemnity against the same. The building contract was the usual one, but contained, among others, the following provisions: "The contractor is to be paid on the 1st and 15th of each month, upon presentation of written certificates for estimates from the architect, 90 per cent. of the amount of

material on the ground and in the building and labor, the final payment to be made within 10 days after the contract was fulfilled."

On April 20, 1911, Miss Patterson arranged with the appellee, the St. Louis Union Trust Company, which will be referred to as the Trust Company, for a loan of $75,000 to be used for the erection of the building contracted for as above set out, and executed a mortgage on that day, in which Mrs. Mellon joined, whereby they conveyed to the Trust Company, as security for the contemplated loan, the fee to the lots, as well as the improvements and buildings to be erected thereon. The mortgage, although signed by both parties, contains a covenant of Miss Patterson that she is the owner of the 99-year leasehold, then of record in the office of the register of deeds of Oklahoma county, and a covenant by Mrs. Mellon that she is the owner in fee simple of the lots, subject to said lease. It also contains the usual covenants against incumbrances. In addition to that the mortgage contained the following clause: "The said Mary E. Mellon, as party of the first part in the within and foregoing mortgage, hereby joins in the execution of said mortgage to secure the indebtedness of Dora Patterson; said indebtedness being contracted for the purpose of enabling the said Dora Patterson to erect the improvements upon said premises described in said mortgage as contemplated by the written 99-year lease made and executed by and between the said Mary E. Mellon, as lessor, and the said Dora Patterson, as lessee, dated November 1, 1909, so that the interest of the said Mary E. Mellon, as owner of said premises, and lessor, as described in said lease, and the interest of the said Dora Patterson, as lessee, being the entire interest, title, and estate, in fee simple absolute, in, to, and upon the real estate described in this mortgage, is hereby mortgaged unto the said second party for the purpose of securing the payment of said indebtedness and each and every part thereof." The notes executed to the Trust Company for this loan were signed by Miss Patterson alone. The mortgage was executed and acknowledged by both mortgagors on April 20, 1911, and filed for record on August 2, 1911.

The proceeds of the loan were not placed by the Trust Company to the credit of Miss Patterson until August 12, 1911, and the first withdrawal of this credit was on September 5, 1911, by a check drawn by Miss Patterson on the Trust Company in favor of the contractors, accompanied by a certificate of the architects that the amount was due the contractors for work done and materials furnished on the building. This check was for $7,681.45. The balance of the deposit, which originally amounted to $72,000, $3,000 having been deducted from the loan by the Trust Company for its commissions, was withdrawn at different times by checks of Miss Patterson, all in favor of the contractors, for work and materials for the building, and upon the certificates of the architects, which were attached to the checks. The last check, which exhausted the $72,000, was paid on March 11, 1912. Before the proceeds of the loan made by the Trust Company under the mortgage had been placed to the credit of Miss Patterson, she had paid to the contractors, Campbell & O'Keefe, on the certificates of the architects, the sum of $44,189.71 out of her own funds as follows:

April 1, 1911	$ 1,500.00
April 29, 1911	7,225.55
May 15, 1911	5,000.00
June 1, 1911	4,575.92
June 15, 1911	4,009.09
July 1, 1911	4,009.09
July 15, 1911	10,521.66
August 8, 1911	7,348.40

And the sum of $5,285.48 she paid on August 8th to the architects for their services, making a total of $49,475.19 paid on the building by Miss Patterson before any money was advanced to her by the Trust Company. The receipts for these payments, with the certificates of the architects, were sent to the Trust Company on August 9, 1911, three days before the $72,000 was placed to Miss Patterson's credit. There is no evidence in the record when the work on the building was commenced, except the certificate of the architects, which shows that on April 1, 1911, the contractors were entitled to $1,500 for labor

performed and materials furnished on the building to that date. At the time this certificate was given by the architects the lease had been of record since March 21, 1911, 11 days, 35 days after the contract for the erection of the building had been made, and 4 months prior to the filing of the mortgage to the Trust Company.

On August 24, 1911, the contractors, Campbell & O'Keefe, at the request of Miss Patterson, Mrs. Mellon, and the Trust Company, executed and delivered to them a bond, with the Southern Surety Company as surety, for the sum of $50,000, conditioned that they would pay off and discharge any and all claims against said building and the real estate upon which the building was being erected, and "save and protect the said Mary E. Mellon, Dora Patterson, and the St. Louis Union Trust Company harmless from any claims for material and labor used or performed in and about the construction of said building."

Miss Patterson failing to pay the last installment due the contractors for the erection of the building, which, with the sums due to the subcontractors and materialmen, amounted to $18,154.44, they filed a mechanic's lien on the building in conformity with the laws of the state of Oklahoma. In this claim they included the amount due them, and also the sums due the materialmen and subcontractors, which latter amounted to $12,094.53; their own claim being $6,059.91. This claim did not include that of the architects, who filed a separate lien claim for $1,000, balance due them for their services. In these claims Campbell & O'Keefe and the architects made no claim of a lien on the lots or against Mrs. Mellon, but only on the leasehold and building and against Miss Patterson. Seventeen materialmen and subcontractors, to whom different amounts were due, were included in that lien claim of Campbell & O'Keefe. Most of the subcontractors had also filed separate lien claims, but of all the claims filed only four made a claim of a lien on the real estate as well as the building and leasehold. The parties who made such claims, and the amounts for which they made them, were: The Darling Mill Company, for $997.11; W. J. Pettee & Co., for $352.10; Bradbury Marble Company, $2,742.74; J. B. Klein & Co., $571.29.

The Trust Company purchased all these claims which had been filed as liens, and took an assignment of them. It purchased them at a discount, but at the hearing it only claimed, and was awarded by the decree, the sums of money it actually paid for them with interest thereon. Miss Patterson having defaulted in the payment of interest on the mortgage debt, the Trust Company filed its bill of foreclosure, and by a supplemental bill included the claims of the lien creditors, which it had purchased and of which it was the assignee. While answers were filed by all the defendants, Mrs. Mellon is the only party who appealed from the final decree. It would therefore serve no useful purpose to set out the allegations in any of the answers of the defendants, except that of Mrs. Mellon, and of her answer only so much as is necessary for the determination of the contentions of the appellant as set out in the assignment of errors, and which were presented to the court in the brief and oral argument of her counsel.

In her amended answer she denies that the claims of the contractors or subcontractors, if liens at all, are liens on the fee of her lots; but she insists that, if the contractors and subcontractors are entitled to any liens, they can claim them only on the leasehold and building, and that they are inferior to the liens of herself and the Trust Company. She alleges that the lease made by her specifically provided that the building should be erected free from all mechanics' liens, and free from any and all claims and rights which might ripen into mechanics' liens, and that it further provided, "It is further agreed, and notice is hereby given, that no mechanics' or other liens shall, in any way, manner, or degree, affect the claim of the lessor on such building or attach to her rights in said premises;" that the contractors and all other claimants had full knowledge of the terms of said lease at the time they entered into the contracts for the erection of the building; and that under the laws of Oklahoma such liens, if valid in other respects, can only attach to the building. The answer especially attacks the claim of Campbell & O'Keefe upon several grounds: (*a*) That the contract for the erection of the building was made by Miss Patterson, without authority from the lessor, and without her

knowledge or consent; *(b)* that said contractors are estopped from claiming any lien as against her by reason of the bond executed by them as hereinbefore stated; *(c)* that Campbell & O'Keefe have violated the provisions of said bond in failing to pay the subcontractors as they had obligated themselves to do. The answer also attacks the validity of the claims of the liens of the several subcontractors and materialmen. She further alleges that there are large sums of money due her from Miss Patterson for rent and attorney's fees paid out in this cause, for which she has a lien by virtue of the provisions of the lease, and that this claim of hers is superior to the mortgage lien of the trust company. For that purpose she filed a cross-bill.

There was a final decree, which provided that the claim of Layton & Smith, the architects, and of the Trust Company, as assignee of the contractors, subcontractors, and materialmen, for the sums paid for them by the Trust Company, with interest thereon, be allowed as liens on the lots and improvements; that the claims of the Trust Company secured by the mortgage, with interest and $3,000 attorney's fee, be allowed as liens; that the claims of Layton & Smith and the contractors are established as a first lien and prior to all other liens upon the real estate and premises described in the decree; that the claim of the Trust Company is established as a valid lien upon the real estate and premises, as a second lien; and that the claim of Mrs. Mellon for rents and $1,500 attorney's fee be established as a third lien, subject to the architects', the contractors', and the Trust Company's mortgage. The decree further provided that, if all claims adjudged to be liens are not paid within six months, the lots, with all the improvements thereon, be sold by the special master appointed by the court, and after paying the costs of the action to pay the amounts due according to the priorities of the liens as established by the decree, and barring the equity of redemption.

The record fails to show the appointment of a receiver for the collection of the rents from the building during the pendency of this action, but the decree recites: "It is further by the court ordered, decreed, and adjudged that M. F. Meadows, the duly appointed and acting receiver herein, be by the court continued in his office as such receiver during the pendency of this action, and until the confirmation of the sale of the real estate had and made under this order and decree, and until the further order of this court," etc. This shows that the premises are in the possession of a receiver appointed in this cause.

From this decree Mrs. Mellon alone appealed.

J. H. Everest, of Oklahoma City, Okl. (R. M. Campbell, of Oklahoma City, Okl., on the brief), for appellant.

W. F. Wilson, of Oklahoma City, Okl. (John Tomerlin and E. E. Buckholts, both of Oklahoma City, Okl., on the brief), for appellee St. Louis Union Trust Co.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge (after stating the facts as above). Learned counsel for appellant do not question the findings of facts made by the trial court, but challenge the conclusions of law in determining the claims of appellees superior liens to hers, and also declaring the mechanic's lien claims to be liens on the fee of her lots. On behalf of the appellant it is claimed that the contractors and materialmen are not entitled to any liens, but, if they are, they are limited to the leasehold and building, and are inferior to her lien on these for the rent due and other expenditures made by her. She claims that the execution by Campbell & O'Keefe of the bonds estops them from claiming any liens, either for themselves or the subcontractors. It is further claimed for her that, as there are no allegations nor proof that the work on the building was commenced before the execution of the mortgage

to the Trust Company, the liens of the contractors, if they have any, are inferior to those of the Trust Company, as well as hers. On the part of the appellee it is contended, and the District Court so held, that the mechanics' claims are liens on the fee, as well as on the improvements, and are superior to the mortgage lien of the Trust Company, and that reserved by appellant in the lease.

[1-3] Mechanics' liens, being unknown to the common law, are not for that reason to be strictly construed, but should be liberally construed, in order to carry out the intention of the lawmakers to protect workmen, contractors, and materialmen. Hooven-Owens & Rentschler Co. v. John Featherstone's Sons, 111 Fed. 81, 92, 49 C. C. A. 229, 240; Russell v. Hayner, 130 Fed. 90, 64 C. C. A. 424. The liens being statutory, the national courts will follow the construction placed upon the statute by the highest court of the state, if they have been construed by it. It is therefore important, for the determination of the rights of the parties, to look to the Statute of Oklahoma. Section 3862 of the Revised Laws of Oklahoma of 1910 provides:

"Any person who shall, under oral or written contract with the owner of any tract or piece of land, perform labor, or furnish material for the erection, alteration or repair of any building, improvement, or structure thereon; or who shall furnish material or perform labor in putting up any fixtures, machinery in, or attachment to, any such building, structure or improvements; or who shall plant any trees, vines, plants or hedge in or upon such land; or who shall build, alter, repair or furnish labor or material for building, altering, or repairing any fence or footwalk in or upon said land, or any sidewalk in any street abutting such land, shall have a lien upon the whole of said tract or piece of land, the buildings and appurtenances. If the title to the land is not in the person with whom such contract was made, but is leased and unimproved, the liens shall be allowed on the buildings and improvements on such land separately from the real estate. Such liens shall be preferred to all other liens or incumbrances which may attach to or upon such land, buildings or improvements or either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, the planting of such trees, vines, plants or hedges, the building of such fence, footwalk or sidewalks, or the making of any such repairs or improvements."

This statute has never been construed by the Supreme Court of Oklahoma on the issues involved herein; but the language of the statute clearly shows that the mechanic's lien, when the realty is leased and unimproved, shall be allowed only on the buildings and improvements on such land, separately from the real estate. It was copied in its entirety from the statutes of the state of Kansas. The question involved in this case had not been construed by the Supreme Court of Kansas before its adoption by Oklahoma, but has since been. In Block v. Pearson, 19 Okl. 422, 91 Pac. 714, the Supreme Court of Oklahoma, speaking of the construction of that statute by the Supreme Court of Kansas after its adoption by Oklahoma, said that the construction of this statue by the courts of Kansas was entitled to the highest consideration. The Supreme Court of Kansas has uniformly construed this statute as affecting the interest of the lessee only, and not that of the lessor. In Huff v. Jolly, 41 Kan. 537, 21 Pac. 646, it was held:

"The lien is upon the realty, with the building attached, to the extent of the ownership of the one who contracted for the construction of the building, and no farther; and if there is no ownership, there is no lien."

In Chicago Lumber Co. v. Schweiter, 45 Kan. 207, 25 Pac. 592, and in Getto v. Friend, 46 Kan. 24, 26 Pac. 473, it was held:

"For materials furnished for a building to one who held under an executory contract of purchase, a mechanic's lien is confined to the equity of the purchaser under the executory contract."

To the same effect is Johnson v. Badger Lumber Company, 8 Kan. App. 580, 55 Pac. 517.

Similar statutes in other states have received a like construction by practically all the courts. In Franklin Savings Bank v. Taylor, 131 Ill. 376, 23 N. E. 397, it was held that, where the deed provided that no contract creating a lien should be made, a mechanic's lien could not affect the owner's title. In Dutro v. Wilson, 4 Ohio St. 102, it was held:

"If the ownership is in fee, the lien is upon the fee; if it is of a less estate, the lien is upon such smaller estate [referring to a contract made by one not owning the fee]."

In Forbes v. Mosquito Fleet Yacht Club, 175 Mass. 432, 56 N. E. 615, the lease required the lessee to erect a building on the leased premises, and it was held that the mechanic's lien only applied on the building and leasehold, but not the fee of the lessor. Among the many authorities to the same effect are McCarty v. Burnet, 84 Ind. 27; Benjamin v. Wilson, 34 Minn. 517, 26 N. W. 725; Salzer Lumber Company v. Claflin, 16 N. D. 601, 113 N. W. 1036; Springfield Foundry & Mchy. Co. v. Cole, 130 Mo. 1, 31 S. W. 922; Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199, 107 C. C. A. 93, decided by this court in an action arising under the statutes of Missouri. Many other authorities may be cited to the same effect.

Counsel for the Trust Company cite numerous cases in which the courts have held that a mechanic's lien covers the fee of the lessor, although the contract for the improvements was made by the lessee; but a careful examination of these cases shows that they arose either under statutes which are known as "consent or knowledge" statutes, or the facts upon which the decisions are based materially differ from those in the case at bar.

The later Illinois cases cited are inapplicable, because, as was frankly admitted by counsel in his brief, as well in the oral argument, the statutes of that state, when those cases were decided, were "consent, permission, or knowledge" statutes. The Illinois statute gives a lien on the fee of "any person who shall by any contract with the owner of a lot or tract of land, or with whom such an owner has authorized, or knowingly permitted to improve," etc. The New York statute is also a "consent" statute, and so is the Wisconsin statute. The Wisconsin statute provides that "the lien shall attach to and be a lien on the real property of any person on whose premises such improvements are made, such owner having knowledge thereof and consenting thereto." Section 3314, R. S. Wisconsin. But by a special act of the Legislature of Wisconsin (chapter 466, Laws of 1887) it is provided that the foregoing provision "shall not be construed as giving a lien where the relation of landlord and tenant exists." In Bentley v. Adams, 92 Wis. 386, 66 N. W. 505, these statutes were considered by the court,

and it was held that the special act does not apply to cases where the landowner's contract with the person who constructed a building for him on the land, though coupled with an agreement that such person shall occupy the premises as a tenant for a definite term, and, being unable to pay for the building, surrendered the lease and building to the owner. The ground upon which the court placed its decision is:

"It [the contract between the lessor and lessee] contemplated the construction of a building by the so-called lessee on the land of the so-called lessors for their benefit. They were to become owners of the property. If an owner can free himself from the operation of the lien law by merely making a contract having some of the agreements of a lease, strictly so called, designating the owner of the land as lessor and the contractor who is to build the building as lessee, a very convenient method would exist by means of which such law can effectually be nullified. Chapter 466 was not intended to apply to a case where a person contracts with another to build a building for such person on his land, though coupled with an agreement that such other shall occupy the premises as a tenant of such person."

The court there construed the contract, not as a lease, but as a contract with a so-called lessee to erect the building for the benefit of the owner of the land. This is quite different from the contract in this case.

In Dougherty-Moss Lumber Company v. Churchill, 114 Mo. App. 578, 90 S. W. 405, the improvements, which practically changed the entire building, were to be made at the lessee's expense, but under the "direction and supervision of an architect, chosen by the lessor, whose judgment and decision 'as to what is necessary for the purpose of properly preserving the walls or roof of said premises or support the same, * * * shall be absolute and final upon both parties,'" and upon expiration of the lease the building was to become the property of the owner of the lot without any compensation to the lessee. The court said:

"From the record before us it appears that the lessee was to use the premises for theater purposes alone. In their condition they were unsuited for such use, and when converted into a theater they could be used for nothing else. In effect, the lessor burdened the lessee with the obligation to make and pay for the necessary alterations. That it intended to derive a substantial benefit therefrom is evidenced by the fact that, instead of requiring, at the end of the tenancy, the restoration of the premises in the condition they were in when leased, the improvements were to pass to the landlord. It was to receive a theater for a hotel. Evidently the metamorphosis accomplished at such great expense was for its benefit, as well as that of the termor."

In Dierks & Sons Lumber Co. v. Morris, 170 Mo. App. 212, 156 S. W. 75, and Marty v. Hippodrome Amusement Co., 173 Mo. App. 707, 160 S. W. 26, the leases provided that "all the improvements which the lessee was compelled to place upon the premises, and which changed the building to an extent to make it practically a new building, were to pass to the lessor at the expiration of the lease without any compensation therefor," and it was held that this provision gave the lessor a substantial and present benefit to the freehold.

In some of the other cases cited for appellee the contracts were for a sale and purchase, with conditions that the owner of the fee would advance money to enable the proposed purchaser to erect the improvements, but later these contracts were rescinded, and the prop-

erty, with the improvements, surrendered to and taken possession of by the owner of the fee. Such were the facts in Henderson v. Connelley, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490.

In Iron Works v. Taylor, 12 Colo. App. 451, 55 Pac. 942, the lease contained an option to purchase. As a condition of the contract, the proposed purchaser was required to place certain machinery on the premises. This was done, and later the option was forfeited, and the owner of the fee took possession of the property and the machinery, and the court held that the fee was, under those circumstances, subject to the mechanic's lien.

In Whitcomb v. Gans, 90 Ark. 469, 119 S. W. 676, the lease expressly authorized the lessee to make the improvements at the cost of the lessor, to be deducted from the rents. It was held:

"She [the lessor] not only consented to the making of the improvements, but she bound the lessee to do so, and expressly agreed to pay for same by deducting the cost thereof from the rent."

Without reviewing all the authorities cited by the able and diligent counsel for the Trust Company, it is sufficient to state that they have been carefully examined, and the facts found in all the cases cited are practically the same as those reviewed above. In the case at bar there is no option to purchase. The improvements are not to revert to the lessor; but, on the contrary, it is expressly provided that upon the expiration of the lease they are to be bought by the lessor at 75 per cent. of their value, and this sum, when ascertained in the manner provided in the lease, is to be a lien on the lots and improvements in the nature of a mortgage, if not paid by the lessee within one year.

But it is also claimed that the lessor received a present substantial benefit by reason of the high rental, which amounted to at least 15 per cent. per annum on the then value of the lot, which the evidence shows was $40,000, and free from all taxes and expenses. It is a sufficient answer to this contention that the rental value of the lots was a matter between the parties to the lease. If either of them made a bad bargain, the courts cannot make a new contract for them, in the absence of fraud or mistake, and no such claim is made. In fact, neither of the parties to the lease complained of the rental. Aside from that, the fact that at the time this lease was made the value of the lot was only $40,000 does not mean that, in the contemplation of the parties, it would not increase within the 99 years, the life of the lease. It is a well-known fact, of which courts may well take judicial notice, that when a lease for such a long term is made, in a city increasing in population as rapidly as Oklahoma City, and where values of real estate increase so rapidly, those matters are taken into consideration when the lease is for a fixed sum for the full period of 99 years, as is the case here. Some leases for long terms provide for revaluations at certain periods, and the rent to be fixed accordingly. But in this case the parties saw proper to agree on a fixed rental for the 99 years, and, of course, took into consideration the increase of the value of the lots which could be reasonably expected from the experience of the past. If they made a mistake in being too optimistic, the courts are powerless to relieve them by making a new contract

for them. The language of a statute which enables a lessee to improve his lessor out of his premises must be clear and free from ambiguity to justify a court of equity, and for that matter any court, to give it that construction. The statute of Oklahoma, in our opinion, expressly negatives such an intention on the part of the Legislature.

[4] The lien claimants are not entitled to any lien on the fee, but only on the leasehold and the improvements. Are these liens superior to that granted to Mrs. Mellon by the lease? Clearly not. Assuming, without deciding, that the contractors began work before the lease was filed for record, a fact which they failed to establish by proper proof, and even assuming, without deciding, that their rights attached when the contract for the erection of the building was executed, which was before the lease was recorded, they would still not be entitled to priority over Mrs. Mellon's lien reserved in the lease. This provision in the lease is clearly an equitable mortgage. Ketchum v. St. Louis, 101 U. S. 306, 316, 25 L. Ed. 999; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 578, 13 Sup. Ct. 936, 37 L. Ed. 853; Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865; Connolly v. Bouck, 174 Fed. 312, 98 C. C. A. 184. The contractors, Campbell & O'Keefe, knew at the time they made the contract for the erection of the building that Miss Patterson was not the owner of the lots, but only a lessee of Mrs. Mellon. When they entered into the contract they were chargeable with notice, not only of all matters which they knew, or which were of record, but of all facts which by the exercise of reasonable diligence they could have ascertained. By inquiry of Mrs. Mellon, the lessor, they could have learned the terms of the lease before they entered into the contract. Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; 2 Pomeroy's Eq. Jurisprudence (3d Ed.) 597. Failing to exercise reasonable diligence to ascertain that fact, they cannot appeal to the conscience of the chancellor and plead their failure to exercise reasonable diligence as an excuse. Ketchum v. St. Louis, supra.

[5] The claim of the appellant that the contractors are estopped from claiming a lien on the leasehold and building by reason of the execution of the bond cannot be sustained. The authorities cited do not sustain the contention as they are not in point. There was no waiver of the lien by the execution of the bond, but only that, before they can claim payment, the building shall be free from all liens. In Spears v. Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789, the surety of the principal contractor claimed a lien on the property while there were still unpaid claims of other subcontractors which were liens, and it was held that, being a surety of the contractor, he could not recover. McHenry v. Knickerbacker, 128 Ind. 77, 27 N. E. 430, Interior Woodwork Co. v. Prasser, 108 Wis. 557, 84 N. W. 833, and Aikens v. Frank, 21 Mont. 192, 53 Pac. 538, like Spears v. Lawrence, are actions by the sureties of the principal contractor.

In the building contract Miss Patterson expressly reserved the right to pay off all lien claims and deduct the amounts thus paid out of the money due the contractors. As she owed the contractors more

than the claims of the subcontractors amounted to, she, or those standing in her shoes, cannot refuse to pay these claims, and also refuse to pay the principal contractors the money due them, and which they would be required to use for paying off all other liens due under the contract. It is her default that is the cause of Campbell & O'Keefe's inability to pay the subcontractors, and one cannot, in a court of equity, plead his own default as a defense. Construing the contract and bond together, it is beyond question that the intention of the parties was that Miss Patterson should not be required to pay any more than was justly due from her under the contract with Campbell & O'Keefe; and that is all that is claimed, as in their lien claim they included all debts which can possibly become liens on the buildings—at least, there is no claim that any other liens are in existence. Whenever the amounts due Campbell & O'Keefe are paid, for themselves and the subcontractors, for whom they would act as trustees, the building will be free from all liens of the contractors, subcontractors, and materialmen, without Miss Patterson, or any other party in interest, being required to pay any greater sum than she is liable for under the contract. In that case the conditions of the bond would be fully satisfied. Harlan v. Texas Fuel & Supply Company (Tex. Civ. App.) 160 S. W. 1142; Pine Bluff Lodge of Elks v. Sanders, 86 Ark. 291, 111 S. W. 255.

[6, 7] Is the debt of the Trust Company secured by the mortgage entitled to priority on the leasehold and building as against the claim of Mrs. Mellon? The Trust Company had actual knowledge of the contents of the lease, which was of record for some time before the execution of the mortgage. This being the case, the mortgage lien of the Trust Company is subject to Mrs. Mellon's lien on the building, except as to the fee to the lots, which will be later determined in this opinion. As between the mechanics' liens and the mortgage lien of the Trust Company, the mechanics' liens are entitled to priority on the leasehold and building. The record shows that on April 1, 1911, the contractors had performed sufficient work on the building to entitle them to $1,500, as certified by the architects. On August 9, 1911, before the mortgage transaction with the Trust Company had been completed, or any of the money loaned paid to Miss Patterson, or even placed to her credit, the Trust Company had knowledge that the building was then in course of construction and that Miss Patterson had paid nearly $50,000 for the work done and materials furnished for the building up to that time. It therefore took the mortgage with notice of the mechanic's lien claims, which entitles those claims to priority on the leasehold and improvements. The amounts due the Trust Company are liens on the leasehold and building, subject to Mrs. Mellon's and the mechanic's lien claims it purchased, and in addition thereto the mortgage claim is a lien on the fee of the lots in case the property has to be sold and the sums realized from a sale of the leasehold and building are insufficient to pay all of the liens. In that event the Trust Company is entitled to have the fee to the lots sold for the balance due it.

[8, 9] The rents in the hands of the receiver should be paid to Mrs. Mellon and credited on her account. Her lease gives her a lien on the

rents for the money due her. The mechanic's lien claimants have no claim on these rents, and make none; nor does the mortgage to the Trust Company give it a lien on the rents. Therefore it has no claim on the rents as against Mrs. Mellon, who, under the terms of the lease, was to have a first lien on the building and "upon the rents of all buildings and improvements upon said premises at any time during said term." Sage v Memphis, etc., R. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694, is decisive of this question.

The cause is reversed and remanded, with directions to enter a decree as follows:

After ascertaining the amounts due to Mrs. Mellon and the Trust Company, as assignee of the contractors, and as mortgagee, the liens shall be declared in the following order of priority:

First. The moneys in the hands of the receiver, realized from the rents, after deducting the expense of the receivership, shall be applied to the indebtedness found due Mrs. Mellon, and for the balance, if any, she is to have a first lien on the leasehold and building.

Second. That the Trust Company has a lien on the leasehold and building, subject to that of Mrs. Mellon, for the claims of the contractors assigned to it; the amount to be limited to the sums it paid for them, with interest thereon.

Third. That the Trust Company has a lien on the leasehold and building for the sum due it as mortgagee, subject to the liens hereinbefore stated, and a first lien on the fee of the lots. That unless these sums are paid by a party in interest within a time fixed by the court, the special master shall sell the premises, barring the equity of redemption of all the parties to the action. Upon such sale he shall first sell the leasehold and building; but, if the proceeds of that sale are insufficient to pay all the liens, he shall sell the lots, and if there be any surplus from the sale of the lots, after paying all sums due under the decree, such surplus shall be paid to Mrs. Mellon. In no event shall the lots be sold to satisfy the mechanic's lien claims. In case Mrs. Mellon pays all liens as declared by the decree, she shall become the absolute owner of the lots and building, free from the terms of the lease, and the claims of all parties to this action, and those claiming under them since the institution of this action.

The costs in this court will be taxed against the appellee, the Trust Company. The costs of the court below will be taxed as the District Court may deem equitable.

GRATTAN v. TREGO.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1915.)

No. 152.

1. BANKRUPTCY ⟸396—EXEMPTION—STATE LAW.

Under Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1913, § 9590), providing that the act shall not affect the allowance to bankrupts of the exemptions to them prescribed by state laws in force at the time of the filing of the petition in the state where they have their domi-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

cile, and section 47a (Comp. St. 1913, § 9631), providing that trustees in bankruptcy shall set apart the bankrupt's exemptions, the right of a bankrupt to a homestead exemption was to be determined by local state law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. ⊂⊃396.]

2. WILLS ⊂⊃634—ESTATE DEVISED—FEE SIMPLE IN REMAINDER—CHARACTER AS VESTED.

Where a bankrupt's father willed a farm to testator's wife for life, then to the bankrupt at her death, upon paying the other children $500, the bankrupt took a present vested fee title, subject to the life tenant's rights in the farm.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. ⊂⊃634.]

3. BANKRUPTCY ⊂⊃396—EXEMPTION—TITLE TO SUPPORT—STATUTE—"OWNER."

Under Const. Kan. art. 15, § 9, and Gen. St. Kan. 1909, § 3646, both providing that a homestead of 160 acres of farming land, occupied as a residence by the family of the owner, shall be exempted from sale under any process of law, where a bankrupt was the owner in remainder of the fee in such a farm, whereon his family resided, his mother being life tenant, and nonresident, he was entitled to such farm as an exemption; the title being sufficient to constitute the bankrupt "owner" of the land, within the meaning of the Constitution and statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. ⊂⊃396.

For other definitions, see Words and Phrases, First and Second Series, Owner.]

4. BANKRUPTCY ⊂⊃396—EXEMPTION—TITLE TO SUPPORT—STATUTE—"OWNER."

Under Const. Kan. art. 15, § 9, and Gen. St. Kan. 1909, § 3646, where a bankrupt, owner in remainder of the fee in the farm on which his family resided, paid his mother, the life tenant, $125 annually for the farm, paid the taxes, and kept up the improvements, he was a tenant of his mother, owner of the life estate, from year to year, and entitled to an exemption in the farm as a homestead; his title as tenant being sufficient to constitute him "owner," within the Constitution and statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. ⊂⊃396.]

5. BANKRUPTCY ⊂⊃396—EXEMPTION—TITLE TO SUPPORT—STATUTE.

Under Const. Kan. art. 15, § 9, and Gen. St. Kan. 1909, § 3646, both providing that a homestead of 160 acres of farming land, occupied as a residence by the family of the owner, shall be exempted from sale under any process of law, the bankrupt, owner of the fee in remainder in such a farm, being a tenant from year to year of the life tenant, was not precluded from his right to the exemption because the life tenant had the present right of immediate occupancy, since a right of occupancy given by a leasehold from year to year is sufficient to support the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. ⊂⊃396.]

6. BANKRUPTCY ⊂⊃396—EXEMPTION—HOMESTEAD—TIME OF OCCUPANCY—STATUTE.

Under Const. Kan., art. 15, § 9, and Gen. St. Kan. 1909, § 3646, both providing that a homestead of 160 acres of farming land, occupied as a residence by the family of the owner, shall be exempted from sale under any process of law, no specified time is necessary for the occupancy of such a farm by the owner's family to entitle him to his exemption therein on bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. ⊂⊃396.]

Petition to Revise Order of the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition by James E. Grattan, as trustee in bankruptcy of the estate of E. W. Trego, against E. W. Trego, to revise sustaining by the District Court in bankruptcy of respondent's claim to a homestead exemption. Petition dismissed.

Edwards, Kramer & Edwards, of Kansas City, Mo., Bennett & Cullison, of Iola, Kan., and Frank W. Yale and Ernest S. Ellis, both of Kansas City, Mo., for petitioner.

E. W. Myler and A. F. Florence, both of Iola, Kan., for respondent.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

LEWIS, District Judge. This is an original proceeding to revise the action of the District Court sitting in bankruptcy in sustaining the claim of the bankrupt to a homestead exemption. The respondent, bankrupt, resided in the town of Humboldt, Kansas, up to October 23, 1913. He had owned a residence in the town, and he and his family had occupied it for several years. He deeded it to his wife on August 1, 1913, and she sold and conveyed it on October 30, 1913. On October 23, 1913, he moved his family from the town onto a 160-acre farm (S. E. ¼ Sec. 3, T. 26, R. 19) a few miles distant in the country. He had been a hardware merchant, but before leaving the town had failed in business.

After placing his family and his household goods in the residence on the farm on October 23, 1913, he and his family have continued to remain there and occupy the premises as a home. The farm had been the property of his father who died testate January 12, 1893, leaving a widow who was eighty years of age at the time the exemption was claimed, and the respondent and other children surviving him. The respondent testified that his father "left the farm for mother (the widow) to have the income for life, and at her death I was to have the farm by paying the other children $500."

The last will was not offered in evidence, but its terms in this regard were given by the respondent, when on the stand as a witness, in the words above quoted, and the petitioner accepts the terms of the will as thus given as correct.

It further appears that the widow soon after the death of her husband went to the State of Pennsylvania and has since resided there. She has never occupied the farm since that time. It does not appear that anyone is dependent on her, or that anyone is living with her or that she is the head of a family. On her removal from Kansas, more than twenty years ago, she turned the farm over to her son (respondent) on a verbal agreement of lease, by which he was to pay her annually $125.00, pay the taxes, and keep up the improvements. That condition has been maintained ever since and he has complied with the agreement. He was at liberty to occupy the farm himself or to rent it, as he pleased. He has let others in, some of whom paid him a money consideration and some a part of the crop.

They held under him, but it does not appear that anyone, except the respondent, was in possession on and after October 23, 1913.

On December 5th, following the removal to the farm and while it was so occupied by respondent and his family, he filed his voluntary petition in bankruptcy, was adjudicated a bankrupt thereon, and the petitioner thereafter was appointed trustee of his estate. The bankrupt claimed the farm as his homestead exemption in his schedule; a hearing was given him on his claim, testimony was taken establishing the foregoing recited facts, and the trustee filed his report with the referee advising that the bankrupt had made claim to the farm as exempt to him as a homestead, but stating that in his opinion the bankrupt was not entitled to have the claim sustained and the homestead set off as such because of the character of the estate owned by the bankrupt in the lands, and further because the claimed right had not been acquired a sufficient length of time before bankruptcy. The referee took the same view, the claim was denied and the trustee refused to set off the exemption. The question was certified and the learned District Judge entered an order reversing the action of the trustee and referee and directing that the lands be set off to the bankrupt as his homestead exemption. The petition here challenges the action of the court in directing that the claim be allowed.

[1-4] Of course, the issue is determined by local law. Bankruptcy Act, Sections 6 and 47a; Bank v. Glass, 79 Fed. 706, 25 C. C. A. 151.

The state constitution and statute are in the same words:

"A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists." Const. Kan. art. 15, § 9.

The contention for petitioner is two-fold, (a) bankrupt's title was not sufficient, and (b) his occupancy was not by present right.

1. On the death of his father the bankrupt took the fee title subject to the rights of the life tenant. It was a present vested estate in the lands. 2 Washburn on Real Property (5th Ed.) p. 590.

In Tarrant v. Swain, 15 Kan. 146, the claim was based on a title in co-tenancy; in Moore v. Reaves, 15 Kan. 150, the claim was based on a mere equitable right, a contract to purchase; in Hogan v. Manners, 23 Kan. 551, 33 Am. Rep. 199, the claim was based on a lease from year to year, with the privilege in the lessor of revocation at any time; and in each instance the claim to exemption was sustained. Not only was the bankrupt the owner of the fee in remainder, but we think the facts show that he was the tenant of the owner of the life estate from year to year at the time of his occupancy and claim to the exemption. Either of these estates so held by the bankrupt was sufficient to meet the first contention. We think the title sufficient and that bankrupt was the owner of the lands within the meaning of the statute and constitution as thus construed.

[5] 2. But it is contended, and with more force, that the claim cannot be sustained because of the life estate in the widow who has, it is said, the present right of immediate occupancy; and to this is cited In re

Sale, 143 Fed. 310, 74 C. C. A. 448, and cases therein relied on, and others which may be found in 21 Cyc. 503, 504, and 15 A. & E. Encyc. of Law (2d Ed.) 537. It must be conceded that those cases so hold, and this seems to be the general doctrine; however, in some of them the life tenant was also in possession of the premises, and for this reason the homestead right could not co-exist in the owners of the two estates, and was held to belong to the life tenant who had the present possessory right.

It is urged that Hay v. Whitney, 59 Kan. 771, 51 Pac. 896,[1] supports the contention. The claim was there made by a lessee. The right to the exemption was denied, and as we read it, the conclusion was based on the fact that the lessor also occupied the premises at the time. Here the life tenant is not in possession and has not been for more than twenty years. That right has belonged to the bankrupt during all that time and at the time he made the claim.

It was expressly held in Hogan v. Manners, 23 Kan. on page 556, 33 Am. Rep. 199, supra, that a right of occupancy given by a leasehold from year to year was alone sufficient to support the exemption. The court, after stating that the claimant of the right had only a leasehold interest from year to year, said:

"The question arising on these facts is, whether a leasehold estate will support the homestead right."

The question was answered in the affirmative, and on page 558:

"A leasehold estate in land is therefore 'land,' within the statutory definition of the term, and an owner of the leasehold estate is an owner of land; and it matters not whether the duration of this estate be ninety-nine years, or but a single year; the character of the title or estate is the same. The owner of a leasehold estate is therefore within the letter of the homestead law; he is also within the spirit. Its purpose is not so much to give a man property as to secure his family a home."

Again (page 559):

"In Sears v. Hanks, 14 Ohio St. 301 [84 Am. Dec. 378], the court, speaking of the homestead law, says: 'We think its provisions protect the debtor's family as against his creditor to the enjoyment of an actual homestead, irrespective of the title or tenure by which it is held.' In Spencer v. Geissman, 37 Cal. 99 [99 Am. Dec. 248], it was held that one having a mere naked possession, the title being in a stranger, may acquire a homestead right as against everybody but the true owner."

Authorities are cited to support the conclusion. The possession of the bankrupt was by right against even the life tenant.

[6] 3. The other ground on which the trustee and referee denied the claim is not pressed. It is not tenable. No specified time is fixed for length of occupancy prior to the assertion of the claim. Indeed, occupancy, as here used, has been made to relate back of actual possession for the purpose of protecting the right. Ingels v. Ingels, 50 Kan. 755, 32 Pac. 387; Randolph v. Wilhite, 78 Kan. 355, 96 Pac. 492.

[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 59 Kan.

The action of the court in directing that the homestead exemption be set off as claimed was right, and the petition is dismissed, with costs to respondent.

It is so ordered.

McDONALD, Immigrant Inspector, v. SIU TAK SAM.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1915.)

No. 4356.

1. ALIENS ⇐32—DEPORTATION WITHOUT HEARING.

A Chinese cannot be deported as a laborer without being first given a hearing on the charge, since constitutional guaranties of life, liberty, and property are not restricted to citizenship, and before they can be adjudicated upon or taken away there must be a fair and impartial hearing by some tribunal established for the purpose.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇐32.]

2. ALIENS ⇐32—DEPORTATION OF CHINESE—FAIRNESS OF HEARING.

Where an immigrant inspector took the ex parte statements of three Americans, who saw the Chinese claiming status as a merchant ironing in his cousin's laundry, the Chinese not being present when the statements were taken, or his counsel, and they not having been given a fair chance to be present, not being notified of the statements and their contents after they were taken, and time and opportunity not having been afforded them for investigation and refutation, the inspector at once making his certification to the Secretary of Interior for a deportation warrant, the Chinese was not given the fair hearing necessary to deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇐32.]

3. ALIENS ⇐32—DEPORTATION OF CHINESE—STATUS AS MERCHANT—SUFFICIENCY OF EVIDENCE.

In habeas corpus proceedings by a Chinese against an immigrant inspector to secure his release from custody under a deportation warrant, evidence *held* to show that such Chinese, since he had entered the country as a merchant, had maintained that status, and had not become a laborer.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⇐32.]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Habeas corpus by Siu Tak Sam against Brown McDonald, as Immigrant Inspector. Relator was discharged from custody, and respondent appeals. Affirmed.

Alfred Jaques, U. S. Atty., and Egbert S. Oakley, Asst. U. S. Atty., both of Duluth, Minn., for appellant.

John H. Norton, of Duluth, Minn., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

LEWIS, District Judge. This is an appeal from an order discharging the appellee from custody of the Immigrant Inspector who held

him under a Deportation Warrant. The action was taken by the District Court after hearing on return to the writ of habeas corpus.

The appellee was born in China, and is, therefore, an alien "Chinese person." He is now thirty-five years of age. He reached the Port of Seattle, State of Washington, and landed there September 30, 1912, and was admitted as a Chinese merchant under the provisions of Section 6 of the Act of May 6, 1882 (22 Stat. 60 [Comp. St. 1913, § 4293]). On April 4, 1914, the appellant, as immigrant inspector, found him at Hibbing, a village in St. Louis County, Minnesota, in the laundry of Shew Chong, another Chinese, who is a cousin of appellee. He was immediately taken in charge by the inspector, who wired to the Secretary of Labor for a warrant for his arrest. The warrant was issued that day and recited:

"That the said alien is a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry into the United States; and that he is unlawfully within the United States in that he has been found therein in violation of the Chinese Exclusion Laws and is, therefore, subject to deportation under the provisions of Section 21 of the above-mentioned Act [Act Feb. 20, 1907, c. 1134, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263]."

The inspector thereupon placed the appellee in jail at Duluth. As required by the statute and also directed in the warrant of arrest, the inspector proceeded to a hearing on the charge as to whether he was subject to deportation. The hearing was begun at Duluth on April 20, 1914, before the inspector, and appellee was there represented by counsel. The only testimony taken at that time and place was given by the appellee, his cousin Shew Chong and one Sue Lung. Their testimony established conclusively that the appellee had been admitted as a Chinese merchant; that he was in fact theretofore a merchant in China; that in China he was considered a wealthy man; that his intention in coming to the United States was to continue in the business of a merchant; that since coming here he had not been a laborer; that he brought $1,000 with him, had received from China an additional $1,000 since he landed, of which sums he then had between $1,300 and $1,400.

It further appeared that during the year and a half the appellee had been in the United States he had spent a few days in Seattle and Portland, and the remainder of the time in Minneapolis and St. Paul, in all of which cities he was looking for an opportunity to engage in the business of a merchant.

The proprietor of the laundry in Hibbing was his cousin, and his purpose in being there was to make a visit and advise with him. He had only been at Hibbing two or three weeks when he was arrested. He had made a visit to his cousin at Hibbing sometime before that for the same purpose, remaining there only two or three weeks and returned to Minneapolis.

It further appeared from the testimony of appellee and the two Chinese witnesses above named, taken at Duluth on April 20th, that at the time the inspector entered the laundry at Hibbing and made the arrest on April 4th, the appellee was ironing some of his own clothing.

The evidence thus not only completely failed to establish the charges in the warrant:

"That the said alien is a member of the excluded classes in that he was a person likely to become a public charge at the time of his entry into the United States; and that he is unlawfully within the United States in that he has been found therein in violation of the Chinese Exclusion Laws,"

but on the contrary both charges were proven untrue.

When the hearing closed on that day, leaving the status of proof as above recited, the inspector gave verbal notice to appellee's attorney that:

"I expect to visit Hibbing, Minn., within the next few days, and that I expect to secure there sworn statements from Policeman David Williams, H. Z. Mitchell, city editor of the Hibbing Tribune, and Lee Johnson, messenger for the Merchants and Miners State Bank of Hibbing, to the effect that this Chinaman was working as a laborer in the Him Kee Laundry on Centre St., Hibbing, Minn., on April 4, 1914, about 10 o'clock A. M., when he was apprehended by me, and that these witnesses so saw him."

The Inspector then further stated, in substance, that he had no authority to issue subpœnas for witnesses either in behalf of appellant or appellee, but that the attorney of appellee had the right to come with him to Hibbing and question the witnesses after they had been questioned by him, and that any questions the attorney might put to the parties named and their answers would be taken down and made a part of the record. Appellee's attorney thereupon stated that he desired to go to Hibbing with the inspector but that he could not go for about a week. On April 23d, three days after the testimony was taken at Duluth and the understanding was had that further testimony would be taken at Hibbing a week or so later, the inspector called up the office of appellee's attorney and found that he was not in. He told the attorney's assistant that he would question the witnesses at Hibbing the next day and that either the attorney or his assistant could come along and meet him in Hibbing and be present at the examination. The assistant replied that appellee's attorney was otherwise engaged and could not go.

The inspector went to Hibbing without further notice, interrogated the parties named, ex parte as he reports, put down what he claims were the questions propounded and the answers given, all of which was certified to the Secretary as a part of the proceedings in the case. He also certified as a part of those proceedings what purports to be an examination in the form of questions and answers of one Mo Chong Way taken at Portland, Oregon, on April 21, 1914. The appellee was not present and not represented when that was done. This was also certified to the Secretary as a part of the hearing.

The warrant for the deportation of appellee was issued by the Secretary of Commerce and Labor of date May 26, 1914. It recites that it is based on the "proofs submitted to me, after due hearing before Inspector in Charge Brown McDonald, held at Duluth, Minnesota, * * * that the said alien is unlawfully within the United States in that he has been found therein in violation of the Chinese Exclusion Laws," and omits the other ground stated in the warrant of arrest, "That the said alien is a member of the excluded classes in that he

was a person likely to become a public charge at the time of his entry into the United States."

It thus appears that when the Secretary reviewed the record certified for the purpose of determining whether or not the deportation warrant should issue, he came to the conclusion that there was nothing to sustain the charge that appellee was "likely to become a public charge at the time of his entry into the United States." We, therefore, confine the inquiry to the other charge, i. e., Was appellee found in the United States in violation of the Chinese Exclusion Laws; was he a laborer? But before that inquiry is open for consideration, it must be determined whether the appellee had a fair hearing on that question. Chin Yow v. United States, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369.

1. As already pointed out, the hearing at Duluth on April 20th, consisted only of the testimony of the three Chinese, including appellee, and there is no proof whatever given at that time to establish the fact that appellee was a laborer. Neither does the ex parte proof taken at Portland on April 21st, have the slightest tendency to establish that fact. It, like that taken at Duluth, is to the contrary. The only other proof in the record consists of the ex parte statements of David Williams, the policeman, H. Z. Mitchell, the editor of a newspaper, and Lee Johnson, a bank clerk, all at Hibbing, taken by the inspector in the manner and under the circumstances above recited.

[1] The inspector in the taking of these statements pretended to administer an oath to each of the parties. He did the same thing when the three Chinese witnesses made their statements at Duluth on April 20th, and we have referred to what they said as testimony; but in the recent case of Whitfield, Inspector, v. Hanges, 222 Fed. 745, — C. C. A. —, decided by this court, it was determined that the inspector was without authority to administer an oath; however, it is unnecessary to give any consideration to that matter here. The opinion in that case considers at length and determines the necessary requisites to constitute a fair hearing in such a procedure as this, and it seems unnecessary to again repeat the requirements. An alien cannot be deported without being first given a hearing on the charge. He can no more be made the victim of arbitrary power than a citizen. Constitutional guaranties of life, liberty and property are not restricted to citizenship; and before they can be adjudicated or passed upon or taken away there must be a fair and impartial hearing by some tribunal established for that purpose. The Act of February 20, 1907, contemplates this and requires it (Section 20); likewise the rules made by the Secretary for the enforcement of the Act.

[2] We do not think the inspector, in taking the ex parte statements of the three men at Hibbing, gave to appellee a hearing within contemplation of general principles of jurisprudence protecting the rights of all men, within the Act under which the proceeding was had, or within the rules made and established by the Secretary for the guidance of the inspector. The appellee was not present when these statements were taken; his counsel was not present, and they were not given a fair chance to be present. In the light of the record both appellee and his counsel were denied a reasonable opportunity to be present, and

they were denied a chance to meet and rebut the substance of the statements made by the three men at Hibbing. Because, so far as the record shows, no communication was had with them about the statements and their contents after they were taken, no notice was given to them, and no time or opportunity afforded for investigation and refutation; but on the contrary the inspector at once made his certification to the Secretary for final action. And this was done in the face of the fact, then established, that appellee had been in Minneapolis and St. Paul at given addresses for sixteen or seventeen months just prior to the arrest, where evidence could most likely be had to definitely establish or refute the charge that he had voluntarily abandoned the status under which he was permitted to enter and had become a laborer. For more full consideration of the question see Whitfield, Immigrant Inspector v. Hanges, 222 Fed. 745, — C. C. A. —.

The appellee presented with his petition for the writ the entire proceedings taken by the inspector and certified and no other proof was adduced on the hearing before the District Judge on return to the writ.

[3] 2. The appellee was regularly admitted on certificate as a Chinese merchant. He had $1,000 on his arrival, and received from China some time later a remittance of an additional $1,000, and at the time of his arrest still had about $1,300 to $1,400. He had continued to seek, and was seeking at the time of his arrest, a place to locate as a merchant. He admitted that he was engaged in ironing some of his own clothing in the laundry of his cousin at Hibbing at the time of his arrest. Accepting the ex parte affidavits of Williams, Mitchell and Johnson for all that can be claimed for them, they add nothing to his admissions, except that Williams says there was a pile of freshly ironed shirts on the table, where appellee was standing with iron in hand, when he entered the laundry, and that he was dressed as if he were engaged in that sort of work. This evidence falls far short of establishing that appellee was at that time engaged as a laborer, especially so when taken in connection with the other testimony in the case.

In United States v. Yee Quong Yuen, 191 Fed. 28, 111 C. C. A. 500, this court had under consideration the inquiry as to whether a Chinese person, who had been brought to this country by his father, a Chinese merchant, had later become a laborer and subject to deportation. The son, with the assistance of his father, had purchased a drygoods establishment at Denver, but it was only continued for a short time. Judge Adams, speaking for the court, said:

> 191 Fed. 29, 111 C. C. A. 501: "It soon proved to have been a bad trade, and after losing some $200 the business was disposed of, and the boy, being without a home in Denver, went to a laundry, where he worked awhile for his board, waiting, as he and his father both testified, until some mercantile business of better promise than before could be found for him. While so waiting he was found by an immigration inspector and arrested. The boy's testimony was that his sole purpose in coming to this country was to engage in some mercantile pursuit, as his father had done, and this was corroborated by his father's testimony and by other circumstances. * * *"
>
> 191 Fed. 30, 111 C. C. A. 502: "While they were waiting after their first unsuccessful venture for an opportunity to engage in another business, the father supplied him with expense money. The worst of his offending was that he worked for his board at a laundry for a few months prior to his arrest, and while he and his father were attempting to find a new business for him.

This state of facts, in our opinion, discloses no abandonment of the father's status, or no voluntary adoption of any new status by the son. Neither does it disclose any attempt at circumventing the laws of the United States respecting the exclusion of Chinese laborers."

So here, there is but one rational conclusion that can be drawn on consideration of the entire record, including the ex parte statements, and that is that appellee, during the eighteen months that he had been in the United States, had constantly maintained the status under which he was permitted to enter, and had not at the time of his arrest become a laborer.

For these reasons we are of the opinion that appellee could not lawfully be deported, and the order discharging him from custody is

Affirmed.

In re BARDE et al.

(Circuit Court of Appeals, Ninth Circuit. July 20, 1915.)

No. 2497.

1. HOMESTEAD ⇐67—PROPERTY CONSTITUTING HOMESTEAD—VALUE.

L. O. L. § 221, exempts the homestead of any family from judicial sale for the satisfaction of a judgment. Section 222 provides that the homestead shall not exceed $1,500 in value, nor 160 acres in extent, if not located in a town or city laid off into blocks and lots; that, if so located, it shall not exceed one block, but that in no instance shall it be reduced to less than 20 acres nor one lot, regardless of value. Section 224 provides that, on notice to the officer making a levy of the claim of homestead, the officer shall notify the creditor; that if the homestead shall exceed the minimum, and he deem it of greater value than $1,500, he may direct the sheriff to select three disinterested householders to appraise the homestead, commencing with the 20 acres or lot upon which the dwelling is located, and appraising such lot or 20 acres separately; that if the same exceed $1,500 the sheriff shall sell all in excess of $1,500 in lots or subdivisions as directed by the debtor, if he chooses to direct, or otherwise, so as to leave the homestead as compact as possible. Section 225 provides that in lieu of such proceedings the creditor may pay the debtor the sum of $1,500 and proceed to sell the homestead. *Held*, that a single lot with a dwelling house thereon is exempt as a homestead, though its value exceeds $1,500, as this is the meaning of section 222 when read as a whole, and sections 224, 225, merely provide means of enabling the creditors to obtain the excess in those cases only where the homestead is greater in extent and value than the limit prescribed by section 222.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 94; Dec. Dig. ⇐67.]

2. HOMESTEAD ⇐63—PROPERTY CONSTITUTING HOMESTEAD—VALUE—"LOT."

Within L. O. L. § 222, providing that the homestead shall not be reduced to less than 20 acres nor one lot, regardless of value, the word "lot" means a lot of the dimensions prescribed by the map or plan of the city or town within which the homestead may be situated.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 91; Dec. Dig. ⇐63.]

For other definitions, see Words and Phrases, First and Second Series, Lot.]

Petition to Review an Order of the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

In the matter of M. Barde and another, individually and as partners as Barde & Levitt, bankrupts. On review of a judgment or order setting aside exempt property. Affirmed.

Bauer & Greene and A. H. McCurtain, all of Portland, Or., for trustee and petitioner.

Giltner & Sewall, of Portland, Or., for respondent.

Before GILBERT and MORROW, Circuit Judges, and VAN FLEET, District Judge.

VAN FLEET, District Judge. This is a petition to review an order of the court below setting aside to the individual bankrupt, Barde, as exempt from the claims of his creditors, certain premises occupied by himself and family as a dwelling place and claimed by him as a homestead, consisting of one city lot in the city of Portland, with the dwelling house thereon, of the ascertained value of $12,000. The controversy arises on the contention of the trustee that the award is in excess of the exemption to which the bankrupt is entitled under the homestead law of Oregon; and the question is purely one of law, dependent upon the construction of the act, the facts being in no respect in controversy.

[1] The sections of the act affecting the question are found in chapter 2, title 3, vol. 1, Lord's Oregon Laws, and are as follows:

"Sec. 221. Homesteads Exempt—Must be Actual Abode.—The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must be the actual abode of, and owned by such family or some member thereof.

"Sec. 222. Extent of Homestead Exemption.—Such homestead shall not exceed $1,500 in value, nor exceed one hundred and sixty acres in extent, if not located in town or city laid off into blocks and lots; if located in any such town or city, then it shall not exceed one block; but in no instance shall such homestead be reduced to less than twenty acres nor one lot, regardless of value."

"Sec. 224. Claim of Homestead, upon Levy—Appraisement.—When any officer shall levy upon such homestead, the owner thereof, wife, husband, agent or attorney of such owner, may notify such officer that he claims such premises as his homestead, describing the same by metes and bounds, lot or block, or legal subdivision of the United States; whereupon such officer shall notify the creditor of such claim, and if such homestead shall exceed the minimum in this act, and he deem it of greater value than $1,500, then he may direct the sheriff to select three disinterested householders of the county, who shall examine and appraise such homestead, under oath, commencing with the twenty acres or lot upon which the dwelling is located, appraising such lot or twenty acres separately; and if the same exceed $1,500, then the sheriff shall proceed to sell all in excess of $1,500 by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor, if he chooses to direct; otherwise, he shall sell the same as aforesaid, so as to leave the homestead as compact as possible.

"Sec. 225. When Execution Creditor may Sell Homestead.—In lieu of the proceedings aforesaid, the execution creditor may at any time pay the execution debtor the sum of $1,500, and proceed to sell the homestead as he might heretofore have done, adding the said $1,500 to his lien, but the money aforesaid shall be exempt from execution."

The contention of petitioner is, in substance, that in determining the extent of the exemption granted the above sections are all to be construed together, and that when so construed they limit the right of

homestead to premises which shall in no instance exceed in value the sum of $1,500; that if they are found to exceed that limit of value they are to be cut down to the extent of the excess, such excess to be subject to the rights of creditors; that if of a character not susceptible of being divided, they may be sold and an award of $1,500 made to the homestead claimant in lieu of the homestead, the excess realized to go to the creditors.

The District Court proceeded upon the theory that the extent and character of the homestead right was fixed and determined by the provisions of section 222 alone, and that, as the premises claimed by the bankrupt fell within the limitations of that section as not exceeding one city lot, it was without discretionary power to refuse to set it aside. Our consideration of the question induces the conviction that the view adopted by the learned District Judge was the correct one, and his conclusion the only one reasonably to be deduced from the language of the act. The Supreme Court of the state has never construed the provisions defining the exemption, and it is not without some justification that counsel for petitioner say in their brief that:

"The language in which that intention is attempted to be expressed is like nothing else ever before enacted, and the case is therefore one of first impression."

But while its terms in many respects are not happily chosen, and it undoubtedly is in some of its features open to the objection of ambiguity, we are satisfied that those defects in no material respect affect the particular features involved in the question here presented.

[2] Section 221 is not very material here; it merely declares the exemption of the homestead from forced sale and the requisites of occupation and ownership. Then comes section 222. This section is very obviously the substantive feature of the act so far as defining the extent and character of the homestead is concerned, and although it certainly is not, as claimed by respondent, "as clear as language could make it," it is, we think, clear enough to disclose the legislative intent. Read as a whole, it can only mean this: A homestead may consist of as much as, but not more than, 160 acres of land if outside a city or town "laid off in lots and blocks," or of an entire block of land if within such a city or town, provided that in neither instance it exceed in value the sum of $1,500; if it exceed that value, and includes an area of more than 20 acres of land or one lot, the excess may be taken by the creditors, *but* not to an extent which will reduce it below such minimum limit of 20 acres of land or one lot in extent, "regardless of value"—that is, irrespective of the value of such 20 acres or such lot; the designation "lot" manifestly referring to a lot of the dimensions prescribed by the map or plan of the city or town within which the homestead may be situated. There is no room for any other construction of the section as a whole. While the first paragraph, standing alone, would indicate that the limit as to value was intended to apply in all instances, the closing paragraph clearly and positively negatives that idea; the language, "but in no instance shall such homestead be reduced to less than twenty acres or one lot, *regardless of value*," being too plain and unequivocal to be ignored or avoided.

Petitioner concedes the correctness of this construction, if the extent of the exemption intended by the Legislature depends on section 222 alone; but he insists that sections 224 and 225 cannot be laid out of view in determining that question, and calling attention to the provisions of those sections, and particularly to the language of section 225, that the creditor "may at any time pay the execution debtor the sum of $1,500, and proceed to sell the homestead as he might heretofore have done," and that the money "shall be exempt from execution," he argues that:

"If the Legislature literally meant that in no event should the homestead be reduced to less than one lot, this section serves no purpose."

But, as we have indicated, the language of section 222, in defining the exemption, is too plain and unambiguous to be construed away; and, moreover, that sections 224 and 225 were not intended to in any way limit the right granted by section 222 is, we think, obvious. As clearly indicated by their terms, their function is to provide means of enabling the creditors to have the benefit of the excess in an instance, and only in an instance, where the homestead as claimed is found to be greater in extent and value than the limit prescribed by section 222. It is only where (section 224) "such homestead shall exceed the minimum in this act," and the creditor "deem it of greater value than $1,500," that he is entitled to proceed under either of these sections—section 225 giving merely an alternative mode of procedure based upon the same conditions as to extent and value as are required by section 224. Where such excess in extent and value appear, then and then only do these sections come into play. Here, the property not being beyond the right given by section 222, we are not concerned with those sections, nor the inconsistencies or incongruities urged upon our attention as arising between them, nor called upon to reconcile such if they exist.

If the conclusion reached shall be deemed to work an injustice to the creditors, the remedy is with the Legislature, since the court is circumscribed by the law as it finds it.

The judgment or order under review is affirmed.

WAGNER v. KOHN.

(Circuit Court of Appeals, Second Circuit. July 6, 1915.)

No. 293.

1. EVIDENCE ⟸441—PAROL EVIDENCE—VARYING NOTE.

As between the maker of a collateral note and the payee thereof, the maker is liable on the note according to its terms, which cannot be overcome by a parol understanding that a third person would pay it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. ⟸441.]

2. BILLS AND NOTES ⟸135—COLLATERAL NOTE—CONVERSION BY MAKER—RIGHTS AND LIABILITIES OF PARTIES.

Where a note recited a promise to pay a specified sum, with interest, and a deposit with the payee as collateral of certain bonds of a company,

and it appeared that the money for which the note was given was money advanced by the payee to enable the company to discharge its debt to the maker, and the understanding between the company and the maker was that the company would pay the note, and the payee exchanged the bonds for other bonds, and a receiver of the payee sold the other bonds for more than the amount of the note, the maker was entitled to have the proceeds used for the payment of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 332; Dec. Dig. ⊂⇒135.]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on writ of error to review a judgment of the United States District Court for the Southern District of New York, entered on January 15, 1915, in favor of the defendant, and adjudging that he recover costs in the sum of $69.35.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, both of New York City, of counsel), for plaintiff in error.

McKennell & Appell, of New York City (Thomas Abbott McKennell and Alfred H. Appell, both of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is an action brought by plaintiff as receiver of the Mt. Vernon National Bank to recover on a note made to the bank by the defendant. At the time the note was given and as a part of the transaction there was deposited as collateral with the bank certain bonds issued by the Westchester County Brewery Company and which had a face value of $4,000. It appears that the Westchester County Brewery Company, hereinafter referred to as the Company, was indebted to the defendant in the sum of $6,000, secured by a mortgage on its property. This mortgage was found to interfere with the plan of the Company to put out a bond issue, and defendant was asked to discharge it of record, and it was so discharged in August, 1910, and at that time it paid $3,000, one-half the amount due. In October following defendant was pressing for payment of the balance. The Company had $1,000 available for that purpose, and applied to the bank to borrow $2,000 additional. The president of the bank advised the Company that the bank already "had all the loaning paper the bank could stand under the Westchester County Brewery's name," and it was agreed to ask defendant to sign a collateral note for $2,000, which the cashier was to discount. It was also agreed between the bank and the Company that the bonds of the latter to the value of $4,000 would be given to the cashier as collateral to secure the payment of the note, and at that interview the president of the bank handed the cashier bonds to the amount named to be used for the purpose. The evidence shows that the president of the bank was also the money adviser of the Company, and was to float the bond issue of the latter, and had at the time some of the bonds in his possession with authority to sell. The defendant assented to this

arrangement, executed the collateral note, and received the cashier's check drawn to his order. The note and bonds were put into an envelope and left with the bank.

The note made by defendant is dated October 25, 1910. It recites that the undersigned promises to pay on demand to the bank or its order $2,000, with interest at the rate of 6 per cent. per annum, "having deposited with the said bank as collateral security for the payment of this and any other liability or liabilities of the undersigned, or of the guarantors hereof, * * * the following property, viz.: Four thousand dollars ($4,000) par value first mortgage bonds Westchester County Brewery, * * * and the undersigned also hereby gives to the holder hereof a lien for the amount of all the said liabilities upon all the property or securities," etc. It also empowers the holder, upon nonpayment "of any of the liabilities above mentioned when due," to sell at public or private sale the said securities or any part thereof.

[1] There was testimony to show that it was understood that the note was to be paid by the Company. But as between the plaintiff and the defendant there can be no question but that defendant was liable on the note according to its terms and that the written agreement could not be overcome by a parol understanding that the Company would pay it.

[2] The bonds deposited were Nos. 591–600, being 10 in number and of the par value of $100 each, and Nos. 41–46, being 6 in number and of the par value of $500 each. On December 30, 1910, these bonds, without the knowledge or consent of defendant, were delivered by the president of the bank to the Empire Trust Company, the trustee under the mortgage which secured them, and were exchanged for bonds of a second issue of equal par value; the bonds of the first issue being canceled. The authorized amount of the first issue was $125,000, and of the second issue $200,000. The substituted bonds came into the possession of the receiver of the bank, a receiver having been appointed in April, 1911, who sold them prior to the commencement of this action and realized 66⅔ of the par value, or more than the amount of the note.

These being the facts as disclosed upon the record, the defendant insists that the action on the note cannot be maintained against him. Upon the close of the case in the court below his counsel moved to dismiss the complaint, upon the ground that the plaintiff had not produced the security mentioned in the note, and that there was no proof of any tender of the security contemporaneous with the demand for payment, nor at any other time, and upon the further ground that it affirmatively appeared that the securities pledged for the note had been converted by the bank, and that they were in value sufficient to extinguish the liability on the note. Counsel for the plaintiff asked the court to direct a verdict for the plaintiff for the full amount of the note. It was agreed that the plaintiff made out a prima facie case by the production of the note and proof of payment of the recited consideration to defendant.

If the note had been an ordinary note this argument on behalf of plaintiff would have been sound. But the note is not an ordinary one.

It is a collateral note, and that fact appears by its recital, and the testimony conclusively establishes that the collateral was in fact deposited. The evidence shows that before this action was brought the collateral was surrendered by the bank without defendant's knowledge and canceled. The substituted bonds were likewise, before action and without defendant's knowledge, sold by the plaintiff or by his predecessor in the receivership, and he did not possess them at the time of the trial. In the absence of a special agreement to resort first to the collateral, the plaintiff as holder of the note was under no obligation to realize upon the collateral before suing upon the note. Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513 (1875); De Cordova v. Barnum, 130 N. Y. 615, 617, 29 N. E. 1099, 27 Am. St. Rep. 538 (1892); Jenkins v. Conklin, 146 App. Div. 302, 303, 130 N. Y. Supp. 778 (1911). Whether he could obtain payment of the note without making tender of the collateral may be open to question. Jones, in his work on Collateral Securities (section 593), declares that the return of the pledge is not a condition to be performed before or concurrently with the payment of the debt secured. In Lawton v. Newland, 2 Starkie, 72 (1817), Lord Ellenborough held that plaintiff might recover in assumpsit against the defendant for money loaned without having first delivered up or offered to deliver up the gun which he held in pledge. The defendant, he said, might enforce the return by bringing an action of trover. And in Donnell v. Wyckoff, 49 N. J. Law, 48, 7 Atl. 672 (1886), the court said:

"It is settled that the pledgee may bring an action for the debt without producing or accounting for the pledge. By the contract of bailment, the property pledged is delivered to the pledgee as security for the payment of the debt. Judgment for the debt is neither payment nor extinguishment. The debt remains in a new form, and until the debt is paid the pledgor, under the terms of the bailment, has no right to have the pledge given up to him."

But the rule laid down in Colebrook on Collateral Securities, § 106, is as follows:

"The pledgee of negotiable collateral paper, although entitled upon default to enforce payment of the principal obligations and to retain such collateral securities until payment, should be ready in such action, in order to entitle himself to judgment, to produce the negotiable collateral securities, or account satisfactorily for their nonproduction," etc.

And it has been held in New York that a refusal to return the collateral is a justification for refusing to pay the debt secured. In Ocean National Bank of N. J. v. Fant, 50 N. Y. 474 (1872), it appeared that the maker of the note, when payment was requested, stated that he was willing to pay on production of the collaterals. The collaterals were not produced, and the maker declined to pay, and the action was brought. The court held that an agreement to restore the collaterals on payment of the note was to be implied and that the acts should be simultaneous:

"The right of the maker to receive these collaterals when he should pay the note stood upon the same footing as his right to the surrender of the note itself; and, laying out of view special cases of lost notes, it is well settled that, to constitute a valid demand, the note must be produced and ready to be surrendered on payment. * * * It would be most unreasonable to re-

quire the maker to pay such a note in the absence of the collaterals, which frequently consist of negotiable securities, and to trust to his legal remedies against the holder to recover them."

And see Schlesinger v. Wise, 100 App. Div. 587, 94 N. Y. Supp. 718, 720 (1905).

It is not now necessary to decide which of these conflicting theories is in our opinion correct. The defendant claims that as the plaintiff has sold the collateral, or the bonds substituted for them, and has realized an amount in excess of the amount due on the note, this constitutes a good defense to this action on the note. On the conversion of the collateral the pledgor was entitled to sue the pledgee in trover, and in such an action, the debt being unpaid, the pledgee is entitled to have the amount of the debt deducted from the damages. Sedg. on Damages, 601, note. But, the collateral having been converted, if the pledgee sues the pledgor, should not the same principle be applied, and the value of the collateral be deducted from the amount of the debt?

In Brown v. First National Bank, 112 Fed. 901, 50 C. C. A. 602, 56 L. R. A. 876 (1902), the facts were these: The payee of a note held as collateral security a judgment which the maker of the note held by assignment and had pledged to the payee by way of security; the payee of the note, without the knowledge of the maker or the sureties, released the judgment; an action on the note was subsequently brought by the payee against the maker and sureties; the note was for the sum of $3,366.75, and the judgment which was released was the sole incumbrance on land valued at about $20,000; the payee brought an action on the note, and the court took the case from the jury and directed a verdict for the payee, on the ground that the matters of defense were cognizable only in a court of equity, and not at law. The Circuit Court of Appeals for the Seventh Circuit reversed the case, on the ground that the payee by his surrender of the collateral lost his right to recover on the note, and that the defense was available to both principal and sureties, and was cognizable in a court of law as well as in equity. Thereafter the maker of the note brought suit in the Circuit Court for the District of Kansas against the payee, who had disposed of the collateral, to recover $7,500 damages for the wrongful release of the judgment. The Circuit Court of Appeals for the Eighth Circuit said that the wrongful act of the payee as to the collateral gave the maker of the note an affirmative cause of action for breach of the contract of pledge, of which he might have availed himself in an independent action, and that it also at his option constituted a tort, and a cause of action for conversion It added:

"His claim for damages was not only an affirmative cause of action against the bank, but it also constituted, at his option, *a good reason why the bank was not entitled to recover upon the note*, a good defense of payment of the note, to the action upon it."

And the court held that as the defense had been interposed in the action brought on the note, and he had had the benefit of it in that action, the record not disclosing to what extent his claim had been thus applied, he was not able to maintain the suit, as he could not use

the same defense first as a shield and then as a sword. Brown v. First National Bank, 132 Fed. 450, 66 C. C. A. 293 (1904).

In Ambler v. Ames, 1 App. D. C. 191 (1893), the court said in an action on a promissory note that:

"If the security has been used and proceeds realized from it, it is, of course, competent for the defendant so to show, and to claim credit upon the indebtedness to the extent of such proceeds."

In Donnell v. Wyckoff, supra, an action was brought upon a note for the sum of $7,500. At the time the note was given certain shares of stock were delivered with it as collateral. The court held that in an action on the note the defendant could set up the wrongful conversion of the stock by way of defense and be allowed the value of the pledge as payment of the debt pro tanto.

It is true that the bonds deposited as collateral belonged to the Brewery Company and were not the property of the defendant. But we are unable to discover that under the circumstances of this case that fact confers upon the bank or its receiver, as against this defendant, the right to convert the bonds and not be charged with the proceeds in an attempt to recover against him on the note. The defendant had a special property in the bonds so deposited because of the agreement the Company made with him. If the Company had not agreed that its bonds might be used as collateral for the note, defendant would have given no note. The money for which the note was given was money paid by the bank to enable the Company to discharge its debt to defendant, and the understanding between the Company and defendant was that the Company was to pay the note which was given for its accommodation. The collateral was given for the protection of defendant, as well as for the protection of the bank.

Judgment affirmed.

OGDEN et al. v. GILT EDGE CONSOL. MINES CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1915.)

No. 155.

1. BANKRUPTCY ⊂=441—PETITION TO REVISE ORDER—STATUTE—"PROCEEDING IN BANKRUPTCY"—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS."

Under Bankr. Act July 1, 1898, c. 541, §§ 24b, 25a1, 30 Stat. 553 (Comp. St. 1913, §§ 9608, 9609), providing that appeals as in equity cases may be taken in bankruptcy proceedings from a judgment adjudging or refusing to adjudge the defendant a bankrupt, and giving Circuit Court of Appeals jurisdiction to revise in matters of law the proceedings of courts of bankruptcy, an order of a District Court in bankruptcy refusing to grant leave to intervene to stockholders of defendant corporation to contest the grounds upon which an adjudication in involuntary bankruptcy was sought could be reviewed by the Circuit Court of Appeals on a petition to revise; such a proceeding not being to review an adjudication in bankruptcy, but a "proceeding in bankruptcy" as distinguished from a "controversy arising in bankruptcy proceedings."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 914; Dec. Dig. ⊂=441.

For other definitions, see Words and Phrases, First and Second Series, Controversy arising in bankruptcy proceedings; Bankruptcy proceedings.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. BANKRUPTCY ⊂=440—APPEALS—STATUTE.

The only cases in which an appeal can be taken in bankruptcy proceedings are those mentioned in Bankr. Act, § 25a, providing for appeals from a judgment adjudging or refusing to adjudge defendant a bankrupt, from a judgment granting or denying discharge, and from a judgment allowing or rejecting a claim of $500 or over.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂=440.]

3. BANKRUPTCY ⊂=88—INVOLUNTARY PROCEEDINGS—ANSWER—VERIFICATION —SUFFICIENCY.

Where the answer denying insolvency, filed by stockholders of a corporation defendant in bankruptcy petitioning for leave to intervene, was certified after the signatures of the petitioners: "Subscribed and sworn to before me this 22d day of August, 1914. Geo. D. Ort, Notary Public. [Notarial Seal]"—the verification was sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109-112; Dec. Dig. ⊂=88.]

4. BANKRUPTCY ⊂=52—BANKRUPTCY PROCEEDINGS—EQUITABLE CHARACTER.

Bankruptcy proceedings are equitable in nature, and bankruptcy courts administer the law according to the spirit of equity.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=52.]

5. CORPORATIONS ⊂=206—STOCKHOLDER'S SUIT—EQUITABLE CHARACTER.

The doctrine is a well-recognized principle of equity jurisprudence that stockholders of a corporation may sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791-796; Dec. Dig. ⊂=206.

Right of stockholders to sue or defend on behalf of corporation, as dependent on refusal of corporation or officers to act, see note to Eagle Iron Co. v. Colyar, 87 C. C. A. 390.]

6. CORPORATIONS ⊂=206—STOCKHOLDER'S SUIT—RULE OF COURT.

Where the allegations in a petition for leave to intervene in bankruptcy proceedings of stockholders of the defendant corporation, and the proposed answer made a part thereof showed that an adjudication in bankruptcy was not being opposed by the directors, so that they might acquire the property at less than its value, equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv), requiring that the stockholder of a corporation, seeking to bring a stockholder's action, must have endeavored to secure such action as he desires on the part of the directors, will be dispensed with, as is the case where the pleadings show that the interests of the directors are antagonistic to those of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791-796; Dec. Dig. ⊂=206.]

7. BANKRUPTCY ⊂=88—PROCEEDINGS AGAINST CORPORATION—INTERVENTION BY STOCKHOLDERS—LACK OF SPECIFICATION IN ALLEGATIONS—REMEDY.

Where the allegations in a proposed answer, which stockholders of a corporation, defendant in bankruptcy, sought leave to file, were not specific enough in charging fraud against the directors, motion to make more specific would have been proper.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109-112; Dec. Dig. ⊂=88.]

8. BANKRUPTCY ⊂=88—PROCEEDINGS AGAINST CORPORATIONS—STOCKHOLDER'S DENIAL OF LEAVE TO INTERVENE.

Where the petition of stockholders in a corporation, defendant in bankruptcy, for leave to intervene, was denied on the ground that the allegations of their proposed answer were not specific enough in charging di-

rectors with fraud, it was error to refuse amendment, when requested by the parties, since in equity proceedings the parties are entitled to a reasonable time to amend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109–112; Dec. Dig. ⊂⊃88.]

Petition to Revise Order of the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

In the matter of the bankruptcy of the Gilt Edge Consolidated Mines Company. Petition by Robert N. Ogden and another to revise an order in bankruptcy of the District Court denying leave to intervene. Petition granted, and order set aside, with directions.

This is a petition to revise an order of the District Court, made in a proceeding in bankruptcy, which finally resulted in the adjudication of the respondent, Gilt Edge Consolidated Mines Company, a corporation, a bankrupt in an involuntary proceeding. The facts alleged in the petition are that on August 5, 1914, the respondents, Claudon, Achard, and Holinger, claiming to be creditors of the Mines Company, filed a petition in involuntary bankruptcy against it. The acts of bankruptcy alleged were that "the Mines Company is insolvent, and that within four months next preceding the date of this petition the said Gilt Edge Consolidated Mines Company committed an act of bankruptcy in that it did heretofore, to wit, on the 7th day of April, 1914, suffer and permit a judgment to be entered against it in the circuit court of the county of Lawrence, in the state of South Dakota, in the Eighth judicial district, in favor of Moses E. Clapp, William D. Lawry, and John L. Turner, for the sum of $12,000, and failed and neglected to pay the same; that on the 7th day of April, 1914, an execution was issued on said judgment against the said Gilt Edge Consolidated Mines Company for said sum of $12,000, and that the sheriff of said Lawrence county, in the state of South Dakota, to whom said execution was directed, levied the same upon the property of said Gilt Edge Consolidated Mines Company, situated in the county of Lawrence, state of South Dakota (the lands levied on are described); that on the 11th day of May, 1914, all of the aforesaid property was sold by said sheriff under said execution to R. M. Ogden, as trustee for the said Moses E. Clapp, William D. Lawry, and John L. Turner, for the sum of $12,109.62, and that no redemption has been made from said sale by said Gilt Edge Consolidated Mines Company or by any person in its behalf; that on the 17th day of June, 1914, the said Gilt Edge Consolidated Mines Company suffered and permitted a judgment to be entered against it in the circuit court of Lawrence county, state of South Dakota, in favor of one Seth W. Ford, for the sum of $2,475.94, which said judgment remains unpaid and unsatisfied; that the said Gilt Edge Consolidated Mines Company owes debts to the amount of $70,000 or thereabouts, which it is unable to pay;" that the petitioners, being stockholders of the corporation, one owning 50,000 shares and the other 10,000 shares, filed their petition in the District Court on August 22, 1914, asking leave to intervene in the bankruptcy proceedings and to file an answer denying the insolvency of the corporation.

With this petition they filed a proposed answer on behalf of the corporation, in which they allege and charge: "Upon information and belief that the officers and directors of said company have refused and refuse to file an answer of said petition or to make any defense thereto; that your interveners first became aware on August 15, 1914, that a petition in bankruptcy was filed herein, the same being made returnable on August 18, 1914; that they immediately telegraphed E. A. Beaman at Providence, R. I., the president of said company, and L. A. Hippach, at Chicago, Ill., vice president thereof, both of them being also directors of said company, as follows: 'As stockholders of Gilt Edge Company we request you to contest bankruptcy proceeding. Please wire us your intentions at our expense.' To which telegram they received on August 17, 1914, the following reply from E. A. Beaman dated at Providence, R. I., on August 17, 1914: 'Will immediately consult directors in Chicago and inform

you of their decision.' Upon information and belief that the return day of the subpœna in bankruptcy is August 18th, and the time for answer will expire on Sunday, August 23d, or upon the following Monday, the 24th; that your interveners have had no further word from the said Beaman, or from any of the directors or officers of the said company. Upon information and belief that the said officers and directors of said company are or claim to be by far the largest creditors thereof, claiming to own all of the obligations outstanding against it, with the exception of about $15,000, and that they are not therefore disinterested representatives of said company and its stockholders. Upon information and belief that it is the desire of said officers and directors of said company to depress the value of the property of said company and to discredit the same, in order that they may themselves purchase said property for a small fraction of its actual value and for a small fraction of the value which they themselves believe the said properties to possess, thereby obtaining complete ownership and control thereof, and divesting these interveners and stockholders of said company similarly situated of their interest in said property without paying them anything therefor, and depriving them of all rights of redemption given them and said company by the state statute. Your interveners further allege upon information and belief that there is in the treasury of said company a large amount of treasury stock, which was placed in the treasury in order that it might be sold, and the proceeds thereof devoted to the payment of the debts of said company, and for the development of said property, but that the directors and officers of said company have made no effort, or insufficient efforts, for the sale thereof. Upon the contrary, these interveners allege upon information and belief that the officers and directors and other stockholders of said company, who have made or claim to have made advances to the company for which they allege the company is now indebted to them, agreed to accept in payment of such advances the treasury stock of the company, but that they have wrongfully omitted or refused so to do for the purpose of creating a large indebtedness against said company, which indebtedness forms the basis of the present bankruptcy proceeding; that said officers and directors have willfully neglected and still willfully neglect to levy any assessment upon the capital stock of said company for the purpose of meeting the just obligations thereof; that all of said acts and omissions on the parts of the officers and directors of said company, including the present proceeding in bankruptcy, have been for the purpose and with the intent on their part of depreciating the value of the properties of said company, in order that they may purchase the same for themselves and for those interested with them at less than their real value, and without affording the company or its stockholders the period of redemption provided by the state laws of South Dakota."

After the signatures to the answer by the petitioners herein the following certificate appears: "Subscribed and sworn to before me this 22d day of August, 1914. Geo. D. Ore, Notary Public. [Notarial Seal.]"

The motion for leave to intervene was denied by the court, and the answer stricken from the files of the court, upon the ground that it had been filed without leave.

One Seth W. Ford, a judgment creditor of the Mining Company, also asked leave to intervene and file an answer denying the insolvency of the Mining Company, which was denied; but, as Mr. Ford is not a party to this proceeding, the action of the court denying him leave to intervene is not before us.

Ogden & Ogden and Martin & Mason, all of Deadwood, S. D., for petitioners.

M. Marso, of Chicago, Ill., for respondents.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge (after stating the facts as above). [1] On behalf of the respondents it is claimed that a petition to revise cannot be maintained in this action, but that the proper remedy was by

appeal. The ground upon which this claim is based is that an adjudication in bankruptcy can only be reviewed upon appeal. Section 25a1, Bankruptcy Act. But this is not a proceeding to review the adjudication, but the action of the District Court refusing to permit the petitioners to intervene for the purpose of making a defense, the officers of the corporation fraudulently refusing to do so. Section 24b of the Bankruptcy Act gives the Circuit Courts of Appeal jurisdiction to revise in matter of law the proceedings of courts of bankruptcy. We are of the opinion that an order of the bankruptcy court, granting or refusing to grant leave to a party to intervene for the purpose of contesting the grounds upon which an adjudication in an involuntary bankruptcy proceeding is sought, may be reviewed by the Circuit Court of Appeals on a petition to revise. This is clearly a proceeding in bankruptcy, as distinguished from a controversy arising in bankruptcy proceedings. A very able opinion on the distinction between proceeding in bankruptcy and controversies arising in bankruptcy proceedings will be found in Thompson v. Mauzy, 174 Fed. 611, 98 C. C. A. 457 (4th Ct.).

[2] The only cases in which an appeal can be taken in bankruptcy proceedings are those mentioned in section 25a of the Bankruptcy Act. Morehouse v. Pacific Hardware Co., 177 Fed. 337, 100 C. C. A. 647. This petition does not state any facts which brings it within either of the three causes mentioned there.

[3] The objection that the verification is insufficient is too technical and cannot be sustained. The answer was signed by the petitioners and, as certified by the notary public, they swore to it before him. This is all that is necessary. The petition for leave to intervene states:

"That the said company has filed no answer or appeared in connection with the said bankruptcy proceedings, and that your petitioners claim an interest as stockholders in said company, and pray leave to contest said petition in bankruptcy and deny the insolvency of the said company, and to submit the question of the solvency thereof to a jury, as more fully appears by the annexed proposed answer, which is hereby made a part of this petition."

The allegations in the proposed answer are set out in the statement of facts herein and need not be repeated. The petition to intervene was not heard until January 9, 1915, and was then denied by the court. On the same day the petitioners filed a motion for leave to amend the proposed answer and intervention "by alleging in greater detail and with certainty the facts constituting fraud on the part of the directors and of the corporation in failing to defend against the petition in bankruptcy herein, and in filing an answer in behalf of the alleged bankrupt admitting its insolvency and consenting to its being adjudged a bankrupt" which was by the court denied. The answer on behalf of the corporation was filed on September 1, 1914, but entered nunc pro tunc as of August 21, 1914. It contained an admission of all the allegations of the petition for the involuntary proceeding and a consent that it be adjudicated a bankrupt.

[4] Bankruptcy proceedings are in the nature of proceedings in equity, and bankruptcy courts administer the law according to the spirit of equity. Bardes v. Hawarden Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Lockman v. Lang, 132 Fed. 1, 6, 65

C. C. A. 621; Id., 128 Fed. 279, 62 C. C. A. 550, 555; In re Broadway Savings Trust Co., 152 Fed. 152, 81 C. C. A. 58.

[5] That stockholders of a corporation may, in equity, either sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action, is a well-recognized principle of equity jurisprudence. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Bronson v. La Crosse R. Co., 2 Wall. 283, 17 L. Ed. 725; In re Swofford Brothers D. G. Co. (D. C.) 180 Fed. 549, 553.

[6-8] Equity rule 27, formerly 94 (198 Fed. xxv, 115 C. C. A. xxv), which requires certain preliminary steps to be taken by the stockholder before bringing his suit, will be dispensed with when the interests of the directors are antagonistic to those of the corporation, where this fact is shown by the pleadings. Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862. The allegations in the petition for leave to intervene, and the proposed answer made a part thereof, clearly show such a condition of affairs as to justify stockholders to intervene and defend on behalf of the corporation, when the directors, charged with the protection of the corporate property, are adversely interested, and not only refuse to defend, but confess judgment, as is alleged in the proposed answer, and as is shown by the record to have been done. If the allegations in the proposed answer were not specific enough in charging fraud against the directors, a motion to make more specific would have been proper. But, in any event, when the petition for leave to intervene was denied upon that ground it was the duty of the court to permit an amendment when requested by the parties. It is well settled that in equity proceedings the parties are entitled to a reasonable time to amend their pleadings. A refusal to grant such leave is error. Files v. Brown, 124 Fed. 133, 142, 59 C. C. A. 403, 412; In re Broadway Savings Trust Company, supra.

The petition to revise is granted, and the order of the District Court, denying leave to petitioners to intervene and leave to amend the proposed answer, will be set aside, and the District Court directed to proceed in conformity with the views set forth in this opinion.

SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al.

(Circuit Court of Appeals, Ninth Circuit. August 23, 1915.)

Nos. 2543, 2547-2559.

1. TAXATION ⟸87—PROPERTY SUBJECT TO TAXATION—PROPERTY IN POSSESSION OF COURT—"RECEIVER."

Where, in suits by a water company to enjoin the enforcement of water rates fixed by county supervisors, preliminary injunctions were issued on condition that the company should deposit in banks the difference between the rates fixed and those actually collected, to remain until the final outcome of the litigation, and the water company made the deposits directed, the deposits were taxable under Pol. Code Cal. § 3647, providing that money in litigation in possession of the court or a receiver must be

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

assessed and the taxes paid thereon under the direction of the court, for the banks receiving the deposits were receivers; a "receiver" being an indifferent person between the parties, appointed by the court to receive property pending suit, and to hold possession and dispose of the same as the court may direct.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 177; Dec. Dig. ⊂⊃87.

For other definitions, see Words and Phrases, First and Second Series, Receiver.]

2. RECEIVERS ⊂⊃153—DIRECTION TO PAY TAXES.

Where assessments on money in the possession of banks as receivers of the court were regular, the court could direct the banks to pay the taxes.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 276, 277; Dec. Dig. ⊂⊃153.]

3. TAXATION ⊂⊃420—ASSESSMENTS—VALIDITY.

Where the records of the court and the accounts kept by different banks, receiving deposits pending suits pursuant to order of the court, showed the particular funds involved and to what suits they are referable, error in assessments going to a misdescription of the funds, or to an unwarranted commingling thereof, by the taxing officers, did not render the assessments invalid, for the question as to what part of the funds was referable to a given suit was a mere matter of account and detail for the court officers.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 711, 712, 715, 717–719; Dec. Dig. ⊂⊃420.]

4. RECEIVERS ⊂⊃151—ASSESSMENTS—ENFORCEMENT—ORDERS OF COURT.

Where the records of the court and the accounts kept by depositories, receiving money pursuant to order of court in pending suits, showed the particular funds involved in each suit, orders of the court directing payment of the taxes were not erroneous, because they did not specify what amounts should be paid out of the moneys on deposit in each suit.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 269–271; Dec. Dig. ⊂⊃151.]

5. TAXATION ⊂⊃418—ASSESSMENTS—VALIDITY.

Where money was deposited with a bank under order of court in a pending suit, an assessment of the money was not vitiated because it was assessed to the bank as receiver.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 707–710; Dec. Dig. ⊂⊃418.]

6. TAXATION ⊂⊃126—BANKS—CONSTITUTIONAL PROVISIONS.

An assessment on deposits in a bank, made pursuant to order of court in pending suits, is not an assessment against the bank or its shares or other property, within Const. Cal. art. 13, § 14, providing for the taxation of the stock of banks, but is an assessment against funds in the hands of the bank, acting as receiver.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 228, 229; Dec. Dig. ⊂⊃126.

Taxation of bank deposits, see note to Pyle v. Brenneman, 60 C. C. A. 413.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Suits by the Spring Valley Water Company against the City and County of San Francisco and another. From orders directing depositories to pay taxes levied thereon, plaintiff appeals. Affirmed.

In June, 1908, the appellant, as complainant, instituted a suit in the court below against the city and county of San Francisco and the board of supervisors thereof, to enjoin the enforcement, during the years 1908–09, of certain water rates fixed by the board. The cause was numbered 14735. Similar suits with reference to the rates for subsequent fiscal years were thereafter instituted in 1909, 1910, 1911, 1912, and 1913. These causes are numbered respectively 14892, 15131, 15344, 15569, and 26. In suits numbered 14735, 15569, and 26 preliminary injunctions were issued upon condition that complainant should deposit in some bank or banks, to be agreed upon by the parties, the difference between the rates fixed by the municipal authorities and those actually collected by complainant; such excess to continue on deposit until final outcome of the suits. It was further provided that such deposits should be subject to the order of the court, and should be paid out only on the checks of a special master, countersigned by a federal judge. A special master was appointed, and directed to ascertain and report the amounts collected from each individual consumer. Subsequently the Mercantile Trust Company, of San Francisco, was designated as a depository for the impounded moneys, the order directing that such deposits be carried under an account entitled "Spring Valley Water Company—Special Account," and subject to the order of the court, as previously declared. In suits numbered 14892 and 15131 the procedure was the same, with the exception that complainant proceeded to deposit the moneys with the Mercantile Trust Company without any specific order designating the depository. In suit numbered 15344 the restraining order made no provision for impounding the excess moneys, but it was subsequently stipulated that, so long as the order continued in force, the moneys collected should be deposited with the Mercantile Trust Company, and should be repaid as the final disposition of the cause might require. In this case a deputy clerk of the court was appointed special master. Deposits were made from time to time in pursuance of the order of the court. Subsequently portions of the amounts deposited were transferred, also by direction of the court, from time to time to other depositories, namely, Wells Fargo Nevada National Bank of San Francisco, Mercantile National Bank of San Francisco, the Crocker National Bank of San Francisco, Bank of California, National Association, Union Trust Company of San Francisco, and the Anglo and London Paris National Bank. The moneys found on deposit in each of these depositories on the first Monday of March, 1913, and the first Monday of March, 1914, were assessed for those years. In each assessment the designated bank or depository was described as "receiver of impounded moneys," and further as "receiver or depository under order of court of the impounded moneys in equity suits numbered 14275, 14735, 14892, 15131, 15569, 15344, and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." On motion, the court directed the depositories to pay the taxes levied. There are 14 of these orders, and an appeal is prosecuted from each order. The appeals on the docket here are numbered 2543 and 2547 to 2559, inclusive. Each of the banks acting as a depository has paid the 1 per cent. tax assessed against it for the fiscal years 1913–14 and 1914–15, under the provisions of article 13, § 14, of the Constitution of the state of California.

Edward J. McCutchen and A. Crawford Greene, both of San Francisco, Cal., for appellant.

Percy V. Long, City Atty., and Robert M. Searls, Asst. City Atty., both of San Francisco, Cal., for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). [1] It is urged that there was no legal authority for the assessments, or for making them in the manner in which they were made. Reliance

is placed by the respondent upon section 3647 of the Political Code of California, under which it is claimed the assessments were regularly and rightfully made, which reads as follows:

"Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

The question turns largely upon whether the banks in which the moneys were directed to be deposited were receivers within the meaning of the section of the statute just quoted. The Supreme Court of the United States has defined a receiver thus:

"A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it." Booth v. Clark, 17 How. 322, 331, 15 L. Ed. 164.

In Atlantic Trust Co. v. Chapman, 208 U. S. 360, 371, 28 Sup. Ct. 406, 409, 52 L. Ed. 528, 13 Ann. Cas. 1155, the court continues:

"He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. Delaney v. Mansfield, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court."

A comprehensive definition is to be found in 34 Cyc. 15:

"A receiver is an indifferent person between the parties, appointed by the court, and on behalf of all parties, and not of the complainant or defendant only, to receive and hold the thing or property in litigation, pending the suit, to receive the rents, issues, or profits of land, or other thing in question, to receive rents or other income, and to pay ascertained outgoings, when it does not seem reasonable to the court that either party should hold it, to hold possession and control of property which is the subject-matter of litigation, and to dispose of the same or deliver it to such person or persons as may be directed by the court. He is said to be the arm and the hand of the court, a part of the machinery of the court, by which the rights of parties are protected."

Now, the direction of the statute, so far as it could have application here, is that money in litigation in possession of a court must be assessed to the receiver. The money impounded constitutes the very essence of the controversy. It is the very thing about which the parties are not agreed respecting title and right of possession; hence the suit, and hence the litigation to determine their rights respecting it. The money, therefore, may be properly said to be in litigation. Further, it is also in possession of the court. It is recited that one of the conditions of the preliminary injunction is that the complainant should deposit the money in some bank or banks to be agreed upon by the parties, to continue on deposit until the final outcome of the action. And it was further provided that the deposit—that is, the money—should be subject to the order of the court, and should be paid out

only on checks drawn by a special master and countersigned by a federal judge. The special master is an officer of the court. Could the money be any more completely under the control, and therefore in the possession, of the court? The answer is obvious.

Now, what was the office and function of the banks? It was to hold the money subject to the order of the court. Such is the express provision of the injunctive process. The court has seized the money in the first instance through its injunctive process, has taken it away from the parties and possessed itself thereof, and has ordered it put in the banks, as custodians, to abide its orders. Thus it would seem, not only that the funds are in custodia legis, but that the banks themselves have become receivers of the funds. By whose authority did they become such receivers? Not by the authority of the parties, though with their consent, but by the authority of the court. This makes them receivers of the court, and there can be no other reasonable solution of the problem. Whether they be called depositories, or receivers, or what not, their legal position is that of receivers of money or funds in the possession of the court.

[2] The banks were primarily assessed as receivers of impounded moneys. Later a correction was made whereby they were designated as "receiver or depository under order of court of the impounded moneys in equity suits," giving the numbers of the suits, the court in which they were pending, and their titles. The banks being receivers of the court, the money on deposit with them under the order and direction of the court was properly assessable to them as such receivers, and the assessments, we think, were regular, and legally made. The assessments being regular, the court was authorized to direct the receivers to pay the taxes levied. Los Angeles v. Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770.

As it pertains to actions numbered 14892, 15131, and 15344, the money was potentially in the possession of the court, and the receivers of such moneys were properly assessable on them.

[3] Another objection to the validity of the assessments is that the description is of "impounded moneys in equity suits numbered 14275, 14735, 14892, 15131, 15569, 15344, and 26," while, as a matter of fact, no moneys whatever were ever impounded in suit No. 14275, and none in suit No. 26, assessed for the year 1913–14, and, further, that the different funds pertaining to each suit were not separately assessed.

The first part of the objection goes to a misdescription of the funds, and the last to an alleged unwarranted commingling thereof by the taxing officers. But this relates to a matter of detail only, as the records of the court and the accounts kept by the different depositories, we assume, will show the particular funds involved and to what suits they are referable, so that there need be no confusion on that score. The assessment is really of a fund in custodia legis to the receiver, an officer of the court, and the question as to what portion of the fund is referable to a given suit is a mere matter of account and detail for the court officers, and not for the assessor and the taxing officers. The fund is chargeable with the tax, and the depository is entitled to credit for it when paid. When the ownership is determined and settled,

the distribution of the fund, diminished by the amount of the tax, will follow, into whosesoever hands it may finally go.

[4] This is decisive of a kindred objection, namely, that:

"The orders of the court * * * were erroneous, in that they directed that one sum should be paid by each bank on account of the tax assessed for each year, and did not specify or determine what amounts should be paid out of the moneys on deposit in each respective action."

The point made is but illustrative of the distinction we draw respecting the detail of accounting as applied to the fund assessed, and the officers upon whom the duty pertaining thereto devolves. The court's orders follow the assessments, and are not a part of them. Independently thereof, the court's orders can create no confusion, as the records of the court and the accounts of the depositories will undoubtedly show the particular moneys involved in each proceeding.

[5] Still another objection, which seems persuasive at first blush, is that, in the case of the Mercantile Trust Company, the moneys on deposit were assessed to the Mercantile National Bank, as receiver, etc., an error attributable to the bank in reporting to the assessor the name of the depository having custody of the funds. But we think, considering that it was the fund that was assessable to the receiver, an officer of the court having its custody, the error was clerical, rather than substantial, and did not vitiate the assessment.

[6] It is another contention of appellant that, as it is provided relative to banks that there shall be levied upon the shares of the capital stock of such institutions an annual tax payable to the state of 1 per centum upon the value thereof, which tax shall be in lieu of all other taxes and licenses—state, county, and municipal—upon such shares of stock and upon the property of such banks, with certain exceptions not material here (citing article 13, § 14, of the Constitution of California), there was no authority for assessment of these moneys in the hands of the bank.

The plain answer to this is that the assessment here was not against the bank, or its shares of stock, or other property of the bank, but against funds in the hands of a receiver of the court, the bank acting as such receiver. Indeed, the assessment against the funds does not affect the bank in any way, either to increase or to diminish its burdens under the taxing laws, and is not in the least inimical to the clause of the Constitution cited.

The orders of the court appealed from will therefore be affirmed, with costs in each case to the appellees.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (five cases).

SECOND AVE. R. CO. v. ROBINSON.

(Circuit Court of Appeals, Second Circuit. July 2, 1915.)

No. 317.

1. RAILROADS ⊂=206—RECEIVERS—APPOINTMENT—VACATION.
An order appointing the receivers of a railroad company to be receivers in a foreclosure suit under a mortgage given by such company does not vacate the original appointment of the receivers.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 676–682; Dec. Dig. ⊂=206.]

2. RAILROADS ⊂=208—LEASES—TERMINATION.
Where the receivers of a leased railroad do not pay the stipulated rent therefor, the lessor may ask the court that they return the property leased.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 685–691; Dec. Dig. ⊂=208.]

3. STREET RAILROADS ⊂=49—LEASES—TERMINATION OF LEASE—RETURN OF PROPERTY—DEPRECIATION.
Where a lease of railroad property was terminated and the property returned to the lessor, it was error for a special master to detemine the value of motors and cars by fixing their cost price and deducting 5 per cent. for 10 years from such price, where the average age of such motors was 6 and not 10 years, and the deduction for depreciation should have been made each year on the depreciated value, and not on the original price.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. ⊂=49.]

Appeal from the District Court of the United States for the Southern District of New York.

John W. Griggs, of New York City, for appellants.
Masten & Nichols, of New York City (Arthur H. Masten and William M. Chadbourne, both of New York City, of counsel), for receiver of Metropolitan St. Ry. Co.
B. S. Catchings, of New York City, for the tort creditors.
Strong & Mellen, of New York City, for Second Ave. R. Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal by the Second Avenue Railroad Company and George W. Linch, its receiver, from an order of Judge Lacombe, dated April 27, 1915 confirming the revised report of W. L. Turner as special master, and has been for the convenience of counsel divided into two proceedings called:
(1) The Use and Occupation Proceeding.
(2) The Motors Proceeding.

1. Use and Occupation Proceeding.

February 1, 1897, the Metropolitan Street Railway Company executed a mortgage to the Guaranty Trust Company as trustee to secure

the payment of bonds aggregating $12,500,000. January 14, 1898, the Second Avenue Railroad Company leased its property to the Metropolitan Company. March 21, 1902, the Metropolitan Company executed a mortgage to the Morton Trust Company as trustee, which covered the foregoing lease, to secure payment of bonds aggregating $16,604,000. February 14, 1902, the Metropolitan Company leased all its property to the New York City Railway Company for 999 years from April 1, 1902. September 24, 1907, Adrian H. Joline and Douglas Robinson were appointed receivers of the New York City Railway Company, and October 1, 1907, the receivership was extended to the property of the Metropolitan Street Railway Company, its lessor. November 19, 1907, the same persons were appointed receivers in a suit to foreclose the mortgage of the Metropolitan Company to the Morton Trust Company. March 17, 1908, the same persons were appointed receivers in a suit to foreclose the mortgage of the Metropolitan Company to the Guaranty Trust Company.

[1] In this long and complicated proceeding it is impossible for the special master, the District Court, or this court to keep in mind every claim, order, and decision that has been made. Hence there may arise from time to time inconsistencies of expression of which it is easy to make too much. The paramount intention, however, to administer the property of these insolvent companies primarily for the benefit of the public by maintaining the operation of the system, and secondarily for preserving the interests of all concerned in accordance with their respective rights and priorities is unmistakable. The order appointing the original receivers to be receivers in the foreclosure suit under the mortgage to the Morton Trust Company did not vacate the original appointment, and we do not think that after November 19, 1907, they operated, as the appellants contend, for the exclusive benefit of the mortgagee.

When we held in the Termination of Lease Proceeding, 198 Fed. 725, 117 C. C. A. 503, and in Penna. Steel Co. v. New York City Railway Co., 216 Fed. 463, 132 C. C. A. 518, that in receivership cases the lessor of a subsidiary line could demand of the court the return of its property in case of default in payment of the stipulated rent, but that so long as it permitted receivers who had not adopted the lease to operate they did so for its benefit and at its risk, we were speaking generally and following Park v. New York, Lake Erie & Western R. R. Co. (C. C.) 57 Fed. 799, New York, Penna. & Ohio R. R. Co. v. New York, L. E. & W. R. R. Co. (C. C.) 58 Fed. 268, Quincy, etc., R. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632, and U. S. Trust Co. v. Wabash, etc., R. R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085.

The appellants seek to distinguish the present case from the Wabash, but like it the receivership was not under a bill to foreclose a mortgage, but at the suit of a general creditor, seeking to preserve the transportation system of the insolvent railway companies for the benefit of the public and of all parties in interest. While the corporation did itself not file the bill, it consented to the relief prayed for, which consent had the same effect as did the bringing of the suit by the corporation in the Wabash Case. We cannot agree that there is any

material difference between this case and the Wabash Cases. Nor do we think that there is any inconsistency between the Wabash Cases and the earlier case of Sunflower Co. v. Wilson, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025, so much relied upon by the appellants. In it the net earnings involved was unpaid freight owed by the Sunflower Company to the receivers of the Railroad Company more than sufficient to pay the stipulated rent of cars due by the Railroad Company to the Sunflower Company. The court held that the Sunflower Company, lessor, need pay to the receivers only the balance over the amount due to it for rent of the cars. In other words, the receivers of the Railroad Company must pay the stipulated rent, and, having done so, were entitled to recover the surplus due to them for freight. Substantially the operation was for net earnings up to the amount of the rent. Read in connection with the facts of the case, the decision is inapplicable to the case in hand or to the subsequent decisions of the Supreme Court in the Wabash Case.

[2] If receivers do not pay the stipulated rent of a leased road, the lessor may ask the court that they return it, and in view of this fact a receiver who has not adopted the lease, but wishes to remain in possession, may prefer to pay as the value of the use and occupation a sum equal to the stipulated rent, though under no greater duty than to pay the net earnings of operation. The general rule is, of course, subject to such and other exceptions. We had not in mind a case like the one under consideration, where receivers, having paid to the lessor, not net earnings, but a sum equal to the stipulated rent, subsequently finding this to be more than the net earnings, had asked to have such payments treated only as on account. The question referred to the special master was:

"What amounts, if any, the New York City receivers and the Metropolitan receivers should pay over to the Second Avenue receiver and the Second Avenue Company on account of net income from the operation of the property of the Second Avenue Railroad Company, after deducting all proper charges against such net income."

The rent payable under the lease to the Second Avenue Company was 9 per cent. on its capital stock, consisting of 18,620 shares, of the par value of $100 each, together with all taxes, assessments, and charges lawfully imposed on the demised premises. The receivers, though not adopting the lease, no doubt to prevent any reclamation by the lessor, did pay the Second Avenue Company sums equal to the stipulated rent at the due dates as follows:

Oct. 31, 1907.	Six months' interest on general consolidated mortgage bonds of Second Avenue Company	$ 32,000
Nov. 29, 1907.	Quarterly rental on stock of Second Avenue Company	41,895
Dec. 31, 1907.	Six months' interest on debenture bonds of Second Avenue Company	2,225
Jan. 28, 1908.	Six months' interest on first consolidated mortgage bonds of Second Avenue Company	140,775
Feb. 28, 1908.	Quarterly rental on stock of Second Avenue Company	41,895
Apr. 29, 1908.	Six months' interest on general consolidated mortgage bonds of Second Avenue Company	32,000
	Total	$290,790

They also paid the special franchise tax for 1907, amounting to $36,756.98.

May 31st the first change in this course of business took place, when the receivers declined to pay the moneys necessary to make up the full amount due for that quarter. After some ineffectual negotiation the Guaranty Trust Company brought suit in the state court to foreclose a mortgage of the Second Avenue Company to it as trustee, dated January 20, 1898, to secure payment of its first consolidated mortgage bonds, amounting to $5,631,000. October 9th George W. Linch, having been appointed receiver in the foreclosure suit, demanded the return of the premises, and the receivers surrendered the same to him at midnight between November 12th and 13th.

The special master held that the receivers, having voluntarily paid sums equal to the stipulated rent down to the quarter beginning March 1, 1908, could not recover the same, but on and after that date were liable only for net earnings. On the other hand, the judge of the District Court held that they operated for net earnings only during the whole period from September 24, 1907, to November 13, 1908, and directed the special master to state an account, charging them with gross earnings and crediting them with expenses of operation during that period. So long as the Second Avenue Company was receiving sums equal to the stipulated rent, it naturally would not, and indeed could not, demand a return of its premises. We think the conclusion of the judge of the District Court unfair to the Second Avenue Company, because it cannot restore the status quo of the date of September 24, 1907, and give the company the option of asking for the return of its property from the receivers in case they operated for net earnings only. As they did actually pay the sum of $32,000 May 1, 1908, on account of the quarter's rent ending May 31st, we think the master should have gone further than he did, and have held that the receivers were to be charged with net earnings only from June 1 to November 13, 1908. The account may be restated on this principle.

2. The Motors Proceeding.

The questions to be considered in this proceeding were referred by the District Court to the special master as follows:

(1) "Whether the Metropolitan receivers are under obligation to deliver to the Second Avenue receiver other motors and connections than those attached to the said 275 cars at the time of their delivery, and, if so, on what terms said motors and connections should be delivered, or the value thereof should be accounted for, by the said Metropolitan receivers?"

(7) "What are the rights, if any, of the receiver of the New York City Railway Company and of the Metropolitan receivers by reason of moneys expended subsequent to their appointment in putting the First Avenue Line of the Second Avenue Company between 59th street and 125th street in fit condition to run, and by reason of their expenditure of other moneys in and about the property of the Second Avenue Company?"

This is not, as counsel for appellants contend, a case of conversion by the receivers of the G. E. 57 motors, or one for punitive damages. October 9, 1908, Linch, the receiver of the Second Avenue Company, filed his petition for a return of the property. On the same day the receivers of the Metropolitan Company filed their answer, in which

they admitted liability to return, among other things, 275 double truck Brill cars equipped with G. E. 1000 motors, as set forth in Schedule D. November 5th the court entered an order directing the receiver to turn over, among other things:

"(3) The electric cars, 275 in number, described in Schedule D annexed to said answer. Said cars are to be accepted by the second Avenue receiver as constituting all the cars purchased with the funds of the Second Avenue as set forth in paragraph 7 of the petition herein, except as hereinafter provided."

On this state of facts, we think the receivers were justified in removing the G. E. 57 motors, and in holding them until the rights of both parties in respect to them had been determined. This must have been the understanding of the parties. The result has unfortunately been very prejudicial to the Second Avenue Company.

[3] Before the master proof was offered of the value of the G. E. 57 motors as of November 12–13, 1908, when they were removed by the receivers of the Metropolitan Company—first, by the usual calculation of deducting an annual percentage for depreciation; second, by proof of what such motors were worth in the market. In his first report the master fixed their value by relying especially on a calculation of depreciation for 10 years' use. Upon exceptions the judge of the District Court directed him to fix their value as of September 24, 1907, when they went into the possession of the receivers. Thereupon the master reported that the motors were put on the cars between 1900 and 1902, and that their value as of September 24, 1907, was $156,750. This value, as we understand it, was arrived at by fixing their cost price at $570 each and deducting 5 per cent. for 10 years from the original price. But the average age of the motors in September, 1907, was 6 years, and not 10 years, and the deduction for depreciation should have been made each year on the depreciated value, and not upon the original price.

There can be in the nature of things no market value for second-hand articles, because there is no standard for fixing their condition. At all events, there was no evidence in this case of market value of the G. E. 57 motors in September, 1907. Therefore, notwithstanding that both parties seem to abandon it, we think the proper way of arriving at the value of the motors is to fix their original price at $570 each and deduct the usual percentage of 5 per cent. for depreciation each year from the depreciated value for 6 years. The order of the court below may be modified to express the value in this way.

The Second Avenue lease contained the following provision as to the return of personal property in case the lease should become inoperative:

"The party of the second part also covenants and agrees that it will at the termination of this lease, or when for any cause it may cease to be operative, transfer, deliver, and return to the party of the first part in good condition the horses, harnesses, cars, tools, implements, machinery, equipments stable, equipments, office furniture and fixtures, and all property of every kind leased to and used by the party of the second part in the maintenance and operation of the railroad and railroads aforesaid, except that which is hereby absolutely transferred, or which has passed from existence by death or destruction, and shall also deliver the substitutes, increments, and additions provided or made

by the party of the second part; and the substitutes for the property impossible to deliver by reason of death or destruction shall be equal in value to that for which they are substituted. * * *"

We agree with Judge Lacombe that the Second Avenue Company was not entitled to have both the general G. E. 57 motors and the G. E. 1000 motors, but only the G. E. 57 motors, and must account for the value of the G. E. 1000 motors delivered to it by the receivers of the Metropolitan Company. They did not add these G. E. 57 motors to the property of the company, but substituted them for the G. E. 1000 motors, which had proved insufficient for the double truck cars, and used the latter throughout the system generally.

The receivers of the Metropolitan Company expended on the Second Avenue line, to keep it a going concern, $290,179.70, as follows:

(1) To complete the electrification of the First Avenue line which is a part of the Second Avenue property	$173,682.43
(2) Remodeling of the First Avenue section of the 96th street car house after the fire	84,110.48
(3) Clearing away the débris of the car house	32,386.79
Total	$290,179.70

These expenditures were necessary for the primary purpose of keeping the system in a condition to perform its duty to the public and were a permanent betterment of the property of the Second Avenue Company.

The decision in the Breach of Lease Proceeding, 216 Fed. 463–466, 132 C. C. A. 518, was between lessor and lessee, and does not apply to the receivers, who did not adopt and are not bound by the lease.

The ninth conclusion of law of the revised report of the special master, as modified by the first article of the order appealed from, must be further modified by calculating the value of the G. E. 57 motors in the way hereinbefore directed. With this modification, and the modification relating to the net earnings, the order is affirmed.

WATKINS SALT CO. v. MULKEY et al.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 254.

1. APPEAL AND ERROR ⊜232—OBJECTIONS IN LOWER COURT—EVIDENCE.
Where defendant, on plaintiff's resting after introducing parol evidence of a contract, moved for a nonsuit on the grounds that the parol agreement was merged in a subsequent written contract and that the oral contract violated the statute of frauds, and the motion was denied, and at the close of the case renewed the motion on the same grounds, and it was again denied, defendant sufficiently objected to the admission of the parol evidence to entitle him to a review on writ of error from a judgment for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. ⊜232.]

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. CONTRACTS ⊂=248—MERGER—QUESTION FOR COURT.
Whether a written contract expresses the agreement of the parties, so that a prior parol agreement is merged therein, is for the court.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1140; Dec. Dig. ⊂=248.
Merger of contracts, see note to Riedinger v. Diamond Match Co., 60 C. C. A. 6.]

3. EVIDENCE ⊂=593—SUFFICIENCY—EVIDENCE IMPROPERLY ADMITTED.
A verdict which has for its basis parol testimony varying a written contract cannot stand.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2430; Dec. Dig. ⊂=593.]

4. EVIDENCE ⊂=419—PAROL EVIDENCE—WRITTEN CONTRACTS—CONSIDERATION.
The rule that parol evidence is admissible to explain or amplify the consideration recited in a written contract does not permit proof of an oral agreement imposing an affirmative obligation on one of the parties, of which there is no indication in the written contract.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912–1928; Dec. Dig. ⊂=419.]

5. CORPORATIONS ⊂=406—POWERS OF OFFICERS.
An agreement by the president of a manufacturing corporation to advance money in aid of the reorganization of another manufacturing corporation, to operate and conduct the affairs of the reorganized corporation, and to turn over stock of the reorganized corporation to persons putting up as security the stock of an independent corporation, is not within the implied authority of the president, and a resolution of the board of directors of his corporation, ratifying a proposition submitted by the president to a bondholders' committee of the corporation to be reorganized, which authorizes the president to conclude the transaction, does not confer authority on the president to make a contract to turn over any part of the stock of the reorganized corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611–1614; Dec. Dig. ⊂=406.
Authority of president of corporation to contract in its behalf, see note to Marqusee v. Hartford Fire Ins. Co., 119 C. C. A. 256.]

6. CORPORATIONS ⊂=386— CONTRACTS — RATIFICATION — ULTRA VIRES CONTRACTS.
A corporation cannot ratify an ultra vires contract.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1554, 1555; Dec. Dig. ⊂=386.]

7. CORPORATIONS ⊂=426—CONTRACTS—RATIFICATION.
The ratification by a corporation of a written contract made by its president is not a ratification of a prior parol agreement, not embodied in the written agreement, nor communicated in any way to the directors of the corporation, for there can be no ratification of that of which the ratifying body has no knowledge.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. ⊂=426.]

8. CORPORATIONS ⊂=428—CONTRACTS—RATIFICATION.
Where the president of a corporation made a written contract which by its express terms was made subject to the approval of the board of directors, and made another written contract relating thereto which was ratified, and made an unauthorized oral agreement affecting the subject-matter of the two contracts, of which there was no mention or suggestion in the written contracts, his knowledge of the oral agreement could not be imputed to the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748–1761; Dec. Dig. ⊂=428.]

9. CORPORATIONS ⟸428—ACTIONS OF OFFICERS—ASSUMPTION OF KNOWLEDGE OF MATTERS KNOWN TO OFFICERS.

A corporation cannot in all cases be assumed to have knowledge of all matters known to its president relating to the business of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748–1761; Dec. Dig. ⟸428.]

In Error to the District Court of the United States for the Western District of New York.

This cause comes here on writ of error to review a judgment entered upon the verdict of a jury in favor of the plaintiffs below for the sum of $32,627.50.

The Watkins Salt Company is a corporation created, organized, and existing under the laws of the state of Delaware, but is engaged in business in the state of New York, and has its principal office and place of business at Watkins, in the county of Schuyler and state of New York. Warren W. Clute is a resident of Watkins, Schuyler county, N. Y., and is president of the Watkins Salt Company. The defendants, who were plaintiffs in the action below and will be hereinafter referred to as plaintiffs, are citizens and inhabitants of the state of Michigan. The plaintiffs in this court, who were defendants in the court below, will be hereinafter referred to as defendants. On the trial below, and at the close of the case, the complaint was dismissed as against Warren W. Clute, there being in the opinion of the court a lack of evidence as against him.

Hubbell, Taylor, Goodwin & Moser, of Rochester, N. Y. (John G. Milburn, of New York City, and Clarence P. Moser, of Rochester, N. Y., of counsel), for plaintiff in error.

Gibbons & Pottle, of Buffalo, N. Y. (Frank Gibbons, of Buffalo, N. Y., and H. A. Lockwood, of New York City, of counsel), for defendants in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This action was brought to recover damages arising out of an alleged breach of contract to deliver to plaintiffs a certain amount of the capital stock of a reorganized salt company, named the Detroit Rock Salt Company. It appears that the Detroit Salt Company, a corporation existing under the laws of Michigan, was manufacturing salt from brine obtained from wells on its premises; but the company was not operating to advantage and had given a mortgage on all the property it owned, the mortgage running to the Security Trust Company as trustee, a Michigan corporation having its office at Detroit. The mortgage was given to secure the payment of bonds issued by the Detroit Salt Company in the amount of $1,000,000. The company was also indebted to divers persons upon notes and open accounts in the amount of $325,000. A suit had been instituted to foreclose the mortgage, as the Detroit Salt Company was in default, and the Security Trust Company had been appointed receiver to take and hold possession of all the property during the pendency of the suit to foreclose the mortgage. After the foreclosure suit was begun the holders of the bonds secured by the mortgage appointed a committee of nine and authorized it to take all proceedings deemed necessary or proper to protect the interests of

the bondholders, including the power to purchase or cause to be purchased in behalf of the committee the property of the Detroit Salt Company, and to reorganize that company or to organize another corporation for the purpose of taking over and operating the property of the Detroit Company.

The bondholders' committee had certain negotiations with the Watkins Salt Company, defendant herein, who was represented by its president, Warren W. Clute. As a result of the negotiations with the bondholders' committee, and of the separate negotiations which took place between the plaintiffs and the Watkins Salt Company, the latter company on June 12, 1912, submitted in writing to the bondholders' committee a plan of reorganization of the Detroit Salt Company. The plan proposed was that the bondholders' committee should proceed with the pending foreclosure proceedings, bid in the property, organize a new company, issue $1,000,000 first mortgage bonds payable in 20 years, $1,500,000 of common stock, and $219,000 of preferred stock, and that the committee, with the new bonds and the preferred stock, should cause to be paid and canceled all of the old bonds, use $325,000 of the common stock to pay the outstanding indebtedness, and then turn over the balance of the common stock to the Watkins Salt Company as its property. The Watkins Salt Company on its part was to make an advance not to exceed $100,000, out of which was to be paid the cost of the receivership, existing liens, expenses of foreclosure and of the bondholders' committee, the expenses of forming the new company, etc. The proposal was accepted by the bondholders and was fully performed.

On August 2, 1912, another written agreement relating to the reorganization of the Detroit Salt Company was made. This agreement was not with the bondholders' committee, but with the plaintiffs herein on the one side and the Watkins Salt Company on the other. The agreement recites that in consideration of the advancements made and to be made by the Watkins Salt Company towards the reorganization of the Detroit Salt Company, at the request of and for the benefit of the parties of the first part, the parties of the first part have agreed to pledge as collateral security for such advancements the entire capital stock of the Detroit & Western Railroad Company. It further recites that the stock is deposited "as collateral security for the repayment to the party of the second part of all moneys now or hereafter advanced by it for or on account of the reorganization" of the Detroit Salt Company. It gives the party of the second part "a lien for all advancements heretofore or hereafter made, not exceeding" $100,000, and gives it also the right to sell the deposited stock at public or private sale and without notice of time and place of sale. It contains other provisions which it is unnecessary to set forth. In explanation of this agreement of August 2d it is to be said that the plaintiffs, "the party of the first part," were stockholders in the Detroit Salt Company, and that one of them, Jennings, was a member of the bondholders' committee and its secretary, and took a very active part in inducing the president of the Watkins Salt Company to submit to the bondholders' committee the proposal already referred to of June 12th, and that the

promise of Jennings that this stock should be deposited as collateral in the manner specified in the writing of August 2d had been made prior to June 12th, and was one of the considerations which led the president of the Watkins Salt Company to submit the proposal of the latter date. The plaintiffs owned all the stock of the Detroit & Western Railroad Company. That railroad was a very small affair. The company owned two cars and an engine and two miles of track. It was located in Detroit, and connected the Wabash Railroad with the Michigan Central Railroad. It was built to carry salt from the mines to the railroads and to bring coal from the railroads to the mines. Without the operation of the mines the railroad was practically valueless. It was worth between $50,000 and $70,000. Jennings testified that he had all his fortune invested in the mine and the railroad and that his last dollar was involved in the reorganization of the salt company.

The agreements of June 12th and of August 2d are of value here as a part of the history of this transaction. The right of action which the plaintiffs assert does not grow out of either of the two written contracts to which reference has been made. It grows out of an alleged oral agreement which the plaintiffs assert they made with Warren W. Clute as the president of the Watkins Salt Company, and which they claim created an obligation on the part of that company to surrender to them 49 per cent. of the stock issued by the Detroit Rock Salt Company, less the amount it was agreed should be paid to unsecured creditors of the Detroit Salt Company. It is conceded that, if such an agreement was ever made, it rested in parol, and that it was made prior to June 12th, when the first of the two written contracts above mentioned was adopted. The court below admitted parol testimony to prove the existence of such an oral agreement. The defendant insists that the evidence was inadmissible, and under the circumstances of the case insufficient to support the judgment which the plaintiffs obtained. It claims that the written contracts must be conclusively presumed to contain the whole of the engagement of the parties, and that the written contracts cannot be altered, added to, or varied by oral evidence. The plaintiffs, while conceding the general rule to be as defendant states it, nevertheless assert that the rule is inapplicable to the circumstances of this case.

[1, 2] The plaintiffs insist that, as the oral evidence was received without objection, the question as to its admissibility cannot be raised in this court, and that the parol agreement must be taken as established by the verdict of the jury. It appears, however, that when plaintiffs rested the defendant moved for a nonsuit on the ground, among others, that the alleged oral contract, if any, and all conversations in reference to it, were merged in the writing of August 2, 1912, and also on the ground that the oral contract violated the statute of frauds, because it was an agreement for the sale of personal property of the value of more than $50. The motion was denied.

Whether the written contract of August 2, 1912, expressed the terms of the agreement was a question for the court, and should not have been submitted to the jury. Seitz v. Brewer's Refrigerating Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 47, 35 L. Ed. 837, (1891). And in the

case cited the Supreme Court, through Chief Justice Fuller, stated the law as follows:

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and the manner of their undertaking, were reduced to writing. Greenl. Ev. § 275."

At the close of the case and on the same grounds the court was asked to direct a verdict for the defendant, which was refused. In view of these facts there is no substance in the argument that the oral agreement was received in evidence without objection. Loomis v. N. Y. C. & H. R. Co., 203 N. Y. 359, 367, 96 N. E. 748, Ann. Cas. 1913A, 928 (1911).

[3] The agreement as to the stock of the reorganized company, if any such agreement was actually made, and we express no opinion as to whether it was or not, was so closely connected with the transfer of the stock of the Detroit & Western Railroad Company that it cannot properly be regarded as relating "to a subject distinct from that to which the written contract applies." To admit proof of an agreement to turn over the stock of the reorganized company in case the railroad stock was deposited as collateral would be to add another term to the written contract contrary to the well-settled and salutary rule governing such cases. And no verdict can be permitted to stand which has its only basis in parol testimony which should never have been admitted.

[4] Counsel for plaintiffs seek to justify the admission of the evidence upon the plea that the parol contract really constituted a part of the consideration of the written agreement of August 2, 1912, and that the matter of consideration is always open to inquiry by parol and capable of oral proof as to just what it may be. It is true that for some purposes parol evidence can be introduced to explain or amplify the consideration recited in a written contract; but this exception to the general rule does not permit proof of an oral agreement for the purpose of imposing an affirmative obligation on one of the parties of which there is no indication or suggestion in the written contract. If that were to be permitted on the theory of an inquiry into the consideration of the contract, the rule respecting the finality of written contracts would obviously be abrogated. This was clearly stated in Howe v. Walker, 4 Gray (Mass.) 318 (1855), when the court said:

"Nor can you, under the guise of proving by parol the consideration of a written contract, add to or take from the other provisions of the written instrument. This would practically dispense * * * with that sound rule of the common law which finds in the written contract the exclusive and con-

clusive evidence of the intent and agreement of the parties, and will not suffer such written contract to be varied or affected by any contemporaneous parol agreement."

[5] There is, however, another reason why it is impossible that the plaintiffs should succeed in their action. The oral agreement upon which they rely was made by them, if their testimony is true, with the president of the Watkins Salt Company. The agreement was of an unusual and extraordinary character. It may even have been ultra vires in its character, although we do not find it necessary to consider that phase of the subject. It was an agreement by a manufacturing corporation to advance money in aid of the reorganization of another manufacturing corporation and to operate and conduct the affairs of the reorganized company. It was agreed by way of inducement and to secure the money advanced that the stock of an independent company should be put up as security, and that in return stock in the reorganized company of the par value of $410,000 should be turned over to these plaintiffs as their absolute property. Certainly it is not within the implied authority of the president of a corporation to enter into any such agreement. We have searched the record in vain for the purpose of finding that the board of directors of the Watkins Salt Company ever expressly authorized its president to make any such agreement as to the stock of the reorganized company. The resolution of the board of directors adopted on June 20, 1912, which ratified the proposition submitted by the president to the bondholders' committee, and which authorized the president "to conclude the transaction as outlined in such proposition," certainly conferred no such authority, for the proposition as outlined made no allusion, even the most remote, to the turning over of the stock or any part of the stock to these plaintiffs. Moreover, the contract that he was authorized under that resolution to consummate was the contract with the bondholders' committee, and cannot possibly be construed as conferring authority upon him to enter into a contract with other parties and upon a subject not submitted to the directors.

[6, 7] It is also plain to us that the Watkins Salt Company cannot be held subsequently to have ratified the unauthorized contract. If the contract was ultra vires and beyond the powers of the corporation to authorize, it would be beyond the powers of the corporation to ratify. But, waiving that, there is no evidence in this record of any ratification of the alleged oral agreement, the written contract of August 2, 1912, does not appear to have been adopted by any specific resolution of the directors. That contract was ratified by the board on November 12, 1912, when it adopted a resolution authorizing the president, Mr. Clute, to sell "as he may see fit, and for such prices and upon such terms as he may see fit," the stock of the reorganized Detroit Salt Company and all collaterals pledged therewith. But this ratification of the contract of August 2d surely cannot be construed as extending beyond the contents of that contract. The ratification of the written contract bearing date of August 2d cannot by any process of legal reasoning be understood as a ratification of the oral agreement

of June 12th not embodied in the written agreement and never communicated in any way to the directors. There can never be ratification of that of which the ratifying body has no knowledge.

[8] But we are told that as the president of the Watkins Salt Company, who is alleged to have made this oral contract, knew of it, it must be assumed that his board of directors had knowledge of it. The proposition stated in detail is this: That when the president of a corporation makes a written contract which by its express terms is made subject to the approval of its board of directors, and makes another written contract related thereto which is ratified, and makes an unauthorized oral agreement affecting the subject-matter of those contracts, of which there is no indication, suggestion, or mention in the written contracts, his knowledge of the oral agreement is to be imputed to the company. We find ourselves unable to assent to the proposition. There is no evidence in the record to show that the president ever communicated the alleged oral agreement to the board, and when defendant at the trial offered evidence to show that it had never been in any way brought to the board's attention, it was excluded.

[9] A corporation cannot in all cases be assumed to have knowledge of all matters known to the president relating to the business of the corporation. Whether such assumption can be indulged seems to turn largely on the particular facts of each case. Cook on Corporations, vol. 3, § 727, p. 2588.

But no one should seriously contend that if a president of a corporation makes an unauthorized contract, which, if valid, would affect the rights of his corporation, his knowledge of the transaction is to be imputed to the corporation, or that it is to be presumed, in the absence of any evidence to the contrary, that he communicated his unauthorized act to his board of directors. The mere statement of the proposition, it seems to us, carries its refutation upon its face. If that were the law, then, as notice to the corporation would begin from the time the unauthorized contract was made, six months thereafter, although the directors had no actual knowledge of its existence, the contract would become valid and binding, not having been disaffirmed by the board. We say six months, because the Supreme Court has held that, unless a board of directors dissents within a reasonable time after it has notice of an unauthorized contract made by its president, it is presumed to have ratified his contract, if the contract is within the corporate powers, and that a delay of six months in the disaffirmance after knowledge of his act is an unreasonable delay. Indianapolis Rolling Mill v. St. Louis, Fort Scott & Wichita Railroad Co., 120 U. S., 256, 7 Sup. Ct. 542, 30 L. Ed. 639 (1886). "After knowledge of his act" can only mean after actual knowledge of his act. But the ruling of the court below means that the president does not need to communicate the facts, that it may be presumed that he has done so, and that the presumption is conclusive and cannot be rebutted. No other inference from the ruling is possible, as the District Court declined to allow evidence to be introduced to show that the president never communicated the oral contract to his directors.

Judgment reversed.

THE TITANIC.

In re OCEANIC STEAM NAV. CO., Limited.

(Circuit Court of Appeals, Second Circuit. June 4, 1915.)

SHIPPING ⊂=209—PROCEEDINGS FOR LIMITATION OF LIABILITY—WITHDRAWAL OF CLAIM.

A damage claimant, in a proceeding in admiralty by a shipowner for limitation of liability, although restrained by the usual injunction in such cases from bringing action on his claim in another court, may as matter of right withdraw his claim, on payment of costs incurred by reason of his entry into the case, and it is immaterial to the court what future action he may contemplate.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646–655, 659, 661, 662; Dec. Dig. ⊂=209.]

Lacombe, Circuit Judge, dissenting in part.

On application for a writ of prohibition on the part of the petitioner prohibiting Judge Mayer from entering orders withdrawing claims and permitting suits to be brought in England.

Burlingham, Montgomery & Beecher, of New York City, for petitioner.

James Allison Kelly, of New York City, for claimant Futrelle.

Hunt, Hill & Betts, of New York City (Frederick M. Brown, Geo. Whitefield Betts, Jr., and Francis H. Kinnicutt, all of New York City, of counsel), for Gilbert M. Tucker, Jr.

Culver & Whittlesey, of New York City, for Hilda M. Lacon.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. Three claimants ask permission to withdraw the claims filed by them in this proceeding. Judge Mayer has indicated his intention to permit this to be done and the present proceeding seeks an order prohibiting such action. Substantially the same questions are involved in each claim, but, in the view which we take of the law, it will be only necessary to consider the claim of Hilda Mary Lacon, which presents the question freed from unnecessary complications.

Hilda Mary Lacon is a British subject residing at Halifax, Nova Scotia. Her claim is for $3,464 for loss of baggage and personal effects. It was filed November 28, 1913. It is asserted that the object of the claimant is to get permission to prosecute her suit in England. This may be true, but whether true or not is, in our view, immaterial. The motion is that the claimant have permission to withdraw her claim in the District Court. We do not see that she is called upon to state her reason for this motion, but it is easy to infer that her reason, as well as that of the other claimants, is that she is satisfied that she can get no adequate redress in the courts of the United States. If she has the right, her reason for asserting her right is immaterial. The rule is, we think, practically universal that, where a suit at law

is commenced for damages and the defendant interposes no counterclaim and seeks no affirmative relief, the plaintiff may discontinue the action at any time on payment of costs. A defendant who opposes such a motion on the ground that the plaintiff contemplates beginning a new action against him in some other jurisdiction will probably have some difficulty in convincing the court of the soundness of his contention. The plaintiff concludes that he does not wish to continue the suit, he pays the defendant all the costs which have accrued and discontinues it; is there any doubt as to his right to do so? If not, what possible bearing has his future course upon his present right? The court cannot refuse to recognize an existing right because of some occurrence which may take place in the future.

Conceding, for the argument's sake, that the court is justified in considering the future, is it conceivable that any court will compel him, in invitum, to remain in its jurisdiction because he thinks he can obtain more complete justice elsewhere? We think not. The only question for the District Court was—Have these parties a right, on paying costs, to withdraw their claims? Having decided that they have that right, the action of the claimants in the future is no concern of the court. If they decide to bring new suits or proceedings it is for the court in which the claims are presented to pass upon their validity and upon any plea in abatement or in bar which may be interposed. The question in all of these cases relates to the present. Have the claimants a right to withdraw their claims? If they have, there is an end of the present controversy. What they do with their claims hereafter is immaterial. In short, the District Court cannot retain jurisdiction for the reason that if it releases the claimants they may get relief in some other tribunal.

Of course the facts differ in the three cases under consideration, but we deem it unnecessary to discuss these differences, because the cases are alike in the fundamental proposition that in each the claimant wishes to withdraw. Whether he be called claimant or defendant in the limited liability proceeding is immaterial. Having come into this jurisdiction, the claimants should pay the costs incurred by reason of their entry. Having done so they are at liberty to withdraw and bring any action or proceeding they please so far as the District Court is concerned. There cannot be two actions pending at the same time and so long as the claimants remain in this jurisdiction the injunction binds them. When they have withdrawn they are as free from it for all purposes as if they never had been parties.

We do not think the action of the Oceanic Steam Navigation Company in filing the petition for limitation places these claimants in the position of defendants and therefore in a position where they cannot withdraw their claim. Facts, not theories, should determine the issue, and, as we have shown, the fact is that the claimants are endeavoring to collect of the Oceanic Company damages sustained by reason of its alleged negligence. On that issue they hold the affirmative and, no matter what name may be given them, are entitled to withdraw the claims if they see fit to do so.

We have not passed upon the question whether or not a writ of prohibition is the proper remedy, for the reason that both parties seem to desire a prompt determination of the issue.

We think the proposed orders should be amended by providing that in each case the claim may be withdrawn on payment of taxable costs, and that the motion for the writ of prohibition should be denied.

LACOMBE, Circuit Judge. I concur in the conclusion reached because I think the orders about to be entered in the District Court would be appealable; therefore no writ of prohibition should issue, even if this court had the power to issue such writ. On other points set forth in the opinion I do not concur.

The statute providing for limited liability and the rules made in conformity therewith give to the American owner of an American vessel, sunk as the Titanic was, the right to compel all claimants resident here and all claimants resident elsewhere, but who have brought their claims into any American court, to come into the statutory proceeding. Such owner is entitled under the statute and the rules to an injunction to protect that right. The sort of injunction which is issued to protect that right is well settled by long established practice.

The Supreme Court has now held that the British owner of a British vessel similarly lost, who has a residence and property here which may be reached by attachment, has the right to avail of the provisions of this statute; indeed it has further held that in a proceeding under such statute initiated by the British owner the conditions to be complied with to provide a corpus shall be such as the American, not the British, statute provides. So much is the settled law of this case. That being so, I do not see how in the case of the British owner who is availing of this statute, any more than in the case of an American owner, the District Court can properly do otherwise than issue the injunction in its usual form, the form well recognized and applied in countless cases initiated since the statute was passed, or can properly modify that injunction to the owner's prejudice or make exceptions in the one case, which it would not make in the other.

As to what is the scope of the injunction authorized and issued under the statute and rules—whether it be far-reaching or narrow—that is a question touching which opinions may differ. That being so, the question should be disposed of directly not indirectly; the person who thinks it should be construed narrowly may act on that assumption, and upon proceeding to hold him in contempt the question of construction will be settled, finally perhaps by the Supreme Court. But if, upon the theory that it should be narrowly construed, the judge who issues it should modify its usual terms so as to secure such a construction, the person who is entitled to it is deprived of his right to a relief given by statute, should the court of last resort hold, it may be in some other case, that the statute contemplated the issuance of a broad injunction.

Recording merely this divergence from the views expressed by the majority of the court, I concur in the conclusion to deny application for writ of prohibition.

BELL v. BLESSING.

In re PACIFIC MOTOR CAR CO.

(Circuit Court of Appeals, Ninth Circuit. August 23, 1915.)

No. 2488.

1. BANKRUPTCY ⟸43—CORPORATIONS—VOLUNTARY PETITION IN BANKRUPTCY—AUTHORIZATION—SUFFICIENCY.

An authorization to a corporation to file its voluntary petition in bankruptcy, given by its board of directors, a member of which practically owned all the stock, is sufficient, notwithstanding Civ. Code Cal. § 361a, prohibiting any assignment of the business, franchise, and property of a corporation, unless with the consent of the stockholders thereof holding at least two-thirds of the stock.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. ⟸43.]

2. BANKRUPTCY ⟸43—VOLUNTARY PETITION IN BANKRUPTCY BY CORPORATION—STATUTES.

A corporation, not a municipal, railroad, insurance, or banking corporation, has, under Bankr. Act July 1, 1898, c. 541, § 4a, 30 Stat. 547 (Comp. St. 1913, § 9588), the same privilege of becoming a voluntary bankrupt as an individual, and its petition therefor need only show that it owes debts which it is unable to pay in full, and that it is willing to surrender its property for the benefit of its creditors; and a resolution of the board of directors, authorizing the filing of a voluntary petition, need not authorize, in conformity with section 3, subd. 5 (Comp. St. 1913, § 9587), an admission in writing on the part of the corporation of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and a resolution authorizing its cashier, treasurer, and bookkeeper to prosecute in the name of the corporation a petition in bankruptcy to final discharge is sufficient to authorize the corporation to proceed as a voluntary bankrupt to obtain its discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. ⟸43.]

3. BANKRUPTCY ⟸4—VOLUNTARY BANKRUPTCY—AVOIDING ATTACHMENTS—EFFECT.

The Bankruptcy Act recognizes the right of a bankrupt to make a voluntary assignment of his property to avoid attachments thereon, and thus secure an equal distribution of his property among all his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 3, 4; Dec. Dig. ⟸4.]

Petition for Revision of Proceedings of the District Court of the United States for the First Division of the Northern District of California, in Bankruptcy; M. T. Dooling, Judge.

In the matter of the Pacific Motor Car Company, bankrupt. Petition by Teresa Bell against Charles B. Blessing, as trustee in bankruptcy of the Pacific Motor Car Company, to vacate the adjudication of bankruptcy. From a judgment dismissing the petition, on sustaining a demurrer thereto, Teresa Bell petitions for revision. Affirmed.

On May 15, 1914, the Pacific Motor Car Company, a corporation, filed its voluntary petition in bankruptcy. It is alleged by the petition, among other things, that petitioner is not a municipal, railroad, insurance, or banking corporation; that its petition is filed pursuant to a resolution of the board of directors of said corporation at a meeting held the 12th of May, 1914; that

the corporation owes debts, which it is unable to pay in full; and that it is willing to surrender all its property for the benefit of its creditors, and desires to obtain the benefit of the acts of Congress relating to bankruptcy. Based upon the petition, the order of adjudication followed on May 20, 1914. On August 11, 1914, Teresa Bell filed in the bankruptcy court a petition praying a vacation of the adjudication and for general relief. The petition, among other things, sets forth a copy of the resolution of the board of directors of the bankrupt, and avers that the resolution was adopted at a special meeting of the board in pursuance of the written consent of three of such directors; that by an act of the Legislature of the state of California relating to insolvent debtors it is provided that no discharge shall be granted to any corporation from its debts; that one S. A. Moss is the owner of all the capital stock of the bankrupt; that he has permitted certain individuals, namely, W. G. Davis, John Ralph Wilson, W. L. Bradbury, and C. L. Hewes each to hold one share of such stock in order to qualify them to act as directors; that two of such individuals resigned as directors, and that after February 24, 1914, only the other two of them acted in that capacity; that after January 1, 1914, Moss conducted and carried on the business under the name of the bankrupt, during all of which time the persons holding but one share of the capital stock were in fact the agents and employés of Moss; that Moss is and has been at all times mentioned solvent and well able to pay all the debts contracted in the name of the bankrupt; that the bankrupt kept no by-laws nor journal of its meetings of directors, nor record of its business transactions, as required by the laws of California; and that said Moss, contriving and intending to defraud petitioner by having her attachment dissolved, caused the said proceeding in bankruptcy to be instituted. To this petition a demurrer was interposed, which was sustained, and the petition dismissed, and the order and judgment of the court in that regard are made the basis of review in this court.

T. Z. Blakeman, of San Francisco, Cal., for petitioner.

Heller, Powers & Ehrman and Reuben G. Hunt, all of San Francisco, Cal., for respondent.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge (after stating the facts as above). Three points are advanced against the regularity and legality of the adjudication:

(1) That the bankruptcy proceedings were not authorized by the requisite stockholders of the corporation.

(2) That the resolution of the board of directors does not meet the requirements of section 3, subd. 5, of the Bankruptcy Act.

(3) That S. A. Moss, being the owner of all the stock, and conducting the business of the corporation as his own, caused the proceedings in bankruptcy to be instituted to hinder, delay, and defraud the petitioner, by having her attachment dissolved.

[1] The first point is predicated upon a statute of California which inhibits any sale, assignment, transfer, or conveyance of the business, franchise, and property, as a whole, of any corporation of the state, unless with the consent of the stockholders thereof holding of record at least two-thirds of the issued capital stock of the concern. Section 361a, Civil Code of California. We think a sufficient answer thereto is that the law looks through mere form to the substance of things; and when it is disclosed, as it is by the petitioner's petition,

that S. A. Moss is practically the owner of the entire capital stock of the bankrupt corporation, and that authority was given by the board of directors, of which Moss is one, for making the assignment in bankruptcy, it would seem that a mere formal meeting of the stockholders, and a recording of their assent as such to the assignment, could add nothing to the authority given by the directors. In either event, the entire stock practically is represented through Moss, and whether he recorded his consent to the assignment as a stockholder or as a director could make no practical difference. We know that the holders of more than two-thirds of the capital stock have given their consent to the assignment, and this, for all practical purposes, is sufficient.

[2] The second point is based upon the idea that the resolution of the board of directors should have authorized, in strict conformity with section 3, subd. 5, an admission in writing on the part of the corporation bankrupt of its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, as it is insisted that that is the only authority by statute for adjudication upon a voluntary petition. Section 4a of the Bankruptcy Act provides that:

"Any person, except a municipal, railroad, insurance or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

This extends to a corporation of the kind of the present bankrupt the same privilege of becoming a voluntary bankrupt as to an individual, and there exists no good reason why it may not become such a bankrupt in the same way. It is only necessary for such a petitioner, praying adjudication, that he show that he owes debts which he is unable to pay in full, and that he is willing to surrender his property for the benefit of his creditors. Hughes, Fed. Procedure (2d Ed.) 99, 100. The allegation or admission is practically the same in either event, but the procedure is different. In the one case, the admission constitutes an act of bankruptcy, and the creditors, basing their petition upon the act, proceed as if the case were one of involuntary bankruptcy; while, in the other, the action is purely voluntary, and the bankrupt proceeds on his own motion and initiative. Now, the resolution of the board of directors clearly authorized the cashier, treasurer, and bookkeeper to prosecute in the name of the corporation a petition in bankruptcy to final discharge, which was amply sufficient to authorize the bankrupt to proceed as a voluntary bankrupt to obtain a discharge from its debts in the bankruptcy court. The second contention is therefore not maintainable.

[3] Answering the third point, it is only necessary to say that the Bankruptcy Act recognizes the right of the bankrupt to make a voluntary assignment of his property, with the purpose of avoiding attachments, and thereby securing an equal distribution of his property among all his creditors, and it cannot be predicated of such a proceeding that its purpose is to defraud the attaching creditors.

The order of the District Court in sustaining the demurrer and dismissing the petition for vacation of the adjudication will be affirmed.

LEISY BREWING CO. v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1915.)

No. 4401.

1. STATES ⟸9—ADMISSION TO UNION—CONDITIONS—INTRODUCING LIQUORS INTO INDIAN COUNTRY—POWER OF CONGRESS.
Congress has power to enact legislation requiring a territory to insert in its Constitution as a condition of admission to statehood a provision prohibiting the sale or manufacture of intoxicating liquors in Indian Territory, as well as the introduction of such liquors from other parts of the state into such territory.
[Ed. Note.—For other cases, see States, Cent. Dig. § 4; Dec. Dig. ⟸9.
Introducing intoxicating liquors into Indian country, see note to Joplin Mercantile Co. v. United States, 131 C. C. A. 171.]

2. CARRIERS ⟸39—DUTY TO CARRY GOODS—LIQUORS—INDIAN TERRITORY.
Where a brewing company proffers intoxicating liquors to a railroad for carriage into Indian Territory, where the introduction of such liquors is prohibited by the state Constitution, the road's refusal to carry is justified.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 98; Dec. Dig. ⟸39.]

3. EVIDENCE ⟸7—JUDICIAL NOTICE—BEVERAGES—CHARACTER OF BEVERAGES.
Courts cannot take judicial notice whether a beverage going through a malting process, but containing no malt whatever, is or is not a malt liquor.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 6; Dec. Dig. ⟸7.]

4. EVIDENCE ⟸7—JUDICIAL NOTICE—BEVERAGES—CHARACTER OF BEVERAGES.
Courts cannot take judicial notice whether a beverage containing less than one-third of 1 per cent. of alcohol is intoxicating.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 6; Dec. Dig. ⟸7.]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by the Leisy Brewing Company against the Atchison, Topeka & Santa Fé Railway Company. From a decree sustaining defendant's motion to dismiss the complaint, plaintiff appeals. Reversed.

This is an appeal from a decree sustaining a motion to dismiss the complaint of the plaintiff, a brewing company, manufacturer of a certain beverage which it calls "Temp Brew." The complaint alleges that plaintiff tendered to the defendant railway company a car load of this brew for shipment over its line of railway from Kansas City, Mo., to points in that part of the state of Oklahoma which was formerly the Indian Territory, and also to the Indian country, and in the old Osage Nation; that it tendered the lawful charge therefor, but that the defendant refused and still refuses to receive and ship any of this brew over its line of railway from Kansas City to any points in the former Indian Territory or Indian country. It is further alleged that "Temp Brew" is a drink manufactured and sold extensively by the plaintiff in various parts of the United States; that a copyright for the exclusive use of the words "Temp Brew," designating it, has been granted by the United States government; that the plaintiff has complied with the Food and Drug Act of June 30, 1906, and all the rules and regulations promulgated thereunder by the proper officers; that it contains .30 of 1 per cent. alcohol; that although, in part, it passes through a malting process when being manu-

factured, yet it contains no malt, and is not a malt liquor or beer; that it is unfermented, and is not detrimental to the health; that it is incapable of producing intoxication when taken by any human being, infant, adult, white, or Indian; that the defendant refuses to carry it from points without the state of Oklahoma, as well as from points within the state of Oklahoma, into the former Indian Territory, Indian country, Indian reservations, and allotments to the Indians, the alienation of which is restricted, claiming that to carry it to those places would be in violation of the acts of Congress and the laws and regulations of the United States. The prayer of the petition is for a mandatory injunction.

The motion to dismiss is based upon the ground that the brew is within the provisions of the acts of Congress prohibiting the introduction of liquors into the former Indian Territory and Indian country.

I. J. Ringolsky, of Kansas City, Mo. (Harry L. Jacobs, of Kansas City, Mo., E. E. Blake and A. T. Boys, both of Oklahoma City, Okl., and M. L. Friedman, of Kansas City, Mo., on the brief), for appellant.

Samuel W. Hayes, of Oklahoma City, Okl. (J. R. Cottingham, of Oklahoma City, Okl., on the brief), for appellee.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge (after stating the facts as above). The statutes which are applicable to the issues involved are the Act of July 23, 1892, 27 Stat. 260, c. 234, amending section 2139, R. S., as again amended by the Act of March 1, 1895, c. 145, 28 Stat. 693, and the Act of January 30, 1897, 29 Stat. 506, c. 109 (Comp. St. 1913, § 4137). The Act of 1895 provides:

"Sec. 8. That any person, whether an Indian or otherwise, who shall, in said territory, manufacture, sell, give away, or in any manner, or by any means furnish to any one, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to any one, or carrying into said territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years."

The Act of January 30, 1897, 29 Stat. 506, makes it an offense for any person—

"to sell, give away, dispose of, exchange or barter any malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label or brand, which produces intoxication, to any Indian to whom allotment of land had been made while the title to the same shall be held in trust by the government."

It also prohibits the introduction of—

"any malt, spirituous, or vinous liquor, including beer, ale and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States."

The Oklahoma Enabling Act of June 16, 1906, required the state of Oklahoma to insert in its Constitution a provision prohibiting the

sale or manufacture in the Indian Territory, as well as the introduction of such liquors from other parts of the state into that part which was the Indian Territory, and in pursuance of that section of the Enabling Act such a provision was made and is now a part of the Constitution of the state of Oklahoma.

[1, 2] That Congress has the power to enact such legislation is admitted by counsel for the plaintiff, as well as the fact that, if the beverage known as "Temp Brew" comes within any of the articles prohibited by these acts, the refusal of the defendant to carry it into the places to which plaintiff desired to have it carried, is justified. But the contention is that the article does not come within any of the prohibited drinks. The learned trial judge was of the opinion that the fact that the complaint did not disclose the ingredients of "Temp Brew" other than alcohol, and admitted that it passed through a malting process, brought it within the prohibited class.

Does the complaint show whether this beverage is a malt or fermented liquor or intoxicating drink of any kind whatsoever? If it is either of these, then the decree must be affirmed. The allegations in the bill are that it is neither, although it also alleges that it passes through a malting process when being manufactured, yet contains no malt; that it is unfermented, and contains but .30 of 1 per cent. of alcohol.

[3, 4] Courts cannot take judicial notice whether a beverage going through a malting process, but containing no malt whatever, is a malt liquor or not, nor whether a beverage containing less than one-third of 1 per cent. of alcohol is intoxicating. Learned counsel have cited numerous decisions of the courts defining what constitutes malt liquor, but an examination of these authorities shows that the courts differ very much, the decisions being anything but harmonious. This is convincing that only by proper proof can these facts be established.

We are therefore of the opinion that the motion to dismiss should have been overruled, and the defendant granted leave to answer and put these allegations in issue. As counsel for the defendant, at the hearing, assured us that the defense is made in good faith, for the purpose of carrying out the beneficent intention of Congress to protect the inhabitants of that section from the baneful effects of the use of liquor, which is the cause of more crime, misery, and poverty than any other article of consumption, we have no doubt that its answer will raise the issues necessary to enable the court to determine from the evidence adduced at the hearing, whether this beverage is within the provisions of the acts of Congress enacted for the laudable purpose of preventing drunkenness in that section of the state of Oklahoma and the direful consequences thereof.

The decree is reversed.

UNITED STATES v. COOK et al.

(Circuit Court of Appeals, Eighth Circuit. June 14, 1915.)

No. 4217.

INDIANS ⊂=15—ALIENATION OF LANDS—ALLOTTEES—HEIRS—"LIMITATION."

Supplemental Creek Agreement of June 30, 1902, c. 1323, § 16, 32 Stat. 503, declaring that lands allotted to citizens shall not be alienated by the allottee or his heirs before the expiration of 5 years from date of approval of the agreement, except with the approval of the Secretary of the Interior, that each citizen shall select a homestead, which shall be inalienable for 21 years, and that the homestead of each citizen shall remain after the death of the allottee for the support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will "free from the limitation here imposed," and if this be not done the homestead shall descend to his heirs "free from such limitation," removes homesteads of such allottees as died intestate, leaving no issue born after May 25, 1901, from the restrictions, and they are subject to sale by heirs; the word "limitation" being used interchangeably with the word "restriction," and referring to the restrictions provided for.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. ⊂=15.

For other definitions, see Words and Phrases, First and Second Series, Limitation.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by the United States of America against William J. Cook and another. From a judgment of dismissal, plaintiff appeals. Affirmed.

Archibald Bonds, of Claremore, Okl. (D. H. Linebaugh, of Muskogee, Okl., on the brief), for the United States.

William T. Hutchings, of Muskogee, Okl., for appellees.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

ADAMS, Circuit Judge. This suit was instituted by the United States under the act of May 27, 1908 (35 Stat. 312, c. 199), as interpreted by the Supreme Court in the case of Heckman v. United States, 224 U. S. 413, 443, 32 Sup. Ct. 424, 56 L. Ed. 820, to cancel a deed made January 1, 1903, by Mahala Colbert, Ellen Colbert, and Thompson Colbert, full-blood Creek Indians, to William J. Cook and William R. Robinson, the defendants in this case. At the trial below the facts appeared to be as follows: On July 26, 1901, an allotment certificate was issued as a homestead to William Colbert, a full-blood Creek Indian. On November 21, 1902, the allottee died, leaving no issue born after May 25, 1901, the date of the ratification of the original Creek treaty. Mahala, Ellen, and Thompson Colbert, full-blood Creek Indians, were his heirs. On January 1, 1903, the heirs executed the deed in question to Cook and Robinson. This last-mentioned deed

was not approved by the Secretary of the Interior. On this state of facts the learned trial court dismissed the bill, and the government now appeals.

From the foregoing statement it appears that at the time of the death of the allottee the Supplemental Creek Agreement of June 30, 1902 (32 Stat. 500), was in force, and as the rights of the parties are to be determined by the provisions of that treaty, we here reproduce the pertinent portion of section 16, upon which their rights depend, as follows:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. * * * The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, *free from the limitation herein imposed*, and if this be not done the land embraced in his homestead shall descend to his heirs, *free from such limitation*, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

What is the limitation referred to in the italicized portions of the act, thus:

"*Free from the limitation herein imposed*," and "*free from such limitation?*"

The government contends that if the word "limitation," as so used, has relation to any restriction upon alienation, it relates to the specific restriction of 21 years upon the alienation of homesteads, and has no relation to the general restriction of 5 years upon the alienation of any and all lands as first mentioned in section 16, and, as a consequence, that homesteads of deceased intestate allottees, who left no issue born after May 25, 1901, are still subject to the 5-year restriction upon alienation by the heirs, notwithstanding the italicized limitation.

While the section is complicated and seemingly contradictory in some respects, a critical examination of all its provisions, with a view to giving them force and effect, convinces us that Congress intended by the italicized words to absolve homesteads of such allottees as died intestate, leaving no issue born after May 25, 1901, from both the 21 and 5 year restrictions found in section 16, and therefore subject to sale by his heirs ad libitum.

But counsel for the government make a contention that the word "limitation" in the last part of section 16 does not refer to any restriction against alienation, either that of 5 years or 21 years, that it is an inapt word for such purpose, but does refer to the limitation of the *estate* "to the heirs born since May 25, 1901," and an ingenuous

argument is made that, as so interpreted, homesteads, so far as an allottee himself is concerned, remain inalienable for 21 years, and so far as heirs of the allottees are concerned they remain inalienable for 5 years after the approval of the Supplemental Creek Agreement. But this argument is not convincing. In the case of Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, the Supreme Court of the United States uses the word "limitation" interchangeably with the word "restriction," and in our opinion it is quite clear that the word "limitation" was intended by Congress to refer to the restrictions of 5 and 21 years theretofore in the section provided for.

The facts of this case are in substantial respects like those involved in the case of Rentie v. McCoy, 35 Okl. 77, 128 Pac. 244, wherein the Supreme Court of Oklahoma held that a conveyance to the heirs of an allottee in conditions and circumstances similar to those here involved were not subject to the 5-year restriction found in the first part of section 16 of the Supplemental Creek Agreement. To the same effect is the case of Reed v. Welty (D. C.) 197 Fed. 419. And these last two cases are referred to with approbation by the Supreme Court of the United States in the case of Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198, decided November 14, 1914.

We think these last-mentioned cases afford satisfactory authority for the conclusion we have reached in this case. The judgment is affirmed.

EWERT v. FULLERTON.

(Circuit Court of Appeals, Eighth Circuit. August 30, 1915.)

No. 4353.

1. EJECTMENT ⊂=106—QUESTION FOR JURY—LEASE.
   In ejectment, whether the assignee of a lease of land from an Indian had notice of a prior unrecorded lease *held*, under the evidence, for the jury.
   [Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 307–310; Dec. Dig. ⊂=106.]

2. EJECTMENT ⊂=109—DIRECTION OF VERDICT—POWER OF COURT.
   Where both parties in ejectment moved for a directed verdict, it was not error to refuse both requests, since the court still retained the right to decide that the concession of both parties that the case presented no question for the jury was without foundation.
   [Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312; Dec. Dig. ⊂=109.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by Paul A. Ewert against S. C. Fullerton. Judgment for defendant, and plaintiff brings error. Affirmed.

Paul A. Ewert, of Joplin, Mo., pro se.

S. C. Fullerton, of Miami, Okl., pro se.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

LEWIS, District Judge. This was ejectment. Ewert was plaintiff below and lost. The estates involved were all leaseholds, under which the conflicting claims to right of possession were asserted. There were two tracts, one owned by Ta-Mee-Heh Quapaw, an Indian woman, and the other by Ta-Mee (alias Newakis) Quapaw, her daughter. Fullerton got his leases first, but withheld them from public record until after the Indian women had given like leases to one Church, who was acting for Ewert, and to whom they were later assigned. In that condition, the rights of Fullerton under his leases were made subordinate to Ewert's right under his leases by the State Recording Act, unless the latter, when his leases were given, had actual notice of Fullerton's rights.

[1] Error is assigned, that the court refused to direct a verdict for plaintiff when both had rested. But there was substantial conflict in the evidence on the question of notice, which raised the only contested issue of fact submitted to the jury by appropriate instructions. Church's testimony tended to establish that when he took the leases for Ewert he did not have knowledge or notice of the prior unrecorded leases to Fullerton. As against this the testimony of Ta-Mee Quapaw, who was plaintiff's witness, tended strongly to establish the contrary. She acted both for herself and her mother in the negotiations with Church which resulted in the leases taken in his name for the plaintiff. She could understand, read, write and speak English; her mother could not. She testified, in part:

Q. Now when you were negotiating or he (Church) was negotiating for these leases, do you remember just what you said to him? A. Yes, sir.

Q. Didn't you say to him there are several leases outstanding on that property, or words to that effect?

A. I just told him about the old leases.

Q. What words did you use?

A. Well, I told him they were leased to Fullerton and I did not want to lease it out no more.

Q. You told him the land was leased to Fullerton?

A. Yes, sir.

Q. And you didn't want to lease it any more? A. Yes, sir.

Q. That is the language you used? A. Yes, sir.

Q. And was that all you said to Mr. Church about leases other leases on this land? A. Yes, sir.

Q. Did he enquire what leases to Fullerton or did he simply say that he knew about those or that he didn't care about that?

A. No, he said he was going to be partner with Fullerton.

Q. He said he was going to be a partner with Fullerton?

A. Yes, sir.

Q. That was the only reply he made? A. Yes, sir.

Q. Have you told the jury all you said to Mr. Church and all Mr. Church said to you about there being other leases?

A. Yes, sir.

The action of the court in refusing the request was not error.

[2] It is further argued that the court erred in not directing a verdict either for the plaintiff or the defendant, each of whom at the

close made such a request in his behalf; and in support Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, and Sena v. American Turquoise Co., 220 U. S. 497, 31 Sup. Ct. 488, 55 L. Ed. 559, are cited. No such error was claimed in the assignment; but we pass that requirement to say that we find nothing in the authorities cited or elsewhere in support of the contention. The court might have granted either request as dictated by its judgment at the time; but the requests did not put the court under compulsion to sustain either. The requests were concessions by each party that the case presented no question for the jury, and operated as a waiver by each of his right to have the jury pass on the issue; but such action by the parties did not take from the court the right to decide that the concession was without foundation, and thus reject the consequent attempted waiver of the province and duty of a jury. United States v. Bishop, 125 Fed. 181, 183, 60 C. C. A. 123; Empire State Cattle Co. v. Railway Co., 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; Id., 147 Fed. 457, 77 C. C. A. 601; Minahan v. Railroad Co., 138 Fed. 37, 70 C. C. A. 463; McCormick v. Bank, 142 Fed. 132, 73 C. C. A. 350, 6 Ann. Cas. 544; Sigua Iron Co. v. Greene, 88 Fed. 207, 31 C. C. A. 477. If both parties desired to impose the duty of determining both fact and law on the court, the statute expressly points out a way in which that can be easily done. U. S. Compiled Stat. 1913, § 1587; Beuttell v. Magone, supra.

We do not find that error was committed at the trial, and the judgment must be affirmed with costs.

UNITED STATES v. MARSHALL et al.

ILLINOIS SURETY CO. v. FEHER et al.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 265.

COURTS ⊂=269—DISTRICT IN WHICH TO SUE—GOVERNMENT CONTRACT.

A statute providing that any person who has furnished labor or materials to the holder of a government construction contract may intervene in an action instituted by the United States on the bond of the contractor, and if no action is brought by the United States within six months such materialman may sue in the name of the United States in the district in which the contract was to be performed, and not elsewhere, does not require that an action by the United States against a contractor and his surety to recover the cost of completing a contract abandoned by defendant, wherein creditors intervene, shall be brought in the district wherein the contract was to be performed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. ⊂=269.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on appeal from a judgment of the District Court, Southern District of New York, in favor of various creditors

of Edward G. Marshall, contractor with the United States, against the Illinois Surety Company on a bond given by said contractor pursuant to the Act of February 24, 1905, chapter 778, 33 Stat. 811 (Comp. St. 1913, § 6923). The action was commenced at law by the United States against the contractor and the surety company on his bond. The complainant averred noncompletion of the work and abandonment by the contractor—also that the work was completed by the government at a cost which (including the sums paid to the contractor for the work he did) did not exceed the stipulated price. It asked judgment for $125 paid for inspection of the work done to complete the job. The creditors intervened. In conformity with our opinion (212 Fed. 136, 129 C. C. A. 584) the action was transferred to the equity side of the court and tried by Judge Learned Hand. His opinion will be found in 225 Fed. 687. Proof was offered in support of the claims of the intervening creditors.

Nelson L. Keach, of New York City (L. Laflin Kellogg and Alfred C. Pette, both of New York City, of counsel), for appellant.

William F. Kimber, of New York City (Francis E. Scott, of New York City, of counsel), for appellee Feher.

Charles Burstein, for appellee Eagle Column Co.

Harry E. Shirk, of Brooklyn, N. Y., for appellee Handler.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The work called for by the contract was the building of an extension to the hospital at Ft. Totten, which is located in the Eastern District of New York. It is contended that the District Court for the Southern District was without jurisdiction to entertain an action under the act of 1905, because the first section provides that suit shall be brought in the district in which the contract was to be performed and not elsewhere.

The section provides that any person who has furnished labor or materials for the prosecution of the work covered by the contract shall have the right to intervene and be made a "party to any action instituted by the United States on the bond of the contractor and to have their rights and claims adjudicated in such action * * * subject to priority of the claim and judgment of the United States. * * * If no suit should be brought by the United States within six months * * * then the person supplying the contractor with labor or materials shall [upon complying with certain prerequisites] be authorized to bring suit in the name of the United States * * * in the district in which said contract was to be performed and executed * * * and not elsewhere, for his or their use and benefit."

In our opinion there is much force in the suggestion that so much of the section as gives exclusive jurisdiction to the court in the district where the contract was to be performed applies only to an action instituted by the persons supplying labor and materials themselves in the name of the United States, and that when the United States itself

institutes any action under this statute on the bond of a contractor it may do so without being restricted to the district of performance by anything contained in the act. It is suggested that the decision in United States v. Congress Constitution Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163, compels a contrary conclusion. But the opinion indicates an intention to confine the decision to the concrete case presented. It says:

"According to the declaration, the contract for the construction of the building had been satisfactorily performed, full payment therefor had been made to the contractor, the conditions of the bond had been breached only by his failure to pay designated subcontractors for labor and materials, * * * and the object sought to be attained was the adjudication and enforcement of those demands, unaccompanied by any pecuniary demand of the United States. Manifestly, therefore, the action, although brought by the United States, was essentially one in behalf of the subcontractors, and the respective interest of the United States and the subcontractors therein were in no wise different from what they would have been had the action been brought in the name of the United States by the subcontractors for the use and benefit of the latter."

Concluding the discussion, the court says:

"Considering the purpose of the statute, as manifested in these provisions, we think the restriction respecting the place of suit was intended to apply, and does apply, to all actions brought in the name of the United States for the purpose *only* of securing an adjudication and enforcement of demands for labor or materials, whether instituted by the United States or by the creditors themselves."

In the case cited there was no controversy between the United States and the contractor; in the case at bar there was one for $125 charged for inspection, and the only relief prayed for was a money judgment for that amount. Such a suit was rightly brought in the district of the residence of defendants.

Upon the other points advanced in argument we concur with Judge Hand, and do not think it necessary further to discuss them.

Decree affirmed.

BROOKHEIM v. GREENBAUM.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 245.

APPEAL AND ERROR ⊂=1010—FINDINGS—CONCLUSIVENESS.

A finding justified by the testimony of the witnesses appearing before the trial court will not be disturbed on appeal, though the court on appeal might have reached a different conclusion on the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. ⊂=1010.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a decree of the District Court for the Southern District of New York which dismissed the complaint filed by the trustee in bankruptcy of Justus H. Garthe against Leo Greenbaum to set aside an alleged fraudulent preference of $1,200, being a payment made by the bankrupt on or about February 4, 1911. The bankrupt filed a petition in bankruptcy February 16, 1911.

For opinion below, see 225 Fed. 635.

Lesser Bros., of New York City (William Lesser and James B. Stephens, both of New York City, of counsel), for appellant.

Wesselman & Kraus, of New York City (Bertram L. Kraus, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The facts are all stated by Judge Learned Hand in his opinion and need not be repeated here. The situation is somewhat sui generis in the fact that the bankrupt, Garthe, who was a butcher and dealer in sausages, did a large business during the time in question and was most of the time in financial difficulties owing to the slipshod manner in which he transacted his business. He kept no complete books, was always borrowing and requesting Greenbaum to indorse his checks, so that he could get them cashed. He was continually complaining of poor collections but managed to keep his head above water until his final bankruptcy. He had had many dealings with the defendant Greenbaum who was his friend and at the time in question he owed Greenbaum $1,200 on a note dated May 6, 1909, for money borrowed some time previous. This note had been allowed to run for about 20 months. If this were a case in which the parties had conducted their business according to ordinary methods, we should find in all probability that a case of preference was made out, but it is not such a case. These parties had been dealing with each other for many years and always in about the same slovenly way. The bankrupt paid his creditors when he had the money and procured extensions when he had not. There was nothing unusual or suspicious in the payment of the $1,200 in question; such payments had frequently been made before.

All this is pointed out in the opinion below and need not be repeated. The judge had the witnesses before him and is much better able to judge of their credibility than a court which sees only their statements

on paper. We should not reverse his finding upon a pure question of fact, where the evidence justifies the finding, even if we might have reached a different conclusion upon the evidence. In Coder v. Arts, 152 Fed. 943, at page 946, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372, the court says:

"When the court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand."

The decree is affirmed.

REED v. CROPP CONCRETE MACHINERY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915. Rehearing Denied May 25, 1915.)

No. 2082.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—CONCRETE MIXER.
The Reed patent, No. 939,629, for a concrete mixer, *held* to disclose patentable invention, although the improvement it embodies consists chiefly in the substitution for the manually operated lever of the prior art for the swinging or closure of the blades and gate of a partially automatic mechanism containing a coiled spring, old in other arts, but which in the patented machine greatly increases its efficiency; also *held* infringed.

2. PATENTS ⊜312—SUIT FOR INFRINGEMENT—ISSUES AND PROOF.
In an infringement suit against a corporation and its president as joint infringers, where the joint answer of defendants alleges that the patented machine had been used by the individual defendant prior to the application for the patent, and that he was the inventor of the same, where the proof fails to sustain such allegation, there is such an admission of infringement by the individual defendant as entitles the complainant to a decree against him.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊜312.]

Appeal from the District Court of the United States for the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by Matthew Howard Reed against the Cropp Concrete Machinery Company and Andrew J. Cropp. Decree for defendants, and complainant appeals. Reversed.

Appellant, Reed, the grantee of letters patent 939,629, issued November 9, 1909, covering an improvement in concrete mixers, filed his bill against defendants, charging joint infringement. Upon final hearing, the determination by the court below that the patent is void for want of patentable novelty, resulted in a decree dismissing the bill, from which this appeal is taken.

Charles M. Clarke, of Pittsburgh, Pa., for appellant.

Glenn S. Noble, of Chicago, Ill., for appellee.

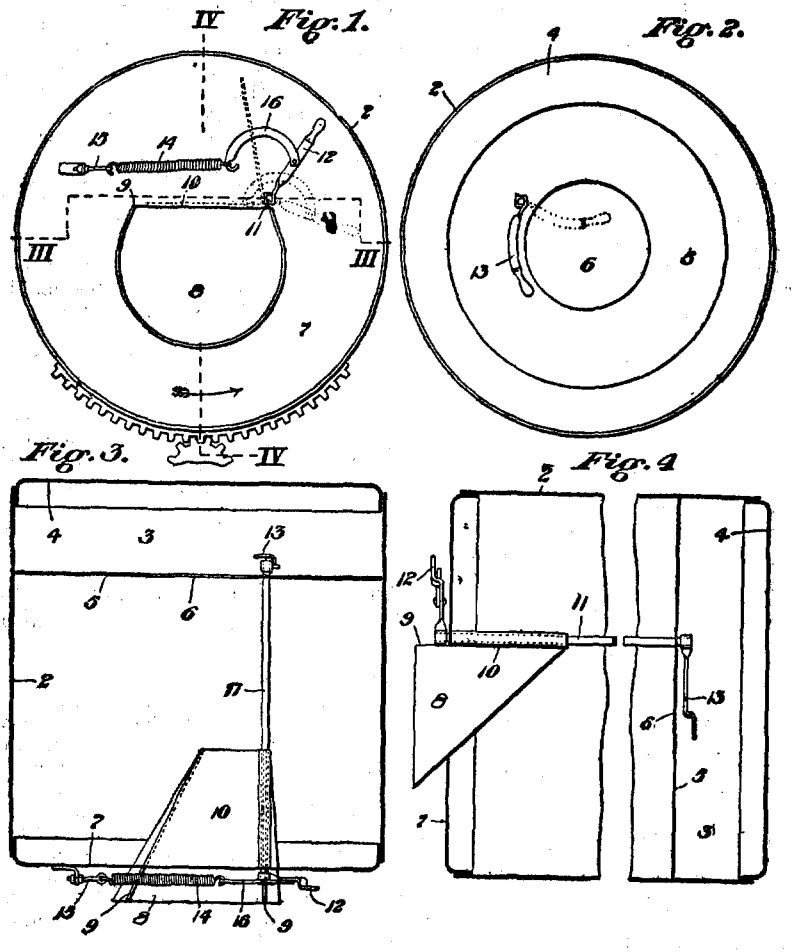
Before BAKER and SEAMAN, Circuit Judges, and GEIGER, District Judge.

GEIGER, District Judge. [1] The rotary mixing drum is an appliance well known and generally used in the preparation of concrete

mixtures. Reed's patent covers an improvement in such a mixer, particularly in the mechanism for actuating the charging blades or the covering gate for the delivering chute. His object is thus stated:

"* * * To provide means for operating the blades or gate and also for holding the blades in mixing or charging position and for holding the gate open or closed and providing for operating either from either end of the mixer drum by means of a lever and spring mechanism."

The invention is thus described by the patentee:



"Referring to the drawings: Figure 1 is a view in front elevation of the mixer drum and portions of its supporting and rotating mechanism. Fig. 2 is a view of the drum from the back. Fig. 3 is a horizontal section on the line *III*, *III*, of Fig. 1. Fig. 4 is a vertical sectional view on the line *IV*, *IV*, of Fig. 1 partly broken away. * * *

"In the drawings *2* represents the drum of cylindrical form, having a rear annular receiving chamber *3* between a back annular flange *4* and a rear partition *5*. Partition *5* is provided with a centrally arranged inlet opening *6*, and the shell between partition *5* and flange *4* has any suitable lifting mech-

anism, not shown, such as those shown in my prior application filed September 28, 1908, Serial No. 455,101.

"The front wall 7 of the drum is provided with a centrally arranged outlet opening defined by the delivery chute *8*, which in the position shown in Fig. 1 slopes downwardly and terminates in upper horizontal edges *9*, and opens into the interior or mixing compartment of the drum.

"The delivery chute is provided with a closing door or cover *10* entirely within the mixing chamber and immediately behind the front wall 7, mounted on a hinge rod *11* pivotally carried in suitable bearings in the front and back wall respectively. Rod *11* is provided at the front with an operating lever *12* and at the back with a similar operating lever *13* secured in any suitable manner, and these levers are so located that, when the gate is thrown open, the levers will occupy the positions in dotted lines in Figs. 1 and 2, the rear lever *13* extending across the opening *6*. By this construction the gate may be operated by the lever at either end, and the position of the rear lever will always indicate to the workman whether the gate is open or closed. When open, the material will pass through the chute, and when closed will be deflected away therefrom to other portions of the mixer.

"For the purpose of positively holding the gate in either open or closed position, I provide a tension spring *14* secured at one end by any suitable attachment, as a bolt *15*, preferably provided with a nut by which it may be adjusted in its bearing to tighten or loosen the spring. *16* is a link connecting spring *14* with lever *12*, or arc shape as shown, so that when the lever is thrown downwardly into the position shown in dotted lines for opening the gate, the arc-shaped link *16* will reach around the end of shaft *11* without interference, as clearly shown.

"The point of attachment of link *16* with lever *12*, is designed to pass beyond the dead center alignment with shaft *11* sufficiently far to insure a pull of the spring on the other side to positively hold the gate raised, as will be readily understood, while the normal tension of the spring in the closed position of the gate, tends to maintain it closed. By this construction it will be seen that the gate may be open or closed from either end by operating either lever *12* or *13*, and will remain in either position against accidental shift or motion.

"Ordinarily, the gate lies down upon the top edges of chute *8* as indicated in the principal figures of the drawings."

Permissible modifications of the structure—also disclosed and claimed—need not, in view of the issue, be noted. The controverted claims of the patent are:

"1. A rotary concrete mixer drum provided in its interior with an adjustable material-deflecting element having a limited range of movement, a rocking shaft extending longitudinally of the drum carrying said element and having an operating lever, and spring mechanism connected with the drum and lever adapted to positively hold the lever, shaft and deflecting element when thrown to the limit of movement in either direction, substantially as set forth.

"2. A rotary concrete mixer drum provided in its interior with an adjustable material-deflecting element having a limited range of movement, a rocking shaft extending longitudinally of the drum carrying said element and having an operating lever and spring mechanism connected with the drum having an arc-shaped terminal engaging the lever and adapted to positively hold it and the shaft and deflecting element when thrown to the limit of movement in either direction, substantially as set forth."

"4. A rotary concrete mixer drum provided in its interior with an adjustable material-deflecting element having a limited range of movement, a rocking shaft extending longitudinally of the drum carrying said element and having an operating lever at its end, and spring mechanism embodying an arc-chaped portion connected with said lever adapted to exert tension thereon to positively hold the lever, shaft and deflecting element when thrown to the limit of movement in either direction, substantially as set forth."

If successful challenge of validity depended upon the inventor's selection of spring mechanisms found in other arts, e. g., those used for

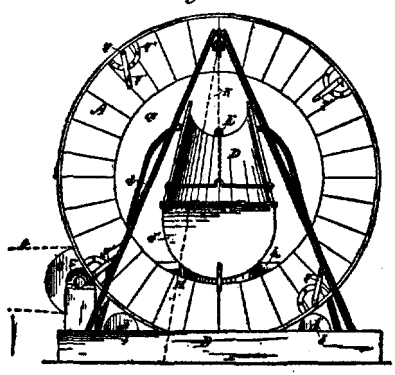
closing rainwater pipes, door hinges, cabinet file covers, box covers, mowing machines, the proofs here would sustain the decree. But if notice be taken of the state of the particular art involved, of the endeavors of others therein, or the advance made by the patented mechanism in suit, its conceded utility and efficiency in promoting expedition and economy in operation, we believe a different view must be entertained. Two patentees, Ransome, No. 322,006, July 14, 1885, and McKelvey, No. 751,541, February 5, 1904, each recognized as pioneer and resourceful in the concrete mixing machinery art, are the only ones whose endeavors in the solution of the problem approached by Reed need be considered. Their respective structures—in the particulars claimed to be relevant—are thus illustrated:

(1) Ransome.

It will be observed that the patentee adopted as a means for actuating the blades which are found within the drum mounted upon the shaft g, the lever g' mounted upon the quadrant g^2, which latter is notched, as indicated, to receive and hold the lever at different angles. That such was his purpose is declared by him in his specification:

"By moving the handle g' the flanges (within the drum) may be made to lie down close to the surface of the drum as they may be moved to extend inwardly at a suitable angle to enable them to lift the material."

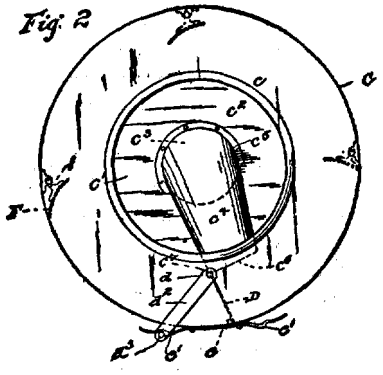
Fig. 4.



(2) McKelvey.

The mechanism here is the double-ended spring E with locking shoulders E', the latter for engaging the pin d^3 of lever d^2 at the limit of its movement in either direction. It will be noted that the lever d^2 actuates the shaft d upon which the gate D hangs.

Fig. 2.



Ransome's disclosure in the particular above set forth was not covered by any claim of his patent; while McKelvey included, as an element of his combination, "means for swinging" the gate and "catches on said drum to engage said rod (the pin 3, supra) when the gate is swung to its extreme positions."

Of course, in passing upon the quality of Reed's mechanism, and in its comparison with Ransome and McKelvey, it must be borne in mind that the merit of a concrete mixing machine is measured almost wholly

by the degree to which it efficiently saves labor; and, obviously, the expedition with which the mixture may be lifted and discharged from the drum is of no small importance. Each of the three inventors had before him the same problem, and we find that Ransome and McKelvey offer no solution, save through the manual operation of the lever for swinging or closure of the blades or the gate. Reed's solution, on the other hand, involves and perfects—at least as to one-half of the function—the idea of automatic accomplishment. Neither of the former suggests the possibility of swinging the blade or gate through its entire range of movement other than by the continued manual act of the operator. It may be that Reed's tension spring, in so far as it holds the gate at either limit of movement, discharges equivalently the function of McKelvey's catch spring; but his introduction of the arc-shaped link into combination with the lever, spring, and shaft, and his mounting of the entire mechanism to enable throwing the lever past the dead center of pull and thereby automatically discharge what remains of the whole function, is, in our judgment, not only novel, but embodies the dignity of invention. The case is not distinguishable from Western Electric Co. v. Larue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294, wherein Larue, who substituted a torsional spring—well known in other arts—for the ordinary pivotal supports for keys in telegraphic instruments, was held to be an inventor. In view of the obvious and beneficially new result accomplished by Reed, the suggestion that Ransome did not "detail a spring or yielding mechanism because he * * * knew that any mechanic having any skill in the art would understand how to put a spring handle, or a spring dog, on to hold the handle in adjusted position," and the further suggestion that McKelvey's structure might be reorganized mechanically by attaching Abell's (mowing machine) tension spring, serve, not to detract from Reed's disclosure, but rather as criticisms of his predecessors in the art.

We therefore conclude that each of the three claims in controversy, interpreted to embody the particular elements of the mechanism disclosed in the drawings and specification, viz., the tension spring, the arc-shaped link or terminal, with the lever, is valid.

A contention is further advanced that the claims are void for lack of illustration and description in this: Each refers to the spring mechanism adapted to *positively* hold the lever and the gate when thrown to either limit of movement; but the disclosure in the drawings is of a *yielding* device to hold the door. It is urged that McKelvey's showing of a *positive lock* must be taken as definitive of the term "positively hold" as used by Reed. Of course, if "positively holding" the gate includes "locking" it by some contrivance such as a notch or a peg, there might be merit in the contention. But this interpretation of Reed's language is neither required nor could it have been intended. Whether a spring will "positively hold" depends upon the degree of its tension; and, fairly interpreted, these claims refer to a spring mechanism of sufficient strength to hold the gate to enable discharge of the functions successively to be performed by the machine.

[2] It is urged by defendants that proof of infringement is lacking.

It is evident from the record that this issue was not pressed by either party. However, complainant's proofs of defendant's exhibition of an infringing machine, the identification of certain machines which, by fair inference, are chargeable to the defendant corporation as manufacturer and seller, were sufficient to at least cast upon it the burden of counter proofs; and, no such proof appearing, a decree against such defendant is warranted. On behalf of the individual defendant, Cropp, who is the president of the corporate codefendant, it is insisted that, as joint infringement is charged, such individual defendant must be dismissed, because, in the absence of proof, his act will be deemed to be in discharge of a corporate duty. Cazier v. Mackie-Lovejoy Co., 138 Fed. 654, 71 C. C. A. 104. But defendants in a joint answer, wherein they deny infringement, also affirmatively charge that complainant obtained his patent fraudulently, viz.:

"These defendants aver that the said * * * Reed, *well knowing that the said Andrew J. Cropp, one of the defendants herein, had previously used the alleged invention of said letters patent,* and having received instructions and explanations regarding said alleged invention from said Andrew J. Cropp, did unlawfully and fraudulently apply for letters patent," etc.

The issue tendered by such allegation was not supported by any proof. Now, the burden of proving infringement, joint or other, was upon complainant; and if defendants had stood upon an answer containing a simple denial, the defendant Cropp might, upon such record, ask for dismissal for lack of proof. But his answer is responsive to the bill, by way of admission of his own trespass, which, under the answer, presumptively continued down to the time suit was commenced. He did not, as he might, respond to the infringement charge by admitting his act, and, by further allegation, give it corporate color or complexion, thus exempting himself under the rule above noted. He confessed, but did not avoid. The latter was *his* duty, not complainant's; and the admission contained in such answer furnishes a sufficient basis for joining him in the decree.

The decree is reversed, with directions to enter a decree in favor of the complainant against the defendants.

GOLDSCHMIDT THERMIT CO. v. PRIMOS CHEMICAL CO.

(District Court, E. D. Pennsylvania. August 4, 1915.)

No. 1221.

1. EQUITY ⊜362—ERROR AS TO CHARACTER OR FORM—REMEDY.

Equity Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) provides that, if it appear at any time that a suit commenced in equity should have been brought on the law side of the court, it shall be forthwith transferred to the law side, and be there proceeded with. Rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv) provides that, if in a suit in equity a matter ordinarily determinable at law arises, it shall be determined in that suit according to the principles applicable, without sending the case or question to the law side. Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) abolishes demurrers and pleas and substitutes therefor a motion to dismiss. *Held*, that rule 22 implies

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that a bill shall not be dismissed because of the existence of an adequate remedy at law, and is not abrogated by Rule 29, and hence an objection to a maintenance of the bill because of the existence of such a remedy at law must be asserted under Rule 22 or 23, and not under Rule 29.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758–761; Dec. Dig. ⊂⊃362.]

2. EQUITY ⊂⊃43—EFFECT OF REMEDY AT LAW.
The existence of an adequate remedy at law is in itself an answer to a bill in equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121–140, 164–166; Dec. Dig. ⊂⊃43.]

3. EQUITY ⊂⊃46—REMEDY AT LAW—ADEQUACY.
To defeat a suit in equity the remedy afforded at law must be full, adequate, and complete, and the mere right to bring an action at law will not of itself suffice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159–163; Dec. Dig. ⊂⊃46.]

4. EQUITY ⊂⊃39—RETENTION OF JURISDICTION—LEGAL RELIEF.
Where plaintiff has a right to an equitable remedy and has filed his bill under which equity has taken jurisdiction, a court of equity will proceed to a final and full determination of all his rights, though this may involve findings which of themselves could have been made in an action at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–114; Dec. Dig. ⊂⊃39.]

5. INJUNCTION ⊂⊃1—JURISDICTION OF EQUITY.
Among the equitable remedies which a litigant is entitled to have applied is the right to an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 1; Dec. Dig. ⊂⊃1.]

6. PATENTS ⊂⊃280—SUITS IN EQUITY—JURISDICTION.
Under the statute authorizing the court to grant injunctions in patent cases according to the course and principles of courts of equity, and upon a finding of infringement in any such case to allow plaintiff damages in addition to profits to be accounted for by defendant, it is the prayer for an injunction which gives jurisdiction to the court in equity.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. ⊂⊃280.]

7. PATENTS ⊂⊃280—SUITS IN EQUITY—JURISDICTION.
A bill in equity cannot be entertained in a patent case where plaintiff seeks only compensation, and equitable jurisdiction cannot be assumed by treating the infringer as a trustee in receipt of profits for which he is liable to account.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. ⊂⊃280.]

8. PATENTS ⊂⊃280—SUITS IN EQUITY—JURISDICTION.
Where a bill in equity for infringement of a patent was filed during the life of the patent and contained a prayer for injunctions both preliminary and final and contained averments which pointed in the direction of an accounting of a character calling for a tribunal fitted and equipped to conduct it, it would not be dismissed for lack of jurisdiction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 439; Dec. Dig. ⊂⊃280.]

9. TRIAL ⊂⊃11—TRANSFER OF CAUSES—ERROR AS TO CHARACTER OR FORM.
Under Equity Rule 22, the question whether a case is to be decided at law or in equity is to be determined when the question can be decided in

the full light of all the information obtainable, and is to be determined on the merits with no more regard to mere form of procedure than is required.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28–30; Dec. Dig. ⊂⊃11.]

10. TRIAL ⊂⊃11—TRANSFER OF CAUSES—TIME.

The right of a defendant sued in equity to insist upon the case being tried at law if there is no real ground for equity retaining jurisdiction can be accorded to him at any stage.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28–30; Dec. Dig. ⊂⊃11.]

Suit by the Goldschmidt Thermit Company against Primos Chemical Company. On motion to transfer case to the law side of the court. Motion dismissed.

See, also, 216 Fed. 382.

J. Addison Abrams, of Philadelphia, Pa., and Charles F. Dane and Livingston Gifford, both of New York City, for plaintiff.

Synnestvedt, Bradley, Lechner & Fowkes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. It is at least not clear that the status of this case has changed since it was before the court on the prior motion to dismiss the bill. There is, however, practical wisdom in the suggestion made by counsel for defendant that the question of the right, in the assertion of which the defendant is rightfully insistent, should be disposed of at this time in order to save the possible second trial of the case. This is the only justification or excuse even for a discussion which partakes of something of the character of a reargument of the question raised.

At the expense of a somewhat lengthy statement of the principles involved, we will begin at the beginning.

In the absence of any statutes or rules of court affecting the question, a reason or ground for a court of equity refusing, or indeed finding that it lacked, the power to entertain jurisdiction of a bill, was always recognized to exist in the fact (where it was the fact) that an adequate remedy at law existed. In chancery bills there was in consequence always incorporated the averment that the plaintiff had no remedy at law. It might further appear from the bill itself that such a remedy existed. Hence followed the practice of demurrers to bills on this ground, as the existence of such a remedy was an insurmountable obstacle to the maintenance of the bill, and a formal answer was uncalled for. In some jurisdictions rules of practice in equity were adopted which dispensed with the requirement of a formal averment of the absence of a remedy at law, but the existence of such a remedy was still recognized as a defense to the bill, and, if the fact was present on the face of the bill, it was still the practice to meet it with a demurrer. When demurrers were abolished by the equity rules, the same result was reached through the medium of motions to dismiss for want of jurisdiction. A further change was then wrought in some juris-

dictions by statutes, and in others by the adoption of equity rules providing that, when the question of jurisdiction on this ground was raised, it should not be disposed of either upon demurrer or motion to dismiss, but the case should be transferred to the law side of the court.

A partial history of the evolution of the practice above outlined as traced through our own equity rules is this:

[1] By the rules in force before those promulgated on November 4, 1912, Rule 21 (198 Fed. xxiv, 115 C. C. A. xxiv) gave plaintiff the optional right to omit the averment of the absence of a remedy at law, and it was provided that the bill should not be demurrable because of this omission. There was a similar positive provision in the State Equity Rules that the averment should be omitted. Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) of the present rules specifically provides for the situation of the existence of an adequate remedy at law appearing, by the requirement that the case shall be transferred to the law side of the court. This clearly and certainly implies that the bill shall not be dismissed on this ground. The Pennsylvania statute contains a similar provision, and like provisions in many other jurisdictions evidence the general drift of the practice in the direction indicated. This was probably born of a common juridical experience. Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), abolishing demurrers and pleas, gave, it is true, defendant the substituted remedy of a motion to dismiss. This surely, however, does not abrogate Rules 22 and 23 (198 Fed. xxiv, 115 C. C. A. xxiv), which are specifically applicable to cases which should properly have been made the subject of actions at law.

This point has already been decided; but, inasmuch as the present hearing is in the nature of a reargument of the whole question, we state our adherence to the opinion before expressed that an objection to the maintenance of a bill on this ground must be asserted under Rule 22 or 23, and not under Rule 29.

[2, 3] With this preliminary question out of the way, we come to the legal merits of the position taken by the defendant. We have already found in its favor the principle that the existence of an adequate remedy at law is in itself an answer to a bill in equity, and we have further found the application of this principle to have been confirmed to defendants in the courts of the United States by the quoted provisions of the statutes. Neither of these findings, however, free us from the inquiry of: "What is an adequate remedy at law?" The same answer has been made to this question by the courts of every jurisdiction, federal and state. It is that the remedy afforded by an action at law must be full, adequate, and complete. Mere existence of a remedy in the sense of the right to bring an action at law will not of itself suffice, but the remedy afforded by the action must be of the character described.

The application of the principle of reference to the law side of the court is also accompanied with another principle. A case may be of a mixed character respecting the remedies called for, and there may be a commingling of the remedies to which the plaintiff is entitled, some of which may be purely equitable and which can be afforded

only through chancery forms of procedure, and others, or at least one other, which may be administered through legal forms.

The principle then applicable is this:

[4, 5] When the right to an equitable remedy exists in a plaintiff and he has filed his bill through and by which a court of equity has taken jurisdiction of his complaint, the court having thus acquired jurisdiction will proceed to a final and full termination of all his rights, notwithstanding the fact that this may involve findings which of themselves could have been made in an action at law. Among these equitable remedies, which are recognized as the right of a litigant to have applied, is the right to an injunction, and in most jurisdictions at least to an accounting, where the accounting is complex and of a character with which a tribunal, made up of a jury, could not be expected to cope. The necessity for discovery also may in itself confer equitable jurisdiction. We have qualified the statement of the proposition bearing upon the jurisdiction of a court of equity on the ground of an accounting, because of the position flatly taken by counsel for the defendant that no equitable jurisdiction on this ground exists in the courts of the United States, at least in patent cases. To complete a general statement of the principles affecting the decision of the question of jurisdiction as between courts of law and in equity, a reference to the statutes on the subject of patents should be added.

[6, 7] The history of all such legislation is succinctly set forth in Root v. Railway, 105 U. S. 189, 26 L. Ed. 975. Its present resting place is in the provision of the statutes granting power to the courts to grant injunctions in patent cases "according to the course and principles of courts of equity," and, upon a finding of infringement "in any such case," the allowance to the plaintiff of damages in addition to "profits to be accounted for by the defendant." Under this statute it is the prayer for an injunction which gives jurisdiction to the court in equity, and, as the then existing legislation conferred a right of action at law for damages only, no bill can be entertained where the plaintiff seeks only compensation, and equitable jurisdiction cannot be assumed through the mere device of treating the infringer as a trustee who has been in the receipt of profits for which he is liable to account.

It only remains to test the soundness of the foregoing principles by a reference to the adjudicated cases. The case of Root v. Railway, 105 U. S. 189, 26 L. Ed. 975, having recognized that the courts were not in accord upon a statement of the principles involved, discusses them with lucidity and fullness for the purpose of silencing all controversy over them in the courts of the United States. This justifies us in limiting our references to this one case and to a few others to show how the principles there enunciated have been applied.

On its face Root v. Railway was the case of a bill filed by the owner of a patent after his proprietary rights had ended. The prayer was for a decree directing the defendant to account for and pay to plaintiff all profits received by him. The bill was demurred to on the ground that the plaintiff was not entitled to the relief prayed for because there was a full, complete, and adequate remedy at law. The demurrer was sustained in the court below and bill dismissed, and this

decree was affirmed by the Supreme Court. It may be an aid to clarity to here interpolate that the purpose of this bill was the bald attempt to evade the legal remedy which had been conferred by statute and to substitute for it an equitable remedy which had not been conferred. Furthermore, there was no averment in the bill which was suggestive even of any fact out of which a right to an equitable remedy proceeded. The Supreme Court, however, took advantage, as has already been stated, of the opportunity to settle the law on this general subject. This they did by an elaborate discussion of the theme, both from the viewpoint of general principles and from the decided cases, and the formulation of the conclusions reached into clear-cut propositions. These may be found summarized on pages 215 and 216 of 105 U. S., 26 L. Ed. 975. We have paraphrased them in numbered statements as follows: A bill in equity will not be sustained: (1) For a naked account of profits and damages against an infringer of a patent; (2) accounting relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; (3) the most general ground for equitable interposition is by injunction against a continuance of the infringement. Grounds of equitable relief, however, may arise other than by way of injunction. Each case must rest upon its own peculiar circumstances which must furnish a clear and satisfactory ground of exception to the general rule. They cannot be defined more exactly than as stated in the following enumeration: (1) Where the title of the complainant is equitable merely; (2) where equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; (3) such an equity may arise out of and inhere in the nature of the question itself springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadequate, and incomplete.

[8] It is clear that no command to dismiss the present bill comes to us out of Root v. Railway. In the first place, the present bill was filed during the life of the patent. In the second place, there is a prayer here for injunctions, both preliminary and final. In the third place, there was time under the rules and practice of the court to have applied for and secured (if otherwise entitled to it) a preliminary injunction, and finally there are averments in the bill which point in the direction of the accounting being of a character which calls for a tribunal fitted and equipped to conduct it.

Nor is the present case ruled by any of the cited cases to which we have been referred.

Mershon v. Furnace Co. (C. C.) 24 Fed. 741, was a case in which the bill was served three days before the expiration of the patent. No injunction, provisional or final, could therefore have issued. There was an entire absence of the averment of any special grounds for equitable relief.

In American Co. v. Railway (C. C.) 41 Fed. 522, no preliminary injunction was asked for, and the patent expired before the return day of the subpœna. There was also here a total dearth of any special grounds for equitable interference.

Heckscher v. Steel Co. (D. C.) 205 Fed. 377, was a case for the recovery of the amount of license fees due under a contract. The court moreover expressly found that the bill was not for an accounting. Incidentally this case is authority for the conclusion independently reached at the former argument that questions of this kind were to be disposed of under Rule 22. There it was raised by demurrer in form which under Rule 29 is a motion to dismiss. Judge McPherson refused to dismiss the bill, but did make an order of transfer for the valid reason above indicated.

The above cases will suffice to blaze for us the path upon which to travel. It is to be observed, however, that Root v. Railway was decided before the adoption of the Equity Rules promulgated November 4, 1912, and therefore before we had Rules 22 and 23. The administrative policy enjoined upon us by these rules is not to permit plaintiffs to be hampered by procedure objections on the ground that complaint had been made to the wrong court, but, while preserving to defendants all their rights in the disposition of cases, nevertheless to dispose of them by having them determined by that court to whose decision they are properly subject.

[9] The spirit and intendment is that the question by what tribunal the case should be decided is to be determined when the question can be decided in the full light of all the information obtainable. Plaintiff is to have accorded to it its right to equitable relief in form and method of procedure, and the defendant is to be given full protection in the assertion of its right in a proper case to have it submitted to a jury. The question is one to be decided on its merits with no more regard to mere form of procedure than is required, and, whenever it appears that a case brought in equity should have been brought at law, full power is given to make the transfer. It is the experience of every trial lawyer of extensive practice, as well as of every trial judge, that, when a case of accounting is about to be submitted to a jury, the suggestion is often forced from the judge, or from counsel, that the accounting should be referred to some one well equipped to render it. If such should turn out to be this case, it would be discovered that a mistake had been made in now transferring it.

The conclusion reached is this:

[10] The defendant is within its rights in insisting upon the case being tried at law, if there is no real ground for a court of equity retaining jurisdiction. This right, however, will remain in the case to be accorded to the defendant at any stage. All that is now decided is that on the face of the record technically a court of equity has jurisdiction, and we cannot find from the record now before us that the averments which confer this jurisdiction are merely colorable, nor can we find at present that the case is one which the defendant is entitled as a matter of right to have tried at law.

The motion to transfer is therefore dismissed, with leave to defendant to renew it at any time.

DECKER v. SMITH.

(District Court, N. D. New York. August 16, 1915.)

1. EQUITY ⊂=410—MASTER'S REPORT—EXCEPTIONS—TIME TO FILE.
Under Equity Rule 66 (193 Fed. xxxvii, 112 C. C. A. xxxvii), requiring the master to return his report into the clerk's office, and giving the parties 20 days from the time of the filing of the report to file exceptions thereto, exceptions to the report must be filed within the time fixed, and exceptions to the master's draft or proposed report merely give him an opportunity to correct his report and are insufficient to present any objections to the report.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 905–919; Dec. Dig. ⊂=410.]

2. PATENTS ⊂=226—INFRINGEMENT—TORTS.
One guilty of infringing a patent is a wrongdoer, and his acts are a tort.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig. ⊂=226.]

3. PATENTS ⊂=312—INFRINGEMENT—ACCOUNTING—BURDEN OF PROOF.
On an accounting for infringing a patent, complainant has in the first instance the burden of proving profits made by defendant; but, when he has shown the profits, defendant, to escape liability therefor, has the burden of showing by clear and satisfactory proof that he incurred and paid expenses in making and selling the infringing goods for which a deduction should be made.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊂=312.]

4. PATENTS ⊂=318—INFRINGEMENT—ACCOUNTING—LIABILITIES.
Where an infringer of a patent manufactured and sold the patented article and nonpatented articles, but failed to keep books of accounts or memoranda enabling him or others to separate the expense of making and selling the infringing article from that of the others, but so commingled his manufacturing and selling business and the expenses thereof as to make it impossible to separate the expense of the infringing business from that of the other, he could not be allowed a deduction from the gross profits on sales of infringing goods on mere surmise, speculation, or estimates, or on mere opinion evidence based on general recollection of time actually spent and salaries or wages paid in making and selling the infringing article.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⊂=318.]

5. PATENTS ⊂=318—INFRINGEMENT—ACCOUNTING—PROFITS.
As a complainant seeking damages from defendant for infringing his patent can recover only the profits on infringing goods sold by defendant, the latter cannot offset or counterclaim expenses incurred and paid in attempting to make sales on infringing goods which were not consummated, and the expense of an experimental trip of an employé of defendant is not an expense of selling infringing goods in the absence of any proof of any sale.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⊂=318.]

6. PATENTS ⊂=312—INFRINGEMENT—DAMAGES AND PROFITS.
In ascertaining damages and profits in patent cases, the ordinary rules of evidence should be applied as far as applicable, but no arbitrary rule should be allowed to prevail over the clear equities of the case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊂=312.]

7. PATENTS ⊂⊃318—INFRINGEMENT—INFRINGER AS TRUSTEE.

An infringer of a patent is a trustee for the owner, and, where he has so confused the profits received with other matters that either he or the owner must bear a loss, the loss must fall on the infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⊂⊃318.]

In Equity. Suit by William M. Decker against De Wane B. Smith. Exceptions to master's report fixing damages for infringement of a patent, and motion by defendant to strike from the files exceptions filed by complainant, as filed too late. Report of master confirmed, and exceptions overruled, and exceptions of complainant not considered.

J. William Ellis, of Buffalo, N. Y., for complainant.
Richard R. Martin, of Utica, N. Y., for defendant.

RAY, District Judge. [1] The master's report was filed November 10, 1914. November 5th, the defendant presented to the master certain exceptions to the proposed or draft report which were considered by the master and filed with the report. November 19, 1914, the defendant filed his exceptions to the report. December 5, 1914, the complainant filed his exceptions to such report. I do not find any exception of complainant to the proposed or draft report. In order to comply with the terms of Equity Rule 66 (1913, 193 Fed. xxxvii, 112 C. C. A. xxxvii), the exceptions to the report, not the draft report, should be filed within the 20 days succeeding the filing of the report as actually made by the master, and these exceptions are to the report as made, not to the draft report. Equity Rule 66 (1913) reads as follows:

"The master, as soon as his report is ready, shall return the same into the clerk's office and the day of the return shall be entered by the clerk in the equity docket. The parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed. If exceptions are filed, they shall stand for hearing before the court, if then in session, or, if not, at the next sitting held thereafter, by adjournment or otherwise."

The reason of the rule is apparent. It prevents delay, gives a reasonable time, and informs the opposing party of the objections to the report. The exceptions raise the issue. The object of filing objections with the master to his draft or proposed report is to give him an opportunity to correct his report, reconsider any point objected to, and decide differently if he on reconsideration deems himself in error. But these exceptions to the proposed or draft report are not a substitute for the exceptions required to be filed to the report as finally made and do not take their place. If additional time in which to file exceptions to the report of the master is desired, application to the court for such extension should be made. Here this was not done and has not been done. The exceptions of complainant to the report of the master were filed too late and cannot be considered. There may be error in the report, in that the master did not heed the exceptions filed to the proposed or draft report; but, if exceptions are not filed in time to the report as made and filed by the master, such er-

rors, if any, are deemed waived. The master has reported net profits at $2,826.26 with interest from the date of such report, October 23, 1914.

The exceptions of defendant duly filed claim that the following deductions should have been made, viz.: (1) $476 claimed to have been paid a stenographer and an expense of defendant's business in making and selling the infringing goods. (2) $136, salary of bookkeeper, an expense of defendant's business in making and selling the infringing goods. (3) $1,162.50, one-fourth of the salary and traveling expenses of one C. E. Marks, a traveling salesman, claimed to have been paid him for salary and services in selling the alleged infringing goods. (4) $1,100, claimed to have been paid one H. J. Smith, a traveling salesman, for services and expenses in selling the infringing goods. These items, if allowed, will wipe out the $2,826.26. If all these items are justly allowed, it will demonstrate that the defendant was conducting this infringing business at a loss.

The defendant conducted his business in the city of Utica, N. Y., under two names, "D. B. Smith & Co.," and "Yankee Company." Under the first name he sold spray pumps, and under the name Yankee Company he sold nursing bottles and nipples, mufflers for gas engines, and whistle outfits for motor boats. In the conduct of these two businesses under the two names the defendant employed one bookkeeper, two stenographers, three traveling salesmen, and his son, Myron H. Smith, who acted as general manager of the Yankee Company.

The infringement began March 18, 1909, and terminated July 12, 1910, when an injunction was served. The defendant also dealt in nursing bottles and nipples held not to infringe.

The master found the gross profits to have been $3,367.04. The master finds, and the evidence sustains and demands the finding, that the expenses of conducting the business of the two companies named was not separated, or kept separate, on any of the books of such companies. It was conceded by the testimony of said Myron H. Smith that it would be and is impossible for a stranger to this business, or these businesses, to tell or ascertain what the expense of conducting each business or the parts of each was. Said Myron H. Smith, in behalf of the defendant, wrote the master as follows:

"There are no books in our office kept either by the Yankee Company or by D. B. Smith & Co. containing entries of amounts paid to Mr. Marks or to Harry J. Smith for salary or expenses. There are no entries on our books covering the items of postage claimed in the account which we filed. There are no entries in our books of salary paid to stenographers or to our bookkeeper. We do not keep any general ledger showing our expense accounts. We do not keep any purchase journal. We do not keep any cashbooks showing cash received or paid out."

This was in response to a request for the books, etc. He also stated that checks desired and called for to show alleged payments were not kept, although some undoubtedly could be found by search, but wrote it would take time, and in effect it appears he preferred to rely on other testimony. The cash received by the one company was not kept separate from that received by the other. The only account books kept by the Yankee Company were a ledger and duplicate

binder of invoices, and the books kept by D. B. Smith & Co. were the same, with the addition only of a journal or order book in which was entered the orders received by the latter company. The money received by both companies were commingled and deposited in bank, but whether to the credit of D. B. Smith or D. B. Smith & Co. does not appear. Payments were made by the checks of the defendant, and no record was kept or produced showing for which company, or the benefit of which company, the deposits were withdrawn. The paid checks were not produced. Neither the stenographer nor the bookkeeper was called as a witness, and the only testimony as to their employment, their salaries and compensation, or the work they did and for which company, was that of the son of the defendant, Myron H. Smith, who testified from memory in these regards. His testimony on these subjects was largely made up of estimates and opinions. The defendant himself was not sworn as a witness, and the books, such as were kept, were not produced. In January, or February, 1909, said Smith says the salary of the bookkeeper was increased $2 per week on account of the nursing bottle business taken on.

One Charles E. Marks has been a traveling salesman in the employ of defendant since January, 1899, selling the goods of D. B. Smith & Co. In 1907, or 1908, in connection with such goods he took on and carried the line dealt in by the Yankee Company, nursing bottles, nipples, and mufflers. He testified that in his opinion he spent one-half his time in the nursing bottle business, but stated that the estimate was made wholly from memory, as he kept no record or memoranda as to time spent in dealing with the different classes of goods or of his expenses relating thereto and properly chargeable to the respective companies.

In January, February, and March, 1910, Harry J. Smith, also a son of the defendant and at his request, made a trip through the Southern States for the purpose of introducing and selling these infringing nursing bottles and nipples to the trade, for which he received a salary of $150 per month and $50 per week for expenses. Harry J. testified that he took but few orders that were filled by the defendant. Myron H. testified that numerous orders were sent in by his brother Harry, but, as most of them "had strings attached to them," they were not filled. None of such orders or of the letters declining to fill them were produced. Myron H. testified the arrangement for this trip was made with Harry by his father. The father was not called as a witness, and no excuse for his silence was shown. It is impossible to ascertain from the evidence produced, the books mentioned not having been produced (possibly these will not show), the number of orders, if any, taken by Harry J. and filled.

The special master says:

"From the foregoing facts I find this to be clearly a case where the expenses of conducting the business of the Yankee Company and that of the D. B. Smith & Co. were so confused and intermingled that it is impossible from the books or otherwise to determine with any degree of accuracy what proportion of expenses are properly chargeable to the nursing bottle business. Certainly it would not be fair to the complainant to allow the whole amount of deductions claimed by defendant, as it is plainly shown that the time of the stenographer was occupied with the whistling outfit and muffler business

as well as the nursing bottle business, and in addition she gave, at times, a portion of her services to D. B. Smith & Co.

"As to the extra salary of $2 paid bookkeeper, there is not, in my opinion, sufficient evidence to allow said claim, as the only evidence given upon the subject was the testimony of Myron H. Smith which is entirely based upon memory with no record or entry of any kind to show when the expense began or what the real arrangement was leading up to said increase of salary.

"Likewise the salary and expenses paid to C. E. Marks, traveling salesman. He undoubtedly was occupied during part of his trip in selling nursing bottles and nipples. There is only his testimony as to the amount of time he devoted to the nursing bottle business which is estimated by him, which estimate is based wholly on memory, to have been one-half of his time, although he could furnish no proof as to the actual time spent or expense incurred in selling or endeavoring to sell said articles. Myron H. Smith in making up account for defendant claimed but one-fourth of the salary and allowance for expense to this salesman for the nursing bottle business.

"I further find that the trip made through the Southern States by Harry J. Smith during the months of January, February, and March, 1910, was entirely experimental, although he received the same salary and allowance for expenses that had been paid to him by his father (the defendant) for several years previous while on the road selling spray pumps for D. B. Smith & Co. He admittedly was without experience in the nursing bottle business when he made such trip and had not previously attempted to sell nursing bottles and nipples, yet received the same salary and a larger expense account than did the salesman Marks, who had had several years' experience with a similar line of goods. In the absence of any record showing the amount paid said Harry J. Smith, and in view of the fact that he was continued on the road during said period and the orders received from him were repeatedly rejected, it does not seem proper that the expense of said experimental trip should be borne by complainant.

"The defendant was in a position to know whether the confusion existing could be cleared up or not if the books of the D. B. Smith & Co. had been produced. He certainly had an opportunity to produce them, but failed to do so.

"In view of the foregoing, any amount found as a deduction for said expenses would be merely speculation and guess work with no definite result.

"Had the books of the D. B. Smith & Co. and the Yankee Company been properly and completely kept, the rule of apportionment might easily have been applied as was done in the old and well-known case of Rubber Company v. Goodyear, 9 Wall. 788 [19 L. Ed. 566].

"I find it impossible to apply such rule to this case.

"This case, in my opinion, comes clearly within the meaning of the recent case of Westinghouse Electric Mfg. Co. v. Wagner Electric Mfg. Co., 225 U. S. 604 [32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653].

"I therefore find and report that there should be a decree in favor of complainant for the sum of $2,826.26, with interest from the date of this report."

Is there error in these conclusions?

[2, 3] In causing these infringing goods to be made and in selling them the defendant was a wrongdoer. His acts constituted a tort. On the accounting before the master the burden in the first instance was on the complainant to show the profits. This burden he sustained, and no exception is taken to the finding as to gross profits, or by defendant to these deductions made by the master so far as they went; but it is claimed these other alleged expenses were incurred and paid in running the infringing business or in making the infringing sales, and hence are properly to be deducted from such gross profits also. When the complainant had sustained and satisfied the burden resting upon him, he was entitled to all of such profits as he had proved on goods sold, unless the defendant should show by clear and satisfac-

tory proof that he had incurred and paid expenses in the making and selling of such infringing goods which should be deducted. In this the burden was on defendant. He was not sworn, and the books were not produced as before stated.

[4] It seems to me, in view of the authorities, that where an infringer of a patent engaged in making, or causing to be made, and also in selling, the infringing articles, and also in making and selling other noninfringing goods, and perhaps in both making and selling other noninfringing goods, fails to keep books or accounts or memoranda which enable him or others to separate and distinguish the expense of making and selling the infringing article from that of the others, and so commingles and intermixes his manufacturing and selling businesses and the expenses thereof as to make it impossible to separate the expense of the infringing business, selling the infringing goods, from that of the others, with any reasonable degree of certainty, such infringer cannot be allowed a deduction from the gross profits on sales of infringing goods proved, on mere surmise, guess, speculation, or estimates, or on mere opinion evidence not based on definite facts but mere opinion based on general recollection as to the time actually spent and salaries or wages paid in making and selling the infringing articles. The negligence or loose business methods of an infringer cannot be used by him as a shield, or as a weapon of offense, in dealing with the one whose rights he has thus invaded or to defeat the recovery of profits actually made by the infringer. In this case all deductions have been made except certain alleged expenses of selling the infringing goods.

[5] As the complainant can recover only the profits on infringing goods sold by defendant, sales actually made, it would seem plain that defendant cannot offset, or counterclaim, or have deducted from the profits derived by him on sales actually made, the expenses incurred and paid in attempting to make sales which were not made or consummated. As there were no profits on such attempted sales, there can be nothing to deduct, and expenses incurred and paid in such attempted sale, or attempts to make sales, but which proved a failure, cannot be charged against profits or used to reduce a recovery of profits actually realized from the sales actually made. In Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 456, 457, 12 Sup. Ct. 49, 35 L. Ed. 809, the infringer in carrying on his infringement of complainant's patent made certain infringing valves which defendant destroyed. These and the expenses of making them were a dead loss in the business of making and selling infringing goods, but the Supreme Court held that:

"It was also proper not to allow a credit for the destroyed valves against the profits realized by the defendant on other valves."

At page 456 of 141 U. S., at page 54 of 12 Sup. Ct., 35 L. Ed. 809, the court, citing the master's report, said:

"The result therefore is substantially this: That the defendants made some 119 valves which they subsequently destroyed, with some castings which they concluded not to use. I find no sufficient reasons for modifying my former disallowance of item 7 in each case."

As to this the Supreme Court said:

"As for the contention that the destroyed valves ought to form a credit against the profits actually realized by the defendant on other valves, it is sufficient to say that the only subject of inquiry is the profit made by the defendant on the articles which it sold at a profit, and for which it received payment, and that losses incurred by the defendant through its wrongful invasion of the patent are not chargeable to the plaintiff, nor can their amount be deducted from the compensation which the plaintiff is entitled to receive. Cawood Patent, 94 U. S. 695 [24 L. Ed. 238]; Elizabeth v. Pavement Co., 97 U. S. 126, 138 [24 L. Ed. 1000]; Tilghman v. Proctor, 125 U. S. 136 [8 Sup. Ct. 894, 31 L. Ed. 664]."

In the instant case the expense of the experimental trip of the son of defendant was a loss in the business, and not an expense of selling the infringing goods on which defendant is charged a profit. If he sold any, the number does not appear. If the correct rule be the profits derived from the infringing business taken as a business and by itself, then when the amount of gross profits of that business is proved it is to be reduced by legitimate and proper and proved expenses of conducting that particular business. These deductions should be based on proof of facts, not on mere estimates and opinions where the expenses were so intermingled with the expenses of sales of other articles as to be absolutely indefinite. This is especially true when the books kept are not produced. But, I take it, this is not the rule for ascertaining profits. At least it was not adopted by the master in this case. But even so it is impossible from the evidence to determine except by guess and speculation the amount of expenses not already allowed, chargeable to the nursing bottle business. If every avenue of getting at the truth in this regard had been thrown open by the defendant, and every means exhausted, the court would be inclined to lean far towards the side of the defendant; but here it finds no reasonable ground for materially relaxing the rules applicable. In Walker on Patents (4th Ed.) § 713, p. 561, it is said:

"Where a part of the infringement of a defendant resulted in profits, and the residue resulted in losses, the complainant is entitled to recover those profits without any deduction on account of those losses."

The author cites Callaghan v. Myers, 128 U. S. 664, 9 Sup. Ct. 177, 32 L. Ed. 547; Crosby Valve Co. v. Safety Valve Co., 141 U. S. 453, 12 Sup. Ct. 49, 35 L. Ed. 809; Graham v. Mason, 1 Holmes, 90, Fed. Cas. No. 5,672; and Steam Stone Cutter Co. v. Mfg. Co., 17 Blatch. 27, Fed. Cas. No. 13,335. This applies to the expenses of the southern trip made by the son of the defendant.

In Walker on Patents (4th Ed.) § 715, p. 562, the author says:

"The generic rule for ascertaining the amount of the profits recoverable in equity for the infringement of a patent is that of treating the infringer as though he were a trustee for the patentee, in respect of the profits which he realized from his infringement. The specific rules by means of which this generic rule is administered are somewhat numerous and somewhat elastic. They are adapted to the varying natures of patented inventions, and to the varying circumstances under which the patents for those inventions are respectively infringed. They all require the best evidence, of which the nature of each particular case to which they may be respectively applied will reasonably admit, and that evidence must be reasonably definite and convincing."

In Fischer v. Hayes (C. C.) 39 Fed. 613, it was held:

"Where a master reports that the profits of defendant derived from the infringement of plaintiff's patent cannot be computed from the evidence, nominal damages only can be assessed, though it is apparent that there were profits."

This goes on the principle that there must be evidence of the amount of the profits. In Locomotive Safety Truck Co. v. P. R. Co. (C. C.) 2 Fed. 677, it was held:

"Although an infringer may be answerable in damages, he is not to be held liable for profits unless there is some satisfactory evidence from which the value of the advantage derived from the use of the invention can be measured."

In the opinion, at page 681 of 2 Fed., the judge said:

"Some witnesses, it is true, have given estimates of the saving of wear by the use of the swinging truck. But an examination of their testimony convinces me that their estimates are mere guesses, without any reliable basis. There are no facts in evidence to justify them."

[6, 7] Such is this case as the master finds, and on going over the evidence I am convinced he was correct in his conclusions. If the complainant cannot recover profits without producing clear and satisfactory proof of their amount, on what principle or sound theory can it be held that defendant, profits once proved, can wipe them out by mere estimates of expenses incurred, books being withheld? In getting at damages and profits in patent cases the ordinary rules of evidence should be applied so far as applicable, and no arbitrary rules should be allowed to prevail over the clear equities of the case. But an infringer, so adjudged, is held to be a trustee for the owner of the patent infringed, and, if he has so intermixed and confused the profits received with other matters that either he or the one whose rights have been invaded and disregarded must bear a loss, that loss must fall on the infringer. This has been decided many times. Westinghouse Electric Mfg. Co. v. Wagner Elec. Mfg. Co., 225 U. S. 604, 620, 621, 622, 32 Sup. Ct. 691, 696, 697 [56 L. Ed. 1222, 41 L. R. A. (N. S.) 653], where the court said (including quotation approved by it):

"But when a case of confusion does appear—when it is impossible to make a mathematical or approximate apportionment—then from the very necessity of the case one party or the other must secure the entire fund. It must be kept by the infringer, or it must be awarded, by law, to the patentee. On established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong. The fact that he may lose something of his own is a misfortune which he has brought upon himself; and if, as argued, the fund may have been made by the use of other patents also, for which he may be liable in another case, it is again a misfortune which he has brought upon himself and an instance of a double wrong causing double liability. He cannot appeal to a court of conscience to cast the loss upon an innocent patentee and by judicial decree repeal the provision of Rev. Stat. § 4921, which declares that in case of infringement the complainant shall be entitled to recover the 'profits to be accounted for by the defendant.' * * *

"In the present case the infringer's conduct has been such as to preclude the belief that it has derived no advantage from the use of plaintiff's invention. * * * In these circumstances, upon whom is the burden of loss to fall? We think the law answers this question by declaring that it shall rest

upon the wrongdoer, who has so confused his own with that of another that neither can be distinguished. It is a bitter response for the court to say to the innocent party, 'You have failed to make the necessary proof to enable us to decide how much of these profits are your own;' for the party knows, and the court must see, that such a requirement is impossible to be complied with. The proper remedy to be applied in such cases is that stated by Chancellor Kent in Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 108, where he said: 'The rule of law and equity is strict and severe on such occasion. * * * All the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it.'

"It may be argued that, in its last analysis, this is but another way of saying that the burden of proof, is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment. If then the burden of separation is cast on the defendant, it is one which justly should be borne by him, as he wrought the confusion."

I think this applies here.

The master could not guess with any degree of accuracy the amounts that were paid by defendant to stenographer and traveling salesmen as expenses and for service, etc., in selling the infringing goods, and the evidence given only presented a basis for a guess or mere estimate, nothing more. Sufficient facts were not proved upon which to base a reliable estimate. I am not to be understood as deciding that where a person works in selling infringing goods and other merchandise also, and keeps no account of the time devoted to the selling of the one as distinguished from the other, he may not give his estimate and recollection of the time devoted to each, but such estimate must be based on facts within the recollection and knowledge of the witness, such as demonstrate with reasonable accuracy the correctness of the estimate. This court cannot guess at the amount with more accuracy than the master could have done, and, as he declined the task, this court does not feel justified in undertaking to say he was wrong. The master also declined to adopt the guessed or estimated amounts given by the salesmen and manager as his or their idea of the proper deductions. Clearly, under the evidence, the stenographer devoted a large part of her time to other work. It is not shown that she could not have been produced as a witness. The books of D. B. Smith & Co. should have been produced, and the defendant himself ought to have known, and if called been able to tell, something of the business arrangements he made and expenses, etc., paid on his own checks in selling the infringing goods.

I think the result arrived at by the master as nearly a correct and just one as it is possible to obtain under the evidence, and there will be an appropriate order confirming the report and overruling the exceptions.

As to the compensation of the master, I will allow $20 per day for 23 days, or $460, and $100 for supervision of examinations, and $61.10 stenographer, in all $621.10, to be paid by the defendant.

There will be an order accordingly.

AMERICAN GRAPHOPHONE CO. et al. v. BOSTON STORE OF CHICAGO.

(District Court, N. D. Illinois, E. D. September 3, 1915.)

No. 482.

1. PATENTS ⟸191—RIGHTS OF PATENTEES—CONTRACTS.
A patentee may, while exercising any of his three co-ordinate monopoly rights of making, selling, and using, reserve by proper agreement such portion thereof as he may see fit; but after he has once allowed the patented article to pass out of the monopoly, without committing, by proper agreement, the one to whom the article comes to the observance of an obligation on his part, he cannot recall it, or claim that by notice he has burdened the article with such reservation.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. ⟸191.]

2. PATENTS ⟸191—RIGHTS OF PATENTEE—CONTRACTS.
An agent or vendee of a patentee may, by direct covenant, bind himself to the observance of price restriction imposed as a condition on which exclusive right of sale by the patentee is being exercised.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 268; Dec. Dig. ⟸191.]

3. PATENTS ⟸257—RIGHTS OF PATENTEE—CONTRACTS.
Whether a violation of a contract by an agent or vendee of a patentee to observe price restriction, imposed as a condition on which exclusive right of sale by patentee is being exercised, may be dealt with as for infringement or breach of contract, enforceable in equity, is immaterial as between the parties, except only as it may affect the jurisdiction of the court to be invoked; but, where the contract is to be taken as the measure of the agent or vendee's right, a failure to observe its stipulation is an infringement.
[Ed. Note.—For other cases, see Patents, Dec. Dig. ⟸257.]

In Equity. Suit by the American Graphophone Company and another against the Boston Store of Chicago. Motion to dismiss amended bill of complaint and order made to show cause in 10 days why injunction should not be granted.

Elisha K. Camp, of New York City, Daniel N. Kirby, of St. Louis, Mo., and Taylor E. Brown, of Chicago, Ill. (Brown & Mehlhope, of Chicago, Ill., and Nagel & Kirby, of St. Louis, Mo., of counsel), for plaintiffs.

Hamilton Moses, of Chicago, Ill. (Moses, Rosenthal & Kennedy, of Chicago, Ill., of counsel), for defendant.

GEIGER, District Judge. [1] I shall consider the contract set out in the complaint as though it were entered into between the defendant and the plaintiff American Graphophone Company. The case is of importance only in so far as it presents the question: Can a patentee, upon a sale of a patented article, by contract require of his immediate vendee the observance of price restrictions upon resale?

Prior to the decision in Bauer v O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S) 1185, Ann. Cas. 1915A, 150, this question, now raised upon the motion to dismiss, would have received an affirmative answer on the authority of Victor v. The Fair,

123 Fed. 424, 61 C. C. A. 58, the cases therein cited, Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct 747, 46 L. Ed. 1058, Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, and certain other cases, particularly the so-called Anti-Trust Cases, which involve patents and patent rights. The determination of the motion, as I think, depends upon the effect, if any, to be given to Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, and Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, as modifying the views thus heretofore entertained.

Now, in the Bobbs-Merrill Case, it was held that the exclusive right of vending a publication, as secured by the copyright statute, did not confer the right, by notice, to burden the copyrighted article with respect to resale price, in whosesoever hands it may come; that is to say, it was held that the right of vending does not include that manner of qualifying title to the thing sold. This seemed to be of the essence of the holding, for the court said:

"The learned counsel for the appellant in this case in the argument at bar disclaims relief *because of any contract*, and *relies solely upon the copyright statutes*, and rights therein conferred." 210 U. S. 346, 28 Sup. Ct. 724, 52 L. Ed. 1086.

Again:

"The *precise question*, therefore, in this case is: Does the sole right to vend (named in section 4952) secure to the owner of the copyright the right, *after a sale* of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, *because of a notice in the book that a sale at a different price will be treated as an infringement*, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. *There is no claim in this case of contract limitation, nor license agreement controlling the subsequent sales of the book.*"

Bauer v. O'Donnell presented, in respect of a patented article, the identical facts of the Bobbs-Merrill Case, and twice the court stated the proposition for decision thus:

(1) "May a patentee *by notice* limit the price at which future retail sales of the patented article may be made, such article being in the hands of a *retailer by a purchase from a jobber* who has paid to the agent of the patentee the full price asked for the article sold?"

(2) "The real question is whether in the exclusive right secured by statute to 'vend' a patented article there is included the right, *by notice*, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely *upon the notice* quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use."

The decision in substance is that, when the patentee sells, he cannot thereafter impeach the fact of sale, nor the transfer of title of the article, by claiming that he had affixed a notice thereto which qualified the right of the seller or purchaser on resale to agree upon any price; but the question here is: Can a patentee, while in the act of exercising his monopolistic right of sale, lawfully bind his vendee to terms of resale to be respected by the latter? It is the question

which in the Victor Case, 123 Fed. 424, 61 C. C. A. 58, supra, was somewhat more broadly stated to involve these facts:

"The bill very clearly shows that appellants said to the jobber: 'We are unwilling to part with the whole of our monopoly. There are no terms on which we will give you an unrestricted right to deal in our machines. However, if you choose to pay our price for a limited right, we will place our machines in your hands to be sold by you, or by dealers under you, to the public at not less than $25 each'—and that the jobber *explicitly accepted this offer.*"

Grant that a patentee cannot, by mere notice, burden an article during the life of the patent with a resale price restriction, that he cannot make a notice attached to the article discharge the function of a "covenant running with the land," as in real estate sales, and that, when he *sells,* he *sells,* we still have the question: How effectively can he and his vendee bargain respecting the exercise of his exclusive right of sale? If it be the law that he cannot make *any* bargain with *his vendee* which involves price restriction, then, of course, in that respect he is on competitive, and not on monopolistic, ground. He is in the position where he may rightfully withhold the manufacture, use, and sale from the whole public, and yet, when he proceeds to sell, must submit to the very policy which the public, in granting him the monopoly, has surrendered to him.

Now, as I view the recent adjudications, the Victor Case, supra, has two aspects which are significant: First, it announces the general proposition that the patentee and his vendee may bargain in any way respecting the scope of the former's release of his monopoly right. Therein it is in accord with the later cases (Bement, Dick, and the Anti-Trust Cases). Secondly, that the notice affixed to the patented article is a sufficient reservation of his right as between himself and the public. Therein, it is clearly overruled by Bauer v. O'Donnell. If the general proposition first above is also overruled, it seems difficult to find a foundation for the cases which subsequently affirmed it. That such is not the intended effect of the Bauer Case seems clear from the language used in stating the question therein to be decided, as well as the direct affirmance of the Bement and Dick Cases, which involve, fundamentally, that very proposition.

It is suggested that the distinction between the Bement, Creamery Package (179 Fed. 115, 102 C. C. A. 413), Bath Tub (226 U. S 20, 33 Sup. Ct. 9, 57 L. Ed. 107), and Rubber Tire Wheel (154 Fed. 358, 83 C. C. A. 336) Cases and the present case is this: That the patentee may sell or assign his *right to sell,* and introduce a covenant for price restriction; that he may sell his right to *manufacture and sell,* and introduce a covenant for price restriction; but that he cannot sell his own patented article and compel his vendee to observe a covenant for a resale price. This attempted distinction, it seems to me, loses sight of the fundamental notion of the patentee's right. It does not help to say that, after a patentee has exhausted his right, he can no longer exercise it, or that, when he has once sold to an individual for a full price, the public cannot be barred from the full and unrestricted use and right of resale. Those are truisms. But what distinction is there between selling or assigning the right to sell—to speak plainly, between licensing to sell on terms of resale, and *selling*

the patented article on terms of resale? Each is or involves the bargaining away of the right secured by the patent, though the form of obligation or the manner of exercising may be different. Naturally, an absolute sale by a patentee of his patented article is the highest form of license through which the purchaser and the public are admitted to the inventor's right, so far as they may enjoy it, in the use and sale of the particular article embodying the invention. In each case, however, the licensee or vendee acquires the same right, having the same origin, and in no event exercisable without permission of the patentee. In each, the transmission by the patentee of a whole or a part of the exclusive right which has been granted him with respect to his inventive concept is (in whole or in part) the subject of the bargain; and the fact that, in the one, the bargain also involves the transfer of title to a physical thing, embodying the concept, does not furnish a basis for distinguishing the situations in so far as they fundamentally have this common element which no one can enjoy or practice unless he can make terms with the patentee.

The covenant for price restriction in the Bement and other cases referred to, although found in a license to manufacture and sell, was germane to the patentee's exclusive right of sale. It was assumed in all of these cases that such covenant was prima facie violative of public policy, but that it was met and overcome by the fact that the public, through the grant of the patent, had given the articles to be sold, a status which enabled monopolistic bargaining; that therefore the rules respecting ordinary sales could not apply. It is impossible, in my judgment, to draw a tenable distinction between those cases and the case of a direct sale by the patentee of his patented article.

To state it again, in different form: If the patentee may say to the world, "I will confer upon any one, by license, the right to manufacture and sell my patented article, provided he will observe a price, fixed by me at which the article is sold to another," he can say, "I will manufacture the patented articles myself, and I will sell to no one except on condition that he observe a resale price to be fixed by me." And he can do so for the reason that the article, because of its embodiment of the invention, has been made a subject of lawfully restrictive price bargaining; and the Wall Paper (212 U. S. 233, 29 Sup. Ct. 280, 53 L. Ed. 486) and Dr. Miles Medical (220 U. S. 393, 31 Sup. Ct. 376, 55 L. Ed. 502) Cases are most persuasive in supporting such view. The language of the Supreme Court in the Miles Case (see 220 U. S. 401, 31 Sup. Ct. 376, 55 L. Ed. 502) could give no clearer recognition to the full right of the patentee *to bargain* for price restriction. The statement is almost made in plain words that, if the proprietary medicine were a patented article, the contract there in question would, as *between the parties*, receive the protection of the patent laws as construed in the Bement Case.

In view of the language in Bauer v. O'Donnell, which discloses so clear a purpose to limit it to the precise facts, it is my judgment that it does not, and was not intended to, overrule the other cases, which seem so firmly to have established the general proposition upon which the sufficiency of the complaint in the present case depends. In other

words, the complaint shows a contract which, against the defendant, as a purchaser from the patentee, is valid and enforceable.

[2, 3] I appreciate that these views may not be in harmony with those expressed in other jurisdictions since the decision in Bauer v. O'Donnell, and for that reason have reduced them to the form of a memorandum. The conclusions are:

(1) That Dick v. Henry, Bement v. Harrow Co., Victor v. The Fair, and the other cases, supra, so far as they permit a patentee, *while exercising* any of his three co-ordinate monopoly rights, by proper agreement to reserve such portion thereof as he sees fit, have not been overruled by Bauer v. O'Donnell; but that, after he has once allowed the patented article to pass out of the monopoly, without committing, by proper agreement, the one to whom the article comes, to the observance of an obligation on his part, he cannot then recall it, or claim that, by a notice, he burdened the article with such reservation.

(2) That an agent or vendee of a patentee may, by direct covenant or agreement, be bound to the observance of price restriction, imposed as a condition upon which exclusive right of sale by the patentee is being exercised. Whether a violation of such agreement be dealt with as for infringement or breach of a contract, enforceable in equity, is immaterial as between the patentee and his contractee, save only as it may affect the jurisdiction to be invoked.

(3) That the complaint states a good cause of action against the defendant. If the contract is to be taken as the measure of the defendant's right, it seems to me that a failure to observe its explicit stipulation constitutes infringement. Certainly the breach of the agreement, if valid, should entitle plaintiffs to relief in equity.

An order may be entered overruling the motion to dismiss. The application for an injunction, involving as it does the same fundamental questions as the motion to dismiss, should also be granted; and, unless the defendant shall, within 10 days, indicate its desire to oppose such application upon grounds not involved in the motion to dismiss, an injunction may go.

PHILADELPHIA RUBBER WORKS CO. v. UNITED STATES RUBBER RECLAIMING WORKS.

(District Court, W. D. New York. June 29, 1915.)

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—PROCESS FOR DEVULCANIZING RUBBER WASTE.

The Marks patent, No. 635,141, for a process for devulcanizing rubber waste, was not anticipated, discloses invention, and describes the process claimed with sufficient definiteness; also *held* infringed.

2. PATENTS ⇐312—INFRINGEMENT—EVIDENCE.

A defendant is not excused from giving testimony to negative infringement of a patented process by reason of its desire to keep its process a business secret, since it can at least show by affirmative proof what steps of the patented process it does not use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⇐312.]

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8. PATENTS ⟸175—CONSTRUCTION OF CLAIM—"MORE OR LESS."

In a patent claim, describing a process for devulcanizing rubber waste by heating to a temperature of 344° Fahrenheit, more or less, and for maintaining such temperature for 20 hours, more or less, the words "more or less" mean approximately or nearly such temperature or length of time, leaving a reasonable margin to the discretion or judgment of the one practicing the process.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250, 250¾; Dec. Dig. ⟸175.

For other definitions, see Words and Phrases, First and Second Series, More or Less.]

In Equity. Suit by the Philadelphia Rubber Works Company against the United States Rubber Reclaiming Works. On final hearing. Decree for complainant.

Charles Neave, of New York City (Alan N. Mann, of New York City, of counsel), for complainant.

Briesen & Knauth, of New York City (Arthur v. Briesen and Fritz Ziegler, Jr., both of New York City, and Simon Fleischmann, of Buffalo, N. Y., of counsel), for defendant.

HAZEL, District judge. Bill for injunction and accounting, alleging infringement of patent No. 635,141, dated October 17, 1899, to Arthur H. Marks, complainant's assignor, for a process for reclaiming rubber from vulcanized rubber waste. The patent plainly states as an essential of the process a dilute alkaline solution, preferably a 3 per cent. solution of caustic soda, sufficient to completely submerge the finely ground rubber in a sealed vessel, which, when subjected to great heat, say "from 344° to 370° Fahrenheit, more or less," for 20 hours, more or less, will devulcanize vulcanized rubber waste and remove therefrom any fibrous substance. The object of the invention was to reclaim rubber in vulcanized rubber waste for re-use, by imparting to it the substantial characteristics of fresh or new rubber. The single claim of the patent reads as follows:

"The described process for devulcanizing rubber waste, which consists in submerging the finely ground rubber waste in a dilute alkaline solution in a sealed vessel, in heating the contents of the vessel to a temperature of 344° Fahrenheit, more or less, substantially as specified, and in maintaining said temperature for twenty hours, more or less, substantially as specified."

[1] The principal defenses are noninfringement, anticipation, and insufficiency or indefiniteness of description. A determination of the adequacy of the last-mentioned defense requires an examination of the specification, with a view to ascertaining whether it could be understood by the skilled in the art and the process practiced from such description. Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527.

The patentee states therein that in the best method known to him for carrying out the process the finely ground rubber waste is put in a sealed vessel, contained in a tightly closed larger vessel, and submerged in an alkaline solution, for example, a 3 per cent. solution of caustic soda, and subjected to great heat, say a temperature of be-

tween 344° and 370° Fahrenheit, more or less, the pressure being maintained for 20 hours, more or less. Any lack of specificness arising from the difference in temperature, and from the use of the terms "submerged," "finely ground rubber waste," "dilute alkaline solution," and "sealed vessel," is not of such a nature as to mislead the skilled in the art as to the method of practicing the process. It is presumable that the words "finely ground" included waste cut into small pieces, and that the submerging solution should vary somewhat in strength and temperature according to the character of the waste material treated.

[3] It is difficult to specify with exactness the strength of a solution, or the degree of temperature, or length of time required for obtaining the best results under varying conditions, and therefore the words "more or less," found in the claim in connection with the degree of temperature and the length of time required, must be interpreted as meaning approximately or nearly such temperature or length of time, leaving a reasonable margin to the discretion or judgment of the one practicing the process. The law is that the admixing of certain substances or the heating of certain substances to a fixed temperature is a process; and in Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279, it is said that, if the method of doing this or the apparatus in or by which it can be done is fairly obvious, suggesting itself to a person skilled in the particular art, it is enough if the patent specifies the process to be accomplished, without giving supererogatory directions as to the apparatus or method employed. See, also, Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 56 L. Ed. 1034. It was also contended that the process was inoperative, because the desired temperature could not be obtained within the inner vessel to achieve devulcanization without applying a stirring apparatus, etc.; but I think there is abundant evidence to the contrary.

According to the proofs, crude rubber in its original state is dense, and, though capable of being stretched, it is nevertheless inelastic; the property of elasticity being imparted to it by the well-known Goodyear process, which combines with the rubber, while in a plastic state, a small proportion of sulphur, which vulcanizes or hardens it, so that it is able to retain its form regardless of variations in temperature. It was testified that in practice, only a portion of the sulphur added to the rubber chemically combines with it during vulcanization, the remainder being classed as free sulphur, and that when rubber articles are depreciated by wear or use the rubber contained therein is reclaimed and restored to a plastic state for revulcanization by the process of devulcanization. Devulcanization removes the free sulphur, or a portion thereof, from the vulcanized rubber, and is attended by a distinct depolymerization, or breaking into smaller aggregations the rubber molecules, which consist of hydrogen and carbon in the proportion of $C_5 H_8$, thus rendering the waste rubber plastic.

Defendant's counsel questioned the practicability of the depolymerization of the waste rubber, contending that the problem was merely theoretical and had originated in the minds of complainant's expert witnesses; but their testimony on this point is uncontroverted and indicates that during vulcanization there is not only a chemical combination of the rubber and sulphur, but that the reaction of the composi-

tion increases the degree of polymerization of the rubber molecules, a phenomenon present when a given substance takes on larger quantities of the same components. That this results from vulcanizing rubber finds support in various publications to which the witness Weber referred, and in the experiments carried on by him with caustic soda as a solvent, for the purpose of proving that the Marks process in question not only removed the free sulphur and fabric, but also broke into smaller aggregations the molecules of rubber. That the term "devulcanization" implies a change in the state of cohesion of the molecules, as distinguished from mere elimination of the free sulphur, is shown in the Beer patent, No. 12,983, of 1855.

There are a number of patents in the record which clearly describe means for devulcanizing rubber articles, such as boots and shoes, in order to reclaim the rubber for re-use, and in all such patents high temperature was applied to the rubber, both water and steam being used. In the Mitchell patent, No. 395,987, a caustic solution was used as a reclaiming agent, but the caustic solution was washed out before the rubber was subjected to great heat. Had it been allowed to remain in until after the heat was applied, devulcanization within the provisions of complainant's patent would probably have resulted. The alkaline solution in prior patents for reclaiming waste rubber was simply used to remove the free sulphur or fabric, and not to effect devulcanization. It was not suggested in the Mitchell patent, to which further reference will hereinafter be made, that old rubber tires or hose could be efficiently devulcanized and the free sulphur and fabric removed therefrom by a single step. If Mitchell had devised such a process, then obviously he would have succeeded in accomplishing what the patentee herein has accomplished. His process defiberized rubber waste by the use of acid and pressure, and then devulcanized it by an additional step, after washing out the caustic soda, which he believed to be harmful during the period of devulcanization.

The evidence preponderatingly shows that vulcanized rubber tires could not be rendered completely plastic by merely removing the free sulphur and fabric, and that such condition was attainable only by depolymerizing the waste or breaking down the rubber molecules formed during vulcanization. Prior to the Marks process under consideration, so-called mechanical scrap rubber which had necessarily been highly vulcanized was not efficiently devulcanized or reclaimed by the acid process familiar to the art. Indeed, the witness Lowman swore that the shoddy made from mechanical scrap by the acid process was of a lower grade than rubber reclaimed from boot and shoe scrap. The experiments by the witness Weber showed that caustic soda aided devulcanization and increased the tensile strength of reclaimed rubber. It is not claimed that the invention in suit restores to waste rubber the superior characteristics of fresh rubber; but it is maintained, and I think has been proven, that after the waste rubber has been treated by the specified process it is capable of extensive use for mercantile purposes.

The patent in suit is not anticipated by anything shown in the prior art. In the Beer patent, No. 12,983, to which importance is attached,

the ground rubber is first boiled in an alkaline solution, and then boiled again after turpentine has been added, this process continuing until the waste is desulphurized; but what degree of heat or what length of time is required is not specified. After the waste is freed from sulphur, it is washed and dried, and only then is it prepared for devulcanization. This method is manifestly not the method with which we are herein concerned, the important feature of which is the simultaneous desulphurization and devulcanization of rubber waste by the use of caustic soda.

The Mitchell patent, No. 395,987, to which reference has hereinbefore been made, comes nearer than any other to suggesting the process in controversy, but the method therein described was not sufficiently extended to include what Marks accomplished. By Mitchell's process waste rubber was reclaimed by immersing it in an acid solution in a sealed vessel and subjecting it to pressure above the boiling point, in fact, 240° Fahrenheit, until the material is corroded and removable by washing, after which the waste is steamed at high pressure to effect devulcanization. Marks, on the other hand, defiberized, desulphurized, and devulcanized waste rubber by a single operation, and in so doing achieved a different result from Mitchell, a result that was beneficial and useful.

It is shown that the mere presence of caustic soda in rubber waste acts as a catalyzer, and will not only operate to stiffen rubber, but, if heated to a high temperature, will produce greater plasticity in the waste. I think the patentee made a patentable discovery, and that its usefulness may be clearly inferred from defendant's adaptation thereof. Other alleged anticipations need not be examined, as those herein specified are the ones principally relied upon.

It was next contended that Marks was not in fact the inventor of the process in question, and that it was invented by one Price. It appears, however, that the patentee, Sweet, and Price, who were employés of the Boston Woven Hose Company, together made laboratory experiments from which it was seen that a caustic soda solution at great heat had a tendency to soften rubber; but it is not proven that Marks did not alone afterwards develope and complete the process when experiments had been abandoned by Sweet and Price. Certainly the record does not disclose that either Price or Sweet conceived that the entire process of reclamation could be performed at one time, by putting the waste in dilute alkaline solution and subjecting it to the high temperature specified in the patent, thus devulcanizing the waste and incidentally removing the fabric therefrom. Marks completed the laboratory experiments, and is therefore entitled to the patent, even though others may have had the same idea and made some experiments along the same line. Agawam v. Jordan, 7 Wall. 583, 19 L. Ed. 177.

As to infringement: It is fairly shown that defendant, in its adaptation for reclaiming rubber waste, uses caustic soda of varying strength, from 5 per cent. to 9 per cent., placing it in a sealed vessel, an iron cylinder, in which the waste, cut into small pieces capable of passing through a sieve of 3/8-inch mesh, is immersed. Steam is then injected into the outer vessel in the space surrounding the vulcanizer at a

temperature of 360° Fahrenheit, and such temperature maintained for a period of from 20 to 24 hours. The caustic solution used by the defendant is no doubt a dilute solution within the reasonable intendment of the patent in suit, and the cut waste the equivalent of the finely ground waste therein specified; and the defendant's waste is thus restored to a plastic condition suitable for revulcanization, in practically the same way as specified in the claim in suit.

[2] It was urged that infringement was not sufficiently proven, but there is no contradiction of the prima facie showing of complainant in relation thereto. Evidence to controvert infringement could easily have been produced by defendant, if the testimony of Butz had not been reliable, and the failure of the defendant to deny or qualify such testimony is indicative of its truthfulness. A. B. Dick Co. v. Belke & Wagner Co. (C. C.) 86 Fed. 149. The defendant is not excused from giving negative testimony by reason of its desire to keep its process a business secret, for in such case, as said by Judge Lacombe in Badische Anilin & Soda Fabrik v. S. Klipstein & Co. et al. (C. C.) 125 Fed. 543:

"A court might not compel them to divulge it, but they could at least show by affirmative proof that some one or more steps (or all the steps) of the processes set forth in the patent had not been followed in the manufacture of the product."

Since the hearing my attention has been directed to a decision rendered by Judge Clarke in the Northern District of Ohio, Eastern Division, wherein he held the patent in suit invalid for want of novelty and invention; but, though I have carefully considered the subject-matter of the patent in connection with the opinion of the learned court, I am persuaded on the record before me to a different conclusion. The patent in suit in my opinion was a step forward in the art, not a great step, it is true, but nevertheless an advance, which has the merit of accomplishing a new result by the application of a new process to the reclamation of rubber waste; and as the defendant appropriated the essential elements thereof, thereby achieving the same result, it must be held to have unlawfully appropriated the same.

Decree for complainant, with costs.

UNITED STATES v. CHIN HING.

(District Court, D. Maine. July 27, 1915.)

No. B1.

1. ALIENS ⇐26—CHINESE EXCLUSION—CITIZENS.

The Chinese Exclusion Acts (Act Sept. 13, 1888, c. 1015, 25 Stat. 476, and Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1913, §§ 4315–4323]), do not apply to persons of that race if they were born in the United States of parents there living; Const. Amend. 14, cl. 1, declaring that all persons born in the United States are citizens of the United States and of the state wherein they reside.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 83; Dec. Dig. ⇐26.]

2. ALIENS ⟸32—CHINESE EXCLUSION—ACTIONS—EVIDENCE.
In a proceeding for the deportation of a Chinese person, evidence *held* to show that he was born in the United States of parents there residing.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

Proceeding by the United States against Chin Hing for his deportation under the Chinese Exclusion Act. From an order of the commissioner, directing deportation, Chin Hing appeals. Order reversed.

John B. Kehoe and Samuel L. Bates, both of Portland, Me., for appellant.

John F. A. Merrill, U. S. Dist. Atty., and Arthur Chapman, Asst. U. S. Dist. Atty., both of Portland, Me.

HALE, District Judge. [1] The United States commissioner has ordered that the appellant be removed from the United States to the republic of China; it appearing to the satisfaction of the commissioner that he is a Chinese person not lawfully entitled to be, or remain, in the United States, and that he is a citizen and subject of no other country than China. Appeal has been taken to this court, from the order of deportation. It is clear that the Chinese Exclusion Act does not apply to persons of that race, even though laborers, if they were born in the United States, of parents living in the United States. This is by virtue of the first clause of the fourteenth amendment of the Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

See U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

[2] Was the appellant born in this country, of parents living in this country? He testifies that he was born 25 years ago in San Francisco, at 714 Dupont street; that he lived there 11 years, and went from there to New York, and from New York to Boston, where he lived 5 years; that he afterwards lived in Waltham, and then came to Lewiston, where he now lives and keeps a laundry. His testimony is clear; he is not shaken on cross-examination.

Chin Heung testifies that he has known the appellant ever since his birth, but that he is not related to him. He says the appellant was born at 714 Dupont street, in San Francisco. Chin Heung testifies, also, that he came on the train with Chin Hing to New York, and went to 35 Pell street. Judge Connolly, of the Superior Court of this county, testifies that he knows this witness, Chin Heung, has known him for a long time, and that he knows him to be a man of honesty and good reputation for truth.

Chinese Inspector Sullivan examined Chin Hing with great care, and obtained testimony which I think, on the whole, is not unfavorable to the appellant's case. At that examination, Chin Hing said he was born in San Francisco. He did not then undertake to testify where in San Francisco he was born. He said he did not know. He made some

statements which may fairly be said to be unfavorable to his contention; but he said nothing which, I think, on the whole, should be held to discredit him. I agree with Judge Hough that it is sometimes advantageous to find out what a Chinaman will say, when suddenly confronted by an inspector, and asked about facts relating to his right to remain in this country. Such examination by an inspector often assists in arriving at the truth. I think this Chinaman met this test. He appears well upon the stand; he has been in this country all his life. Nothing to his discredit is found during his residence in Lewiston. In U. S. v. Leu Jin (D. C.) 192 Fed. 580, Judge Holt gave great weight to the testimony that the Chinaman before him had been in New York ever since he was 8 years old. In this case the appellant has lived many years in Boston and in Lewiston, where his life has been open to observation, and is a matter of testimony in this case. In this class of cases, it is often very difficult to arrive at the truth. Taking the whole testimony into consideration, the appellant has, by a preponderance of the evidence, induced the belief in my mind that he is native-born.

The order of deportation is reversed.

In re J. B. WHITE & CO.

(District Court, S. D. Georgia, N. E. D. August 30, 1915.)

BANKRUPTCY ⊂=223—COMPOSITION—COMPENSATION OF REFEREE.

Under Bankr. Act July 1, 1898, c. 541, § 40, 30 Stat. 556 (Comp. St. 1913, § 9624), fixing the compensation of the referee in case of a composition at one-half of 1 per cent. of the amount to be paid creditors upon confirmation, where there was a composition, but instead of depositing in court the cash required by the act for costs, fees, etc., the bankrupt corporation filed a petition, which was placed on record, requesting that it be relieved from filing the amount required, it agreeing to pay costs, expenses, fees of petitioners' counsel and defendant's counsel, and all other costs as if the money were actually in court, stipulating that such costs might be charged as if the money were actually in bank and being distributed by the court itself, an order of the referee fixing his own compensation at one-half of 1 per cent. of the amount to be paid creditors was proper, both as a matter of statutory right and under the stipulation placed on record by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888–894; Dec. Dig. ⊂=223.]

In Bankruptcy. In the matter of J. B. White & Co., bankrupt. The bankrupt trustee, and committee of creditors petition for review of an order of the referee fixing his fees. Petition denied, and order affirmed.

Wm. H. Fleming, of Augusta, Ga., for petitioners.
Callaway & Howard, of Augusta, Ga., for referee.

SPEER, District Judge. In this case there was a composition. In such cases the full compensation of the referee, fixed by the statute (paragraph 40 of the Bankruptcy Act), is one-half of 1 per centum of the amount to be paid to creditors upon the confirmation of such composition. Here this sum has been made up of a cash deposit of

$18,822.61 and of certain obligations filed with the bankruptcy court in lieu of the cash, which, under the general provisions of the law, the bankrupt must deposit as a prerequisite to the confirmation of the composition. These obligations were accepted, pursuant to a petition addressed to the District Court having jurisdiction by the bankrupt company. This petition was signed by the president of the bankrupt company, and, as appears from the indorsement thereon, was placed, with the record, in the hands of the referee by the attorney for the bankrupt. It contains this recital:

"This defendant therefore requests the court to relieve it from the necessity of filing said large sum of money, it agreeing with the court to pay costs, expenses, fees of petitioners' counsel and defendant's counsel, and all other costs and expenses, the same as if said money were actually in court; that such costs, fees, and expenses shall be charged the same as if said fund were actually in bank and being distributed by the court itself, such arrangement being in the interest of said defendant, being in lieu of filing such large amount of cash."

This offer to the District Court has never been withdrawn, and while the form of the obligation may in some respects have been varied, it constitutes a stipulation made in judicio to pay to the referee his commissions on the amount to be paid as fixed by the statute. It is conceded that the arithmetical calculation of the referee is correct, and since the commission he has adjudged himself entitled to is based upon the amount to be paid, the duty of the court in determining the issue seems plain. True, it has been held in Re J. Bacon & Sons, 224 Fed. 764, in the Western district of Kentucky, that the referee was not entitled to the statutory compensation on the amount of the obligations to be paid in lieu of cash actually deposited. However, the atmosphere of that case differs from this. In that case there was a change of referees, and there was no stipulation with the court on the part of the bankrupt. A ruling somewhat analogous to the case just cited was recently made by the Circuit Court of Appeals for the Third Circuit, in the case of American Surety Co. v. Freed, Trustee, et al., 224 Fed. 333, —— C. C. A. ——. There, however, there was an actual sale of the property for $75,000, and a reorganization of the bankrupt corporation upon a capitalization of $2,500,000, and an agreement between the parties at interest to pay a fixed sum of $6,500 each to the referee and the trustee. There was no such stipulation as that above referred to in this case. Besides, as I am at present advised, I cannot altogether assent to the ruling cited from the Western division of Kentucky above referred to. A composition is a settlement between the parties, with the approval of the court, and the general rule is that settlement between parties cannot deprive the court officials of their statutory costs. Here the referee did all that was required of him. In fact, he did much to aid in the effort to extricate the bankrupt company from its embarrassments.

For these reasons, and especially in consideration of the stipulation placed with the record by the bankrupt, the court not only approves the referee's order allowing to himself the sum he fixed, but on the entire record adjudges that he is entitled to it as a matter of statutory right.

In re PECHIN.

(District Court, E. D. Pennsylvania. June 24, 1915.)

No. 5204.

BANKRUPTCY ⟸413—OBJECTIONS TO DISCHARGE—AMENDMENTS.

Specifications of objections to a bankrupt's discharge, based on his having secured credit by fraudulent false representations, may be amended when, during a hearing on the specifications, another instance of the same general character as those charged came to the knowledge of the trustee and objecting creditors, and where an application for leave to amend was promptly made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. ⟸413.]

In Bankruptcy. In the matter of John W. Pechin, bankrupt. Rule to amend specifications of objections to bankrupt's discharge made absolute.

D. R. Rothermel and Edward Hopkinson, Jr., both of Philadelphia, Pa., for trustee.

Louis Goodfriend and Joseph Hill Brinton, both of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. The policy of the law with respect to the discharge of bankrupts from the legal obligation to pay their debts has been determined and settled by Congress. The bankrupt is entitled to the discharge, except in certain clearly defined cases. One of the exceptions is a case in which it is made to appear that the defendant secured to himself credit by fraudulent false representations. The original specifications of objection to the discharge of this bankrupt made this accusation against him. Since the specifications were filed, and during the progress of the hearing upon those which were filed, another alleged instance of the same general character as those already charged came to the knowledge of the trustee and of objecting creditors. The information was promptly followed by the application for the present rule.

There is nothing in the record of the case to suggest laches, or even oversight. If the bankrupt is discharged, he goes scot free of this debt, as well as others. If the debt was fraudulently contracted, he is not entitled to his discharge. The fact is denied by him, but his discharge should stand or fall by the fact, whatever it is. There is nothing new in the specification as an objection to his discharge. What it amounts to in effect is additional evidence that he has been guilty of the act which takes away his right to relief. We feel that an opportunity to develop the facts should be accorded to objecting creditors. That the allowance of the amendment asked for is within the discretion of the court does not seem to be in dispute. That the amendment should be allowed is to some extent at least buttressed by the thought that the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) provides for a revocation of a discharge because of grounds for its refusal being brought into light after the discharge has been granted.

The situation would be an anomalous one, if facts which would form the basis of a revocation of a discharge after it had been granted could not be permitted to be introduced as an objection to the discharge.

Leave is accordingly granted to amend the specifications, and the rule to show cause, allowed for this purpose, is now made absolute.

UNITED STATES v. CHIN MUN.

(District Court, D. Maine. July 27, 1915.)

No. C 1.

ALIENS ⊂=32—DEPORTATION—EVIDENCE.

In deportation proceedings against a Chinese person on the ground that he was a Chinese subject, evidence *held* sufficient to sustain the burden of proof resting on him to show that he was native-born.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⊂=32.]

Chin Mun was ordered to be deported under the Chinese Exclusion Acts (Act Sept. 13, 1888, c. 1015, 25 Stat. 476, and Act May 5, 1892, c. 60, 27 Stat. 25 [Comp. St. 1913, §§ 4315–4323]), and he appeals. Order reversed.

John B. Kehoe and Samuel L. Bates, both of Portland, Me., for appellant.

John F. A. Merrill, U. S. Dist. Atty., and Arthur Chapman, Asst. U. S. Dist. Atty., both of Portland, Me.

HALE, District Judge. This case comes before me upon appeal from the order of United States Commissioner Bradley, who found and adjudged that Chin Mun is a Chinese person and a subject of no other country than China. The commissioner accordingly ordered that Chin Mun be removed from the United States to the republic of China. From this order of deportation an appeal has been taken to this court. Pursuant to the holding of the Supreme Court in the case of Liu Hop Fong, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888, there has been a trial de novo.

The appellant swears he is 21 years old, and was born at Garden Alley, San Francisco; that he lived in San Francisco 12 years, and then came to New York, where he lived 2 years; from New York he came to Portland, and lived here about 3 years; he then went to Waterville and lived a year; from Waterville he went to Lewiston, where he has lived until the present time. He has been given a rigid cross-examination. While some inconsistencies appear in his testimony, I think they are not sufficient to materially affect it. The appellant was first interviewed by a United States inspector; while his statements now are not absolutely the same as those he made before the inspector, they are not markedly inconsistent with those statements. The same inconsistencies do not appear which often appear in reference to such statements. The appellant is corroborated by Chin Tong You, who has lived in Portland 8 years; he testifies he knew Chin Mun's father

and mother in San Francisco; that he knew his father in China, at Si Kong village in the Sun Ning district. He says he knew the boy three days after he was born, while he himself was working for the boy's father. The appellant is a man of unusually good appearance; he has lived many years in Lewiston, and has borne a good character. From his testimony I am satisfied of the truthfulness of his statement. It is held in the case of Lee Yuen Sue v. U. S., 146 Fed. 670, 77 C. C. A. 96, that in proceedings for the deportation of a Chinaman, where he claims to be native-born, the burden of such fact is upon him. In the case before me, I think the appellant has met this burden; by a fair preponderance of the evidence he has induced the conviction in my mind that he is a native-born citizen.

The order of deportation is reversed.

UNITED STATES v. MOTION PICTURE PATENTS CO. et al.

(District Court, E. D. Pennsylvania. October 1, 1915.)

No. 889.

1. COPYRIGHTS ⟸65—COPYRIGHT LAWS—SCOPE.

Copyrights of dramatizations cover photo-play presentations of the same subject.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 62; Dec. Dig. ⟸65.]

2. COMMERCE ⟸15—MONOPOLIES ⟸12—INTERSTATE COMMERCE—SUBJECTS OF.

Photo-play films, shipped from one state to another, are subjects of interstate commerce, and fall within the scope of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, prohibiting unreasonable and undue restraint of trade and commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 17, 34, 35; Dec. Dig. ⟸15; Monopolies, Dec. Dig. ⟸12.]

3. MONOPOLIES ⟸1—PATENT LAWS—ANTI-TRUST ACT.

The patent laws, which preserve to a patentee the exclusive right for a limited time of making and vending the patented article, are not repealed by Anti-Trust Act July 2, 1890, and the patentee by virtue of his patent may impose reasonable conditions of bailment or sale.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 1; Dec. Dig. ⟸1.]

4. MONOPOLIES ⟸29—ANTI-TRUST ACT—"CONSPIRACY."

Under Anti-Trust Act July 2, 1890, which denounced unreasonable competition and conspiracies, a "conspiracy" may have as an element the seeking of an unlawful end or the employment of unlawful means, and the good motives of the conspirators are no defense.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. ⟸29.

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

5. MONOPOLIES ⟸12—RIGHTS OF PATENTEES.

The owner of a patented device may acquire any other patents for improvements, or several owners may pool their ownerships for their joint protection; but such patents cannot be acquired or combined for the purpose of unlawful restraining of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⟸12.]

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6. MONOPOLIES ⇐12—WHAT CONSTITUTE—DEFENSES.

Motion picture producers and importers, some of whom had patents upon articles, such as the positive films, cameras, and projecting machines, formed a combination to regulate the trade. They created a board to censor films, and established exchanges, refusing to sell films to operators of theaters who did not belong to their exchanges, and who did not pay royalties on their machines to the combination, regardless of when or from whom they were purchased. The restrictions were attempted to be justified as a protection of the patent rights of the parties to the combination. *Held*, that such combination was invalid, as a violation of Anti-Trust Act July 2, 1890.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⇐12.]

In Equity. Petition by the United States against the Motion Picture Patents Company and others to restrain defendants as a monopoly. Decree for petitioner.

T. W. Gregory, Atty. Gen., G. Carroll Todd, Asst. Atty. Gen., Edwin P. Grosvenor, Sp. Asst. Atty. Gen., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for the United States.

J. H. Caldwell, of New York City, and Charles K. Zug and John G. Johnson, both of Philadelphia, Pa., for defendants General Film Co., Thomas A. Edison, Inc., Frank L. Dyer, William Pelzer, Melies Mfg. Co., Pathe Frères, Kalem Co., Gaston Melies, J. A. Berst, and Samuel Long.

James J. Allen, of New York City, for defendants Vitagraph Co. and A. E. Smith.

David J. Myers, of Philadelphia, Pa., and George R. Willis, Luther M. R. Willis, and Frederick R. Williams, all of Baltimore, Md., for defendants Armot Moving Picture Co., Harry N. Marvin, Jeremiah J. Kennedy, Biograph Co., and Motion Picture Patents Co.

R. O. Moon, of Philadelphia, Pa., for defendant Siegmund Lubin.

Charles Biddle, of Philadelphia, Pa., and Henry Melville, of New York City, for defendants Essanay Film Mfg. Co., George Kleine, Selig Polyscope Co., George K. Spoor, and W. N. Selig.

Charles F. Kingsley, of New York City (Melville Church, of Washington, D. C., of counsel), for all defendants.

DICKINSON, District Judge. A petition was filed in this case under the act of July 2, 1890, averring the combination of the defendants to accomplish an unlawful restraint of trade, and consequent obstruction of the free flow of commerce in interstate transactions, in the sale of positive motion picture films and other necessary accessories of the motion picture art. The prayer is that a stop be put, by the power of the law, to the practices charged to be illegal.

The record is of such bulk, and the discussion has taken such a wide range, and has with such thoroughness dealt with all possible phases of the case, that to even outline, with anything like adequacy, all the considerations involved in its decision, would extend an opinion beyond manageable limits. The present discussion is therefore limited to two questions (and largely to one of these) which give us the bearing points upon which the whole case turns. This restriction

does not imply the slighting of any feature of the arguments, so well worthy of the fullest attention, which have been addressed to us, because there is substantial accord in the thought that, with these questions eliminated, the defense has failed. This feature will, however, be adverted to later.

At the risk of being open to the criticism of its being wholly academic, a start may be made with a few general observations. The beginnings of this controversy are found in the ages-long struggle "to secure the blessings of liberty," to obtain which is stated to be one of the objects of our Constitution. There is deep-grained in human nature the impulse to influence, and, so far as it can be done, control, the actions of others. It is too much to expect that this control, when secured, will always be exerted for altruistic ends. Out of this condition has arisen the need of a power of government to check the restraints which the strong would otherwise impose upon those whom they could control. Power and efficiency, however, are possessed in insensible gradation, and there is a right to the liberty of its full, fair exercise. There would be no real gain in securing to some freedom from extralegal control, by imposing upon all unfair and unreasonable restraint, through an unfair and unwise administration of the law.

The liberty spoken of in our Constitution had more direct reference to this latter freedom from the "undue and unreasonable" exactions of constituted rulers. In the cycle of human effort, we have come back to the needs which moved men into constituting rulers over themselves, and the power of the law has been invoked for protection against what are declared to be evil practices. The particular phase of liberty with which this law concerns itself is the freedom or free flow of commerce. It is based upon the right of every individual to choose his own calling in life, and to follow the trade of his choice unhampered by any undue and unfair interference from others. It secures this "blessing of liberty" to all by making it unlawful for any to conspire to bring about "restraint of trade or commerce." This is the genesis and motive of the act of July 2, 1890. It seeks (within constitutional limitations) to reach this end by declaring all such conspiracies to be criminal, and places under the ban of its condemnation all such attempts "to monopolize any part of trade or commerce." Its meaning has been declared in as broad and clean a sweep of language as could well be employed, and has been interpreted for us in a series of opinions which render further comment worse than vain. There are now more than a round dozen of these decisions, in which can be found the rule to be applied to the facts of the instant case.

[1, 2] The full text of the complaint appears in the record and is too lengthy for quotation. The gravamen of the offense may be gathered from the general summary that it is a conspiracy to drive from the field all other traders in the things which make possible the practice of the motion picture art, and to monopolize to themselves that trade, and through this the practice of the art itself. This latter feature justifies the interpolation into the discussion of a preliminary question which lies at the threshold of the proceedings. The defense asserts the real charge to be that of an effort to control the motion picture business. This is asserted to be the business of dramatic rep-

resentation, and dramatic representation to be the practice of an art. The control, with the seeking of which the defendants are charged, is therefore the control of an art, and not of trade, or of anything which is the subject of commerce, or can be brought within the laws relating thereto.

It has been settled by the decisions, under the earlier copyright laws, that the copyright of a dramatization covered a photo-play presentation of the same subject. This was based upon the recognition of, what every observer experiences, the similitude, if not identity, of the impressions received from seeing a photo-play and from the same play acted out by actors living and moving before his eyes. The photo-play business may therefore be well said to bear the same relation to dramatic art which the theatrical business does. The latter has not, however, the same relation to trade and commerce. The moving picture business, as an entirety, is made up of the presentations, to which the public is invited, and of a trade in other things, which make this final display possible. If it is a photo-play, it has, of course, the same basis of the labors of the author and the art of the actor as has the acted play. The spectator of the play sees the actors acting out the play. That which the spectator of the photo-play thinks he sees is an illusion. He thinks he sees, for instance, a man moving (or a picture of it), and in one sense he does, because such is his mental impression of what is before him. This illusion is produced by projecting upon a screen, in rapid succession, enlarged reproductions of a series of consecutively quickly taken photographs of a man as he is moving. There must be, therefore, in the motion picture business the use of all these additional accessories, from the screen back to the raw film and the camera, as part of the apparatus for the production of a photo-play.

One of these essential things in the motion picture business is the positive motion picture film or reel, and the charge made against these defendants is that, whatever may have been their final purpose with respect to the control of the art, what they combined to do, and have done, is to restrain trade or commerce in these films, which are articles of trade and the subject of large interstate transactions, in which the defendants had part. The latter fact is admitted. It is evident that whoever controls the films referred to controls the motion picture business, but the point with which we are now concerned is that interstate trade in these films is within the statute.

[3-6] The next branch of the defense which presents itself for analysis and discussion is that based upon the patent rights of the Motion Picture Patents Company. The plea is, in legal effect and in practical acknowledgment, one in confession and avoidance, for there is, as already stated, a substantial (although not formal) admission that, with this patent right ownership out of the case, plaintiff should have the relief prayed.

The importance of the question thus raised cannot well be overestimated. The eulogy which counsel have bestowed upon our patent law system springs from real feeling, and is not only a beautiful, but doubtless a deserved, tribute to its merits, and their eloquent portrayal of the benefits which have flowed from it is as true as it is impressive.

It is easy to keep in sympathetic touch with them in the first step in their argument, and to accept the proposition that the Anti-Trust Act did not work a repeal of the patent laws. This must be accepted on general principles, even were its supports not buttressed by the cases to which we have been referred. That their validity is not open to question in a collateral proceeding, and is to be assumed in this inquiry, must also be conceded. Prima facie they are and must be taken to be valid, and to be for what the claims allowed by the Patent Office show.

A little space may now be devoted to the consideration of what a patent right is, in order that we may understand the true value of this part of the defense. As has been well said, the patent laws do not confer any right to make, use, or vend the subject-matter of an invention. This is the natural right of the inventor. What the patent law does do, for one thing, is to take away, for a limited time, from all others than the patentee, or his assigns, that which would otherwise have belonged to them also—the right to make, use, or vend the patented article. Another thing it does is to proffer to the patentee the aid of the law in enforcing this prohibition upon others. The latter is really the right given. It is the right to a remedy. It is, as it is sometimes phrased, a proprietary right. There is also the idea of property of a special kind, which has all the general characteristics of other kinds of property. The ownership of a patent, as the ownership of any form of property, may confer a power upon the proprietor which he otherwise might not have been able to wield. It has its peculiarities, as other kinds of property have, and certain consequences flow from this. To one of these we will later refer, but the point now presented is that a patent as property must have the same relations to the act of 1890 as would any other kind of property. In view of this, it is a little difficult to grasp the thought that, in this broad aspect, patents are not subjected to the provisions of this act, just as is any other species of property. We see no escape from the conclusion that they are. Just here, however, comes in a difference born of one of the peculiarities to which reference was made.

The act of 1890, in its first section (Comp. St. 1913, § 8820), declares combinations in restraint of trade to be illegal. By its second section it condemns monopoly. The opinions in Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, Keystone Watch Co. v. United States (D. C.) 218 Fed. 502, and in Patterson v. United States, 222 Fed. 599, — C. C. A. —, make clear the purpose and scope of the two sections. The condemnation is visited both upon the means and the end, forbidden by law. A peculiarity of the rights of the owner of a patent, as distinguished from other property, is this: Each has the right to sell that which is his, but the owner of the patent has the exclusive right to sell his patented article. This is, in a very substantial sense, a monopoly. It must be, however, that the monopoly here meant is not the monopoly condemned by the act of 1890. To hold otherwise would clearly be, as counsel for defendants urge, a logical absurdity, because there can be no such thing as restraint in a trade which has no existence, and a monopoly created by law, in pursuance

of a policy of the law, cannot be said to result from such restraint. To transfer a phrase from the opinion of Judge Cochran, in Patterson v. United States, which was directed to something else, but which is applicable here:

"There can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation."

The right to sell carries with it the right to withhold from sale, or to part with the possession without parting with the ownership. It also confers the right to impose reasonable and legal conditions of bailment or sale "restricting the terms upon which the [patented] article may be used and the price to be demanded therefor." All these propositions are clear, and have been expressly held to be the law. Bement v. National Co., 186 U. S. 70 and 72, 22 Sup. Ct. 747, 46 L. Ed. 1058; and Standard Co. v. United States, 226 U. S. 20, 40, 33 Sup. Ct. 9, 57 L. Ed. 107. The limitation that the terms must be legal should, however, not be lost sight of. An effort, for instance, after a sale, to impose a sale price condition, which will follow the article through successive sales, will not be upheld.

We have, therefore, to determine the limits of a right and a wrong which seem to overlap each other. It is the right of a patentee, through having the exclusive sale of the patented article, to control, and in that sense, to monopolize, the trade in it. It is wrong by any illegal restraint of trade to monopolize it, or any part of it. On the one hand, it cannot have been intended to make it unlawful to acquire that the right to which the law has conferred. On the other hand (as already observed), it cannot be that the grant of a patent right confers a license to do that which the law condemns.

The solution of the problem is to be sought by finding the special field of operation of each of these laws. There is a field of trade, the sole occupancy of which may be in a patentee. Here he is supreme, and the keeper of the gate of entrance. There is another field which is in the common occupancy of all. Where the law has given the whole field to a patentee, with the express right of exclusion of others, and the use of the power of the law to enforce the exclusion, it is unthinkable that such exclusion is an illegal restraint of trade. Where the field, however, is open to all, competition for trade is likened to a race in which all may enter, but in which there must be no unfair jostling or hampering of others. Each one is free to exert all his powers, and distance, if he can, all competitors, and win all the prizes; but he must run fairly and accord to others a like freedom. If he possesses a patented device which will aid him in the race, he may use it, as he may use any other form of property; but he must put it only to its proper use, and if he uses it as a weapon to disable a rival contestant, or to drive him from the field, he cannot justify such use, because of his patent right, except to the extent of protecting his exclusive right. We have, therefore, the principle, which is recognized in all the cases, that if the subject-matter of a contract, which otherwise would be illegal because in restraint of trade, is a patented article, this takes away the illegality only to the extent to which the field of the trade, controlled through the combination, is coextensive with

the field within which exclusive control has been granted by the law. This is the doctrine of Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, Bement v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the Bath Tub Case, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, and all the other kindred cases to which we have been referred.

The difference between this private field and the common field of trade is, as a distinction, sufficiently clear; but there may be again an overlapping. The owner of a patented article has the right to enter upon this common field of trade. His patented article may be so superior, or of such less cost than anything else upon the market, as to supplant all others and give to him the whole trade as effectually as if his patented article has originally had the field to itself. Indeed, its ownership may be sought, for the reason that it has this possibility of power. Again, the patent may apply to only certain features of the article of trade, and yet enable the owner to reap the same advantage, and control a trade in what is beyond the exclusive rights given by the patent. The special circumstances affecting a particular contract or combination may make the principle difficult of application, and the line of legality or illegality hard to draw; but the principle remains the same. The legality of such a contract is determined by the judgment of whether, in its whole scope and legal intendment, it is fairly limited in its operation to the proper field of trade belonging to the patentee, and whether any further advantages which flow to him are fairly incidental, and are not the evil fruit of unfair practices employed to restrain the right of others to a share of the common trade. It is the legal intendment of the contract or combination which is to be found. The motives of the contracting parties, whether innocent or otherwise, do not determine the real character of their act; but it is determined through the judgment of the law. Motives and intentions, except as declared, or appearing from the character of the act, are too vague and difficult of ascertainment to be made the basis of the legal judgment called for in such cases. A conspiracy under this statute, as at common law, may have, as an element, the seeking of an unlawful end or the employment of unlawful means.

We learn from the opinion in the Keystone Watch Case Co. Case that the prohibited restraint of trade, beside being undue and unreasonable, must be the direct, and not a merely incidental, result of the contract or combination, before the latter will be condemned as illegal. If it is asked to be condemned, not because of the illegality of the means employed to accomplish its end, but because monopoly results as a consequence, the monopoly must be shown to be an unlawful monopoly, not the monopoly granted by the patent laws. A contract or agreement among business men, which had as its end to preserve to the owners of a patent the exclusive sale of the patented article, and as its means the exercise of due, reasonable, and fairly proper control over sales to be made, would not be condemned as void in itself, or justify any inference of guilt under the act of 1890. Where, however, by what was agreed to be done, the end indicated, in the sense of the result to be expected, was a monopolistic control of what was not the exclusive property of any one, or such a monopoly was

the direct result of undue and unreasonable restraints of trade, to be employed as the means of carrying out what was to be done, the fact that any one or more of the persons concerned owned patents would not prevent a finding of conspiracy.

A feature of the Watch Case Co. litigation affords us an illustration of the extent to which patent rights enter into the defense to proceedings of this character. The feature alluded to was, in the language of the opinion, that of—

"the system under which the Howard watch was sold by defendants. Certain * * * parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose, and as the owner of these patents the company had the right to make a direct agreement with the jobbers, whereby a minimum price was fixed at which the jobber might sell. * * * The company went further, however, and by mere notice to the retailer, accompanying the box in which the watch was sold by the jobber, attempted to fix the minimum price at which the retailer might sell to the consumer. * * * When the company sold the watch to the jobber, it had fully exercised its right to vend, and had no right to use the notice subsequently given in order to control the price at which the retailer might sell."

As a conclusion to the whole discussion, we deem the Bath Tub Case to be decisive of the principle contended for by the United States. There, it is true, the patent was not on the ware, which was the subject of the trade sought to be monopolized, but on a tool used in its manufacture, and the case doubtless might have been ruled upon that distinction. We cannot accept, as well taken, the position that it was so ruled, because the court, in formulating a statement of the principle upon which the ruling was based, expressly refused to plant the decision on this narrow ground, but placed it upon the broad principle that the agreements in that case—

"transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. * * * The agreements * * * combined the manufacturers and jobbers, * * * which combination was condemned by this court as offending the Sherman law. The added element of the patent * * * cannot confer immunity from a like condemnation; * * * and this we say without entering into the consideration of the distinction of rights for which the government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give, any more than other rights, an universal license against positive prohibitions. The Sherman law is a limitation of rights, * * * which may be pushed to evil consequences. * * *"

We would feel constrained, on the authority of this case alone, to find that the agreements and acts of the defendants in the present case went far beyond what was necessary to protect the use of the patents or the monopoly which went with them, and that the end and result, which would be expected to be and was accomplished, was the restraint of trade condemned by law. Some of the considerations which move to this conclusion are stated later.

This is a lengthy prelude to the consideration of the special facts of this case. We feel relieved from the necessity of any extended reference to them, because they are set forth in the complaining petition with a precision and accuracy which has prevented denial, except

as to the motives which actuated the defendants and the legality of the monopoly. With respect to the motives and conscious purposes by which men are actuated, it has been well said that these "cannot be easily estimated," and we may concede to the defendants no purpose to offend against or to evade the law, and that their intentions were as beneficent and have resulted in as much good to the patronage of the art as is claimed, and that this good bears a fair relation to the profits received by them. This is foreign to the inquiry which we have made, because the duty to refrain from what is prohibited by law "cannot be evaded by good motives." Moreover, "the law is its own measure of right and wrong," as well as the judge of whether a transaction is of the character which it condemns. If, in the judgment of the law, a contract or co-operating agreement is such as to work an undue and unreasonable restraint of trade, and through such restraint to monopolize trade or any part of it, the judgment is one of condemnation, no matter how innocent or otherwise praiseworthy the motives of those who had part in it.

We do not, therefore, feel called upon to make any specific findings on this subject beyond what is stated to be found. The real motives of those whose minds conceived and whose wills carried through this combination were doubtless like those behind almost all other human acts, probably of a mixed character. We would not be justified, and would certainly have no wish, to deny the presence of the very laudable motives which defendants avow in their answer, some of which were to gratify their desire to allay bickerings and recriminations among themselves, to advance and improve the art, to protect the morals of the public, and, as they frankly admit, to make money for themselves. Certain it is that the end and purpose of the plan was to dominate and control the trade in all the accessories of the art, and, in order to assure this, to control the entire motion picture business. We are driven to this conclusion, not only because that is the plain meaning of what they did, but also because they themselves categorically declare the latter to be the imperative need of the business, and one which they alone could supply. The need was for a single directing and regulating head. This extended even to a censorship of what was shown. The United States could not, and the states would not, interpose for the purpose of regulation, and the defendants claim the credit of having performed this neglected duty of the state. In doing all which was done, the defendants not merely deny the illegality of either end or means, but also lay claim to commendation. We only mention this to make clear the fact that they did monopolize, and the only question left is whether this monopoly is a lawful monopoly, or was accomplished through an unlawful restraint of trade.

The combination was not formed until 1908. The defendants were at that time engaged in the business as manufacturers or importers. There were scores of jobbers buying and distributing films and necessary supplies to thousands of exhibitors. The business was expanding, literally by leaps and bounds. The total investment ran into millions. There was therefore a trade to be restrained, and one well worth monopolizing. The original plan, if it was contemplated, did

not disclose any purpose to exclude the middlemen, and, from its first being put in operation, 116 jobbers were licensed by and did business with the defendants. Within a short time, however, the absorption of this part of the trade was decided upon, and the General Film Company was formed to take over the business of distribution. How effective and thorough were the methods employed is shown by the fact that, of the 116, there is left one solitary survivor.

The plan out of which these methods grew was first to combine the defendants, who were manufacturers and importers of films, in an agreement to act as one man might have acted. Lists of exchanges and of theaters were prepared, and no exchange was permitted to have films, and no theater to exhibit them, unless with the consent of all of the defendants. The names of none appeared upon this list except such as bought all supplies from the defendants, and any who dealt otherwise were dropped. Every theater was required to pay a royalty for the use of a projecting machine, even when the machine had been owned by the exhibitor before the combination was formed. The films passed into the possession of exchanges and exhibitors under an agreement which enabled the defendants to recall them at will. It is too clear for comment that the mere possession of the power here shown would make its assertion seldom necessary. It was, however, effectively exercised.

It is also clear that such a combination is condemned by the act of 1890, unless immunity is given by the patent laws. The pressure here is upon the weak point of the argument on behalf of the defendants. The fault in it is basic. There is doubtless injustice in applying, even rhetorically, the "dead Indian" aphorism to trusts. It may be admitted that there may be trusts which are both living and good. When a monopoly has been found, however, to be the result of an unlawful restraint of trade, the argument that the combination through which it has been accomplished is a good trust, or was formed from good motives, or that good results from the monopoly, is for legislative, and not judicial, consideration. As already stated, it is the legal intendment of the whole scheme, which determines its character, what is its end, and what the means to be employed, to be found from the natural and to be expected results. Here, again, the illuminating phrase employed in the Keystone Watch Co. opinion clarifies the thought. If the end is monopoly, and the means the restraint of trade, the inquiry is directed to the character of the restraint. If that is undue and unreasonable, and was directly intended, and the monopolistic result flows as a direct, and not a merely incidental consequence, the combination through which it is brought about is illegal. The same conclusion follows a finding that the end is illegal, because reached through the same means. Indeed, the two things come to be, nearly, if not quite, the same, although there is room for a difference.

The defendants had the right to propose to themselves, as an end, the protection of their exclusive right to sell an article, protected by a patent, which was their property. They had the right to employ, as a means to this end, due and reasonable regulations, and to impose any lawful conditions of sale. If restraint of trade and monopoly flowing from it incidentally resulted as a consequence, as neither the

end proposed nor the means employed was unlawful, the combination which effected these objects could not justly be condemned.

The owner of a patented device, process, or product may undoubtedly acquire from another any issued patents for improvements, and we see no reason to deny the right of the owners of the original patent, and of the patented improvements, to pool their ownerships for their joint or common protection. This we understand to have been expressly ruled. United States v. United Shoe Co. (D. C.) 222 Fed. 349. Indeed, this case may well be claimed as authority for the proposition (within its facts) that there might be a combination of the owners of different patented machines all entering into a manufacturing trade. However this may be, the distinction sought to be pointed out is that while the owner of a patent on a plow, covering the handles or beam, might acquire or join with the owners of patents covering the moldboard, or share, or other parts of the plow, for the protection of the patented rights of all, and thereby incidentally secure an enlarged part of the trade in plows, the judgment would refuse to sanction a combination between the owners of patented plows, patented harrows, patented reapers and binders, and other implements of husbandry, and large dealers in these implements, who were not owners of patents, for the purpose of monopolizing the whole trade in the products of agriculture, if the direct end first proposed was to unduly and unreasonably restrain trade, as a means to the final purpose of monopolizing. The ownership of the patents, in such a case, surely could not be accepted as a defense to the charge of unlawful combination.

If a reason to support the distinction between these supposititious cases is asked for, it may be found in the fact that, in the first case, it could not be concluded that the scheme of the combination had no normal and real relation to the protection of the patent rights; in the second case, no such relation could be even plausibly said to exist, and its assertion would be characterized as a pretense.

The legal justification, set up by the defendants, for what they have done, and for everything they have done, is that in so doing they were lawfully asserting rights acquired by them through a large number of overlapping patents. The total number reaches sixteen. Ten of these are admittedly, however, of minor importance, and, indeed, of no importance, in their bearing upon the case. The remaining six may be roughly catalogued as one each pertaining to films, cameras, and what is termed the "Latham loop," and three to projecting machines. The ownership of these patents was divided among some of the defendants. Others had no interest therein, except in so far as they dealt in the different apparatus, features of which were covered, or claimed to be covered, by the several patents, respectively. If the combination had been limited, and the agreements and the scheme in its entirety had possessed, or could be found to have, any normal real relation to the assertion and protection of these patented rights, and this had been the end proposed, the defendants would be upheld in the maintenance of such rights.

We are constrained, however, to find that there was no such relation, but that the end, directly proposed, was the imposition upon the

trade of an undue and unreasonable restraint, in order that, as the immediate and direct effect and result of the combination, the defendants might monopolize the trade in all the accessories of the motion picture art so far as they are articles of commerce. A further end proposed, and which has largely been achieved, is the domination of the motion picture business itself, and it requires no prophetic vision to foresee that the ultimate result would be that no play would be written, or dramatically enacted, except by authors and artists favored by the defendants.

It is further found as a fact that the defendants did, in furtherance of the scheme of the combination so to do, directly impose upon the trade undue and unreasonable restraint, and that such restraint was the end proposed to be directly reached, and was not merely incidental to efforts to protect the rights granted by the patents, but went far beyond the fair and normal possible scope of any efforts to protect such rights, and that as a direct and intended result of such undue and unreasonable restrictions the defendants have monopolized a large part of the interstate trade and commerce in films, cameras, projecting machines, and other articles of commerce accessory to the motion picture business.

It is further found, for what the finding may be worth, that although the ends proposed in the combination, and carried out by the defendants, were first this restraint, and through this the monopolizing of the trade, to reap commercial advantages to themselves, a further inducement and motive was (and these were also ends in view) the wish to relieve each other from the odium of infringement, to end contests which hampered the development of the art, to protect the morals of the public by the prevention of the exhibition of suggestive or otherwise improper pictures, to promote the progress of this branch of dramatic art by improving the character of the shows, both in the artistic merits and mechanical perfection of the display, and generally to supply what, up to that time, the state had neglected to furnish, a regulating and governing authority over the entire motion picture business. The end and purpose of the combination, and in this sense the motive or moving cause, further was not to protect the patent rights, which the Motion Picture Patents Company was organized to take over; but the control of the patents was made a feature of the scheme, in the belief, or at least the hope, that this would render the scheme (otherwise illegal) not open to the condemnation of the law.

We conclude with the formal finding, in the language of the act of Congress, that the contracts enumerated in the petition, and the combination there described, were a conspiracy in restraint of trade or commerce among the several states and with foreign nations, and were and are illegal, and that the defendants and each of them (with the exception next noted) have attempted to monopolize, and have monopolized, and have combined and conspired, among themselves and with each other, to monopolize, a part of the trade or commerce among the several states and with foreign nations, consisting of the trade in films, cameras, projecting machines, and other accessories of the motion picture business, as charged in the petition of complaint filed.

The exception referred to is this: Melies Manufacturing Company one of the corporation defendants named in the petition, has denied (as have all of the defendants) that it was in any sense a party to the combination charged. We have gone over all the proofs, without finding any, which go to making good of the charge against this particular defendant. It is therefore excluded from the findings made, and the petition as against it is dismissed.

The conclusion is that the petitioner is entitled to the relief prayed, so far as indicated by this opinion, and a decree to effectuate the findings made may be submitted. This statement should perhaps be added: The point has been raised by the United States that the Edison patent on the picture film was limited to its negative form, and did not cover the positive motion picture films, which were dealt in commercially. The conclusions to which we have arrived have been reached without such a finding.

NOLEN v. RIECHMAN, Sheriff, et al.

(District Court, W. D. Tennessee, W. D. August 6, 1915.)

No. 711.

1. COURTS ⟸329—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—PLEADINGS.

An allegation in a bill in a suit in a federal court that the amount involved is greater than $2,000 is not in accordance with Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), declaring that the matter in controversy must exceed, exclusive of interest and costs, the sum or value of $3,000, and the court may not entertain jurisdiction unless the requirement of the Code is met, and it cannot treat the allegation as an inadvertence, where the facts shown do not show that the jurisdictional amount is really involved.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. ⟸329.]

2. COURTS ⟸328—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

To authorize damages to be aggregated to make up the amount requisite to jurisdiction of a federal court, the persons joining in the suit must have a common and undivided interest in the amount involved; and, though one may maintain a representative suit for the benefit of himself and other persons similarly situated, he may not have their damages aggregated, where the property involved is separately owned.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⟸328.]

3. INJUNCTION ⟸85—"JURISDICTION"—RESTRAINING ENFORCEMENT OF UNCONSTITUTIONAL STATUTE.

A federal court of equity may entertain jurisdiction of a suit to enjoin the enforcement of an alleged invalid statute, for the absence of lawful power to impose the restrictions of the statute may result in irreparable loss to the party complaining; for "jurisdiction" is the power to consider and decide one way or the other as the law may require, and jurisdiction

may not be declined merely because it is not foreseen with certainty that the outcome will help plaintiff.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⊂⊃85.

For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

4. CONSTITUTIONAL LAW ⊂⊃48—STATUTES—VALIDITY.

The court may not adjudge a statute unconstitutional, unless it is plainly and palpably so, and where there may exist a state of facts justifying a classification or restriction complained of, the court, in determining the validity of the legislation, will assume that the facts existed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⊂⊃48.]

5. CONSTITUTIONAL LAW ⊂⊃241—EQUAL PROTECTION OF THE LAWS—STATUTES—VALIDITY—"COMMON CARRIER."

Act Tenn. April 3, 1915, defining as a common carrier any person or corporation operating for hire any public conveyance propelled by steam, gasoline, electricity, or other power for purposes of transportation similar to that ordinarily afforded by street railways, and not operated on fixed tracks, by indiscriminately accepting and discharging passengers along the way, and declaring the business of such a common carrier to be a privilege, and forbidding any such carrier to occupy any street or public place in a city or town without first obtaining a permit, by ordinance giving the right of such occupancy, and embodying the routes, terms, and conditions as the city or town may impose, and requiring the carrier to furnish a bond, with sureties, conditioned to pay any adjudged damages as compensation for loss of life or injury to person or property negligently inflicted, defines a new class of "common carriers," and the act is not invalid when applied to the operation of jitneys, as denying the equal protection of the laws, because there is a substantial distinction between a street railway and a jitney, and between a jitney and a taxicab.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701; Dec. Dig. ⊂⊃241.

For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

6. CONSTITUTIONAL LAW ⊂⊃211—EQUAL PROTECTION OF THE LAWS.

The equal protection clause of the fourteenth amendment does not take from the state the right to classify subjects of legislation, and it is only when the classification is arbitrary and unreasonable that the court can declare it beyond legislative authority; and a classification, to be obnoxious, must be clearly and actually arbitrary and unreasonable, and not merely possibly so.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ⊂⊃211.]

7. CONSTITUTIONAL LAW ⊂⊃297—DUE PROCESS OF LAW.

An operator of an automobile as a common carrier on the streets of a city pursuant to a license is deprived of his property without due process of law, where he is unable to furnish a bond required by statute, unless the exaction of the bond can be justified as a proper exercise of the police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832–834; Dec. Dig. ⊂⊃297.]

8. CARRIERS ⊂⊃2—REGULATION—USE OF STREETS—"POLICE POWER."

Act Tenn. April 3, 1915, defining as a common carrier any person or corporation operating for hire any public conveyance propelled by steam, gasoline, electricity, or other power similar to that ordinarily afforded by street railways, but not operated on fixed tracks, and requiring such carrier to obtain a permit and to give a bond conditioned that it will pay

any finally adjudged damages for loss of life or injury to person or property inflicted through its negligence, is a valid exercise of the "police power," which embraces regulations designed to promote public convenience or the general prosperity or welfare, or promote public safety or public health.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. ⊂⊃2.

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

9. CONSTITUTIONAL LAW ⊂⊃81—POLICE POWER.

The court, to sustain a statute under the police power of the state, must see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety, and welfare; and where a statute discloses no such purpose, and has no real and substantial relation to those objects, or is a palpable invasion of rights secured by the Constitution, the court must adjudge it invalid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. ⊂⊃81.]

10. CARRIERS ⊂⊃1—REGULATIONS—USE OF STREETS.

One engaging in the business of common carrier by automobile operated on the streets of a city, and obtaining a license to use the public streets in the prosecution of his business, is subject to the police power, and he holds his property and exercises his rights subject to such other and different burdens as the Legislature may reasonably impose for the safety and convenience or welfare of the public.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 2; Dec. Dig. ⊂⊃1.]

In Equity. Suit by E. P. Nolen against J. A. Riechman, Sheriff of Shelby County, Tenn., and E. H. Crump, Mayor of City of Memphis, and W. J. Hays, Chief of Police of Memphis, to enjoin the enforcement of a statute. Preliminary injunction denied.

L. H. Graves, Wm. R. Harrison, and Joe Hanover, all of Memphis, Tenn., for petitioner.

Leo Goodman, C. M. Bryan, and Ben Capell, all of Memphis, Tenn., for defendants.

Before WARRINGTON, Circuit Judge, and McCALL and SANFORD, District Judges, under section 266 of the Judicial Code, as amended March 4, 1913 (37 Stat. 1013, c. 160).

PER CURIAM. The purpose of this suit is to have enforcement of a statute of Tennessee enjoined, upon the ground of its alleged unconstitutionality. The controversy relates to passenger transportation in the streets of Memphis, and the suit is designed to be representative in character, within the meaning of equity rule 38; the plaintiff alleging that his own described conditions apply "to more than 300 others in whose behalf he also brings this bill." The defendants are the officials whose duties would require them to enforce the statute within the city of Memphis. The issue presented on the merits of the case is whether the state has power to establish a license and indemnity system which admittedly applies to the use of automobiles in what is known as the "jitney" service, though not to street railway service, upon the public highways and grounds within the municipalities of the state.

The statute in dispute became effective April 3, 1915, and may be summarized thus:

(a) It defines as a common carrier any person or corporation operating for hire "any public conveyance propelled by steam, * * * gasoline, * * * electricity or other power" for purposes of transportation "similar to that ordinarily afforded by street railways (but not operated upon fixed tracks) by indiscriminately accepting and discharging" passengers "along the way and course of operation," and declares the business of such common carriers to be a "privilege."

(b) It forbids any such carrier to use or occupy any street or public place in a city or town without first obtaining "a permit or license by ordinance giving the right" of such use or occupancy, and embodying "such routes, terms and conditions as such city or town may elect to impose."

(c) It requires the carrier also to furnish a bond, with sureties, in favor of the state and in such sum as the city or town may reasonably demand, not less than $5,000 for each car operated, conditioned that the carrier will pay any finally adjudged damages, "as compensation for loss of life or injury to person or property inflicted" through negligence of the carrier.

(d) It denounces as a misdemeanor the act of so using and occupying the public street or place without first obtaining such permit or license and giving such bond, and, upon conviction, prescribes a fine of not less than $50 nor more than $100 for each offense, and declares each day's continuance to be a separate offense.

(e) It invests all cities and towns with powers corresponding to the measures so prescribed, and also "to impose upon all such common carriers a tax for the exercise of the privilege herein granted."

The case was submitted upon petition and answer, and an independent affidavit in support of the allegations of the petition. Apart from the legal deductions set out in the pleadings, the following may be treated as undisputed facts: The parties to the suit are all citizens of Tennessee and residents of Memphis. The city of Memphis, through its board of commissioners and in pursuance of the statute, has passed a resolution fixing the bond to be given by operators of motor busses at $5,000; and official orders have been given to compel operators of such vehicles to comply with the provision of the statute, which requires the execution and filing of such bond. The plaintiff is financially unable to procure the bond. The automobile he is operating will thus be materially reduced in earning power and in value to him through enforcement of the law. Street railways are in operation under charters and franchises within Memphis, and no such bond is required of their owners. Taxicabs are in use upon the public highways and grounds of the city; but whether operators of taxicabs are amenable to the bond requirement is reduced to a question of law between counsel. Before the passage of the statute, though no dates appear, the plaintiff obtained license to operate his car on the streets of Memphis for a period of one year.

[1] The sole ground of jurisdiction in this court is the claim of constitutional invalidity of the statute because of its alleged violation of the fourteenth amendment. In spite of the federal question so

presented, the defendants earnestly insist that the real purpose of the suit is to enjoin criminal proceedings, and that a court of equity cannot entertain jurisdiction for that reason. Before considering this feature of the defense, we feel called upon to notice a question of jurisdiction which arises upon the face of the petition. The only allegation there found upon the subject of the amount involved is that it is "greater than two thousand ($2,000) dollars." This, of course, is not in accordance with the requirement that the matter in controversy must exceed, exclusive of interest and costs, "the sum or value of three thousand dollars" (section 24, Judicial Code), nor are we at liberty to entertain jurisdiction unless this requirement is met (A. B. Andrews Co. v. Puncture Proof Footwear Co. [C. C.] 168 Fed. 762, 765, and citations). We might treat the allegation as an inadvertence, but the acknowledged inability of the plaintiff to give the statutory bond, and his limited interest in the machine operated, are suggestive of a serious question as to whether the jurisdictional amount is really involved. In the absence of allegation or showing, it is hard to understand how the loss arising from an operator's inability to use a single automobile for hire can be sufficient to satisfy the statutory requirement; and it is not alleged that the plaintiff, or any one in whose behalf he brings the suit, owns or causes to be operated two or more of such machines.

The question is at once presented, then, whether the alleged loss of the plaintiff could be added to the losses of other operators similarly situated, for purposes of jurisdiction. The principle upon which such an aggregation can be employed as a test of jurisdiction is that the persons joining in the suit must have a common and undivided interest, not distinct interests, in the amount involved; still, this is not to say that, if the property involved is in truth separately owned and held, the parties may not constitute a class who may be joined for the sake of convenience and economy; it is to say that aggregation of their pecuniary interests is not permissible for making up the jurisdictional amount. Clay v. Field, 138 U. S. 464, 479, 480, 11 Sup. Ct. 419, 34 L. Ed. 1044. The plaintiff and other jitney operators have a common interest, it is true, in the question whether a bond can be rightfully exacted of each of them; but it is equally plain that the damage which the plaintiff alleges, and that of other operators, as well as their titles to the vehicles they operate, are separate and distinct. It may well be, therefore, that the plaintiff can maintain a representative suit for the benefit of himself and other like operators under equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), and yet not be entitled to have their damages aggregated to make up the amount requisite to jurisdiction (Simpson v. Geary, 204 Fed. 507, 510 [D. C., three judges sitting]; Wheless v. St. Louis, 180 U. S. 379, 381, 21 Sup. Ct. 402, 45 L. Ed. 583; Bateman v. Southern Oregon Co., 217 Fed. 933, 938, 133 C. C. A. 605 [C. C. A., 9th Circ.]). See, also, Citizens' Bank v. Cannon, 164 U. S. 319, 321, 322, 17 Sup. Ct. 89, 41 L. Ed. 451; Walter v. Northeastern R. R. Co., 147 U. S. 370, 373, 374, 13 Sup. Ct. 348, 37 L. Ed. 206. However, we are not disposed to conclude the plaintiff upon this question, at least on the present state of the record; it may be that the facts will jus-

tify amendment to cure the apparent defect. Northern Pac. Railroad v. Walker, 148 U. S. 391, 392, 13 Sup. Ct. 650, 37 L. Ed. 494.

[2] We return to the claim of defendant's counsel that, since the statute is a criminal enactment, a court of equity cannot entertain jurisdiction to enjoin its enforcement. Reliance is placed upon a number of decisions, and among them the very interesting analysis of the jurisdiction of the chancery court of Tennessee and the review made of the decided cases in Kelly v. Conner, 122 Tenn. 339, 372, 123 S. W. 622, 25 L. R. A. (N. S.) 201; yet Mr. Justice Shields said in the course of the opinion:

"We are dealing solely with the jurisdiction of the chancery court of this state."

This statement seems to have been occasioned in part at least by the rule quoted on the next preceding page from Dobbins v. Los Angeles, 195 U. S. 223, 241, 25 Sup. Ct. 18, 22 (49 L. Ed. 169):

"It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

It must be conceded that this doctrine is an exception to the general rule (In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402); and yet the exception is so firmly established in the federal practice that no useful purpose would be served by pausing to trace its origin. The reason for the exception, where applicable, is the constitutional invalidity of the statute, and, consequently, the absence of lawful power to impose or enforce the particular exactions or restrictions which would result in irreparable loss to the complaining party. Philadelphia Co. v. Stimson, 223 U. S. 605, 621, 32 Sup. Ct. 340, 56 L. Ed. 570. The contention made here that the court is without jurisdiction to consider the statute overlooks the feature of plaintiff's case which challenges the constitutional validity of the statute. It must be remembered that plaintiff alleges and insists that at and before the enactment of the statute he was using his automobile in the carriage of passengers for hire in the streets of Memphis, in virtue of a city license. This was the business of a common carrier (and in legal effect involved a privilege) quite as certainly before as it was after the enactment of the statute; and such business, embracing as it did the use of an automobile, possessed the essential attributes of property. Whether the enactment of the statute was a rightful exercise of the state's police power to regulate such a business is the ultimate question. But to decide, without considering its merits, that plaintiff does not thus present a substantial claim, and to dismiss the case, would be to overlook the basic principle of jurisdiction; for, as Mr. Justice Holmes said in The Fair v. Kohler Die Mfg. Co., 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. 716:

"Jurisdiction is authority to decide the case either way."

And Mr. Justice Van Deventer said, in Geneva Furniture Mfg. Co. v. Karpen & Bros., 238 U. S. 254, 35 Sup. Ct. 788, 59 L. Ed. – (decided June 14, 1915):

"Jurisdiction, as pointed out in that case [The Fair v. Kohler Die Mfg. Co.], is the power to consider and decide one way or the other, as the law may require, and is not to be declined merely because it is not foreseen with certainty that the outcome will help the plaintiff."

[3] Coming, therefore, to consider the validity of the statute for the purpose of determining the question of equity jurisdiction, we observe that the plaintiff alleges and insists that, in view of the fourteenth amendment and of the statute, he is (1) denied the equal protection of the laws, in that other common carriers are not required to furnish a like indemnity bond; (2) he is deprived of his property without due process of law. In determining these questions we must keep in mind "the principle, long established and vital in our constitutional system, that the court may not strike down an act of legislation as unconstitutional unless it be plainly and palpably so," and also that a court is not empowered to adjudge a statute unconstitutional where the question is doubtful. Grainger v. Douglas Park Jockey Club, 148 Fed. 521, 533, 78 C. C. A. 199, 8 Ann. Cas. 997 (C. C. A., 6th Circ.); Mutual Film Co. v. Industrial Commission of Ohio, 215 Fed. 138, 141, and citations (D. C., three judges sitting), affirmed 236 U. S. 230, 35 Sup. Ct. 387, 59 L. Ed. 552; Rail & River Coal Co. v. Yaple, 214 Fed. 273, 279, 280 (D. C., three judges sitting), affirmed 236 U. S. 338, 35 Sup. Ct. 359, 59 L. Ed. 607.

Considering the constitutional guaranties (of the fourteenth amendment) in their inverse order, we come to inquire whether the plaintiff is denied the equal protection of the laws.

[4, 5] The first section of the act declares those engaged in the business herein defined to be common carriers. The third section requires that such carriers shall execute a bond for each car operated, in a sum not less than $5,000, conditioned that they will pay any damage that may be adjudged against them as compensation for loss of life or injury to person or property inflicted by such carriers, or caused by their negligence.

As stated in the caption of the act, the purpose of the Legislature was to define as common carriers within this state persons, firms, and corporations operating certain self-propelling public conveyances and affording means of street transportation similar to that ordinarily afforded by street railways, but not operated upon fixed tracks, to declare their business a privilege, to regulate the same, and to require such common carriers to give bond to indemnify against loss of life and damage to person and property.

Here is a new class of common carriers, clearly pointed out and defined in the law, differing in material respects from other common carriers. For reasons no doubt sufficient in the minds of the lawmakers, this new class of common carriers is required to execute a bond to indemnify against loss those who might be damaged in person or property, through negligence.

Confessedly, steam and street railway companies, and owners and operators of omnibuses, are not required to give bond for protection to those negligently injured by them, such as is provided for in the act under consideration; but it is of common knowledge that statutory

requirements, both federal and state, relating to and regulating common carriers, materially differ. While the services they all render are those of common carriers, yet the services are so different in detail that it would be wholly impracticable to write a statute applicable to them all, and serve, at the same time, the convenience and safety of the public.

The presumption is always in favor of the validity of legislation; and if there could exist a state of facts justifying the classification or restriction complained of, the courts will assume that it existed. Grainger v. Douglas Park Jockey Club, 148 Fed. 513, 78 C. C. A. 199, 8 Ann. Cas. 997, where the subject of classification was exhaustively considered by the Court of Appeals for the Sixth Circuit; Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; Price v. Illinois, infra.

It may well have been that the Legislature had in mind, when it enacted the statute in question, that those engaging in the business which the act sought to regulate operated vehicles susceptible of becoming dangerous to the public by the manner of their operation; that they had no fixed track upon which to run, and were at liberty to move over the entire surface of the street; that they had no schedule; that pedestrians had no way of knowing when and where to expect them; that they increased the danger to persons using the street, whether as pedestrians or while boarding or leaving street cars or other vehicles; that they stopped at street crossings, or along the curb between street crossings, to receive and discharge passengers; that very often the driver owns the machine, or at least an equity in it; that many of them are financially irresponsible; that the patrons of such vehicles are composed of men, women, and children; that the vehicles, in the hands of careless drivers, might rush through crowded streets at a dangerous rate of speed, probably without any financial responsibility to their patrons or others upon whom damage might be inflicted by such machines, because of the negligence of the operators.

Furthermore, a substantial distinction between the property of the owner of a street railway and that of the owner of a "jitney" should not escape attention. The former consists of a fixed plant, including rolling stock, which is operative only along tracks provided for the purpose, while that of the latter is fugitive in character, since it is operative through its own power upon any portion of the surface of an ordinary highway. It results that the street railway property is in its nature an indemnity against the consequences of negligence, and so is at least an equivalent for the bond of indemnity which is here resisted by the owner of the "jitney."

We may add in this connection that under section 3 of the Tennessee Act of March 24, 1877, c. 72, p. 94, amending the law in relation to the consolidation of railways, it was provided that no railroad company should have power under any laws of the state to give or create any mortgage or other lien on its railway property in the state, which should be valid and binding against judgments and decrees, and executions therefrom, for damages done to persons and property in the

operation of its railroad in the state. This act was held by the Supreme Court of Tennessee, in Frazier v. Railway Co., 88 Tenn. 138, 166, 12 S. W. 537, to be constitutional, and to affect all railroad companies alike, whether they should thereafter consolidate or not. This provision, which was incorporated in section 1271 of Milliken & Vertrees' Compilation of the Statutes of Tennessee, was hence one of the provisions for the consolidation of railroads contained in sections 1263 to 1272, inclusive, of the Milliken & Vertrees Compilation which, by section 1 of the Tennessee Act of March 26, 1887, c. 189, p. 321, was "declared to embrace and extend to any street railroad corporations existing in this state"; and therefore in accordance with the ruling in Frazier v. Railway Co. (Tenn.) supra, became thereafter applicable to all street railway companies, as a limitation upon their powers, whether they should consolidate or not. See Baltimore Trust Co. v. Hofstetter (6th Circ.) 85 Fed. 75, 80, 29 C. C. A. 35.

There is another distinction that should be noted; it concerns the taxicab. While the "jitney" and the taxicab are physically the same, yet the services they perform materially differ. The service of the one is designed to accommodate persons traveling along distinct routes and at a rate of fare common to all; but the service of the other is intended for the accommodation of persons whose destinations involve varying distances and lines of travel and presumably at varying prices. The two kinds of service would signify substantial difference in numbers of vehicles needed to meet the respective demands; and so the dangers attending the operation of the "jitney" presumably would materially exceed those arising in the taxicab service. These considerations are independent of the question argued by counsel whether the taxicab is not embraced within the terms of the statute—a question we do not decide.

Under such circumstances, can this court affirmatively say that the provision, requiring those engaged as such common carriers to execute a bond to protect their patrons or others, as a part of the public, against injury caused by their negligence, clearly sustains no substantial relation to the public convenience or safety? Grainger v. Douglas Park Jockey Club, 148 Fed. 513, 78 C. C. A. 199, 8 Ann. Cas. 997. It would seem clear that the provision for a bond must tend materially to induce care in the operation of the jitney and so to promote the convenience and safety of the public. This would be but the natural result of the owner's knowledge that his negligence would create liability on the bond, and in that event render it difficult, if not impossible, for him to continue the business through renewal of his bond.

The Supreme Court of the United States, in the case of M., K. & T. Ry. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971, say:

"With regard to the manner in which such a question should be approached, it is obvious that the Legislature is the only judge of the policy of the proposed discrimination. * * * When a state Legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the fourteenth amendment, unless they can clearly see that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

We may call attention here to the recent decision of the Supreme Court in Price v. Illinois, 238 U S. 446, 35 Sup. Ct. 892, 59 L. Ed. —— (decided June 21, 1915). It is true that the statute then under review was the "pure food" enactment of Illinois; and yet the recognition there given to the extent of power which resides in a state legislative body to define a policy respecting safeguards necessary to the protection of the public is in principle applicable here. The pertinency of the principles there announced will be seen in some of the decisions relied on in the opinion of Mr. Justice Holmes, such as McLean v. Arkansas, 211 U. S. 539, 547, 29 Sup. Ct. 206, 53 L. Ed. 315; Atlantic Coast Line v. Georgia, 234 U. S. 280, 288, 34 Sup. Ct. 829, 58 L. Ed. 1312; Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 256, 28 Sup. Ct. 89, 52 L. Ed. 195; Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529; Miller v. Wilson, 236 U. S. 373, 383, 384, 35 Sup. Ct. 342, 59 L. Ed. 628.

[6] The equal protection clause of the fourteenth amendment does not take from the state the right or power to classify the subjects of Legislation. It is only when the classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. Jeffrey Mfg. Co. v. Blagg, 235 U. S. 577, 35 Sup. Ct. 167, 59 L. Ed. 364; Grainger v. Douglas Park Jockey Club, supra.

A classification, in order to be obnoxious to the equal protection clause of the fourteenth amendment, must be clearly and actually arbitrary and unreasonable, and not merely possibly so. Bachtel v. Wilson, 204 U. S. 36, 27 Sup. Ct. 243, 51 L. Ed. 357; Carroll v. Greenwich Insurance Co., 199 U. S. 401, 26 Sup. Ct. 66, 50 L. Ed. 246; McLean v. State of Arkansas, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315; Grainger v. Douglas Park, supra.

We cannot say that the classification made by the Legislature of the state in the statute in question is so clearly arbitrary and unreasonable that it contravenes the equal protection clause of the fourteenth amendment. On the contrary, we think the circumstances disclose a reasonable ground for classification. Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 31 Sup. Ct. 709, 55 L. Ed. 815; Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350; (D. C.) 215 Fed. 138, supra; Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323; Grainger v. Douglas Park, supra.

[7] Upon the undisputed facts of the case, as we have already said, the plaintiff will, if unable to furnish the required bond, suffer substantial loss in the use of his machine, and in that sense a property loss. Curtin v. Benson, 222 U. S. 86, 32 Sup. Ct. 31, 56 L. Ed. 102. Can it be said, however, that he is being deprived of property in violation of the "due process" clause of the fourteenth amendment? Confessedly, yes, unless the exaction of the bond can be justified upon the ground that it results from a proper exercise of the police power of the State. Grainger v. Douglas Park, supra.

[8] It is earnestly insisted that the statute is not within the police power of the state. In Sligh v. Kirkwood, 237 U. S. 52, 58, 35 Sup. Ct. 501, 502 (59 L. Ed. ——), Mr. Justice Day, speaking for the Supreme Court of the United States, says:

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the state, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the state. New York v. Miln, 11 Pet. 102, 139 [9 L. Ed. 648]. The police power, in its broadest sense, includes all legislation and almost every function of civil government. Barbier v. Connolly, 113 U. S. 27 [5 Sup. Ct. 357, 28 L. Ed. 923]. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524 [17 Sup. Ct. 864, 42 L. Ed. 260]. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago, etc., Railway v. Drainage Commissioners, 200 U. S. 561, 592 [26 Sup. Ct. 341, 50 L. Ed. 596, 609, 4 Ann. Cas. 1175]. In one of the latest utterances of this court upon the subject, it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.' * * * And further, 'it is the most essential of powers, at times the most insistent, and always one of the least limitable powers of government.' Eubank v. City of Richmond, 226 U. S. 137 [33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192]."

See Booth v. State of Indiana, 237 U. S. 391, 395, 35 Sup. Ct. 617, 59 L. Ed. —.

In the light of these two most recent utterances of the Supreme Court, it would seem unnecessary to attempt a further definition of the "police power" or to cite other cases.

[9] If the act is to be sustained under the police power of the state, the court must be able to see that its operation tends in some degree to prevent some offense or evil, or to preserve public health, morals, safety, and welfare, and if the statute discloses no such purpose, and has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge. Minnesota v. Barber, 136 U. S. 320, 10 Sup. Ct. 862, 34 L. Ed. 455; Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 273, 31 L. Ed. 205; Grainger v. Douglas Park, supra.

These principles are so well settled that we deem it unnecessary to cite other authorities to sustain them; but difficulty often arises in determining whether a case falls under the one or the other of them. For the plaintiff it is insisted that this case belongs to the latter class, and he relies upon that line of cases of which Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, is a type.

In that case, Mrs. Dobbins had contracted with a gas company for the erection of certain gas works, upon territory purchased by her for that purpose, outside of a district within which the city of Los Angeles had by ordinance prohibited the building of such a plant, and had obtained from the proper authorities of said city a permit to erect the gas works, upon the territory aforesaid. Thereupon the erection of the plant was begun, and more than $2,500 had been expended. Subsequently the city ordinance was amended so as to include with-

in the district in which gas works were prohibited the site on which Mrs. Dobbins was erecting her plant, and the city was proceeding to enforce the ordinance against those erecting the plant. Thereupon a bill was filed to enjoin the enforcement of the ordinance. The case was heard upon demurrer. There a private individual purchased private property, for private use, and, after obtaining the consent of the proper authorities, went to considerable expense in improving it, and it was held that the ordinance was ultra vires, in that it amounted to a taking of property without due process of law.

[10] In the case at bar, Mr. Nolen embarked in the business of a common carrier, and obtained a license to use the public streets of the city of Memphis in the prosecution of his business; and thereafter an additional burden was imposed on the business by an act of the Legislature, which required of such carriers a bond to protect those whom they might injure through negligence in the prosecution of their business.

The streets are the property of the public, under the control of the state, and are subject at all times to the police power of the state, unless that power is conferred by statute upon a municipality or other agency. Hendrick v. Maryland, 235 U. S. 622, 35 Sup. Ct. 140, 59 L. Ed. 385. The right to exercise the police power is a continuing one, and may be exercised so as to meet the ever-changing conditions and necessities of the public. Those who make investments for the purpose of using the public streets of a city for private business, under a license for that purpose, do so, and hold said property and the right to use it, subject to such other and different burdens as the Legislature may reasonably impose, for the safety, convenience, or welfare of the public.

In the Dobbins Case, supra, Mr. Justice Day says:

"Complying with the terms of the ordinance which was in force when the plaintiff in error was about to begin the erection of the gas works in controversy, a tract of land was purchased within the district wherein the erection of such works was permitted, a contract was entered into for the construction of the works, a considerable sum of money was expended. It may be admitted as being a correct statement of the law as held by the California Supreme Court that, notwithstanding the grant of the permit, and even after the erection of the works, the city might still, for the protection of the public health and safety, prohibit the further maintenance and continuance of such works, and the prosecution of the business, originally harmless, may become, by reason of the manner of its prosecution or a changed condition of the community, a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one, and a business lawful to-day may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good. Fertilizing Co. v. Hyde Park, 97 U. S. 659 [24 L. Ed. 1036]; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 672 [6 Sup. Ct. 252, 29 L. Ed. 516]."

These principles are controlling in the instant case, although by reason of the differing facts in the Dobbins Case they were not controlling there. We are constrained to believe that the classification of the statute now under consideration is founded on a rational basis; that it has a real and substantial relation to the public welfare; that it operates uniformly upon the class of common carriers it creates; and,

consequently, that it cannot rightfully be said to deny to the plaintiff the equal protection of the laws, or to deprive him of his property without due process of law. Grainger v. Douglas Park Jockey Club, supra, 148 Fed. 523, 78 C. C. A. 199, 8 Ann. Cas. 997. We are strengthened in these views by the recent decision of the Supreme Court of West Virginia in the case of Ex parte M. T. Dickey, 85 S. E. 781 (decided June 22, 1915, and not yet officially reported). The controlling facts of the case are closely analogous to the material facts of the present case. The legislation there involved was an ordinance of the city of Huntington regulating, licensing, and taxing certain vehicles, commonly known as "jitney busses." The ordinance forbids—

"any person, firm, or corporation to use or occupy any public street in the city of Huntington with a motor bus, without a permit or license therefor and compliance with the terms of the ordinance. * * *"

The ordinance—

"also requires the licensee to enter into a bond in the penalty of $5,000, with a condition for compliance with the provisions of the ordinance and payment of any and all lawful claims for damages for injury to persons or property sustained by passengers in them or by other persons that may be killed or injured or suffer damage to property in the city of Huntington in the operation thereof."

The ordinance was sustained. To the same effect, in its recognition of the legislative right to exact bonds of indemnity, though differing in matter of remedy, is the opinion in Hoa Le Blanc et al. v. City of New Orleans, 70 South. 212, of Supreme Court of Louisiana (decided June 28, 1915, and not yet officially reported).

Upon all the considerations mentioned, we are led to the conclusion that, while the court would have jurisdiction to grant the relief sought if the statute were violative of the fourteenth amendment, yet, as we do not think it is (and, of course, we do not pass upon any other constitutional question), the plaintiff has not made out a case entitling him to the relief prayed in the bill, and the preliminary injunction sought must be denied.

The District Judge for the Western District of Tennessee will settle the terms of the order, and will allow an appeal, if one is desired.

UNITED STATES v. ANDERSON.

(District Court, E. D. Wisconsin. May 5, 1915.)

INDIANS ⇐15—ALLOTMENTS—RESTRAINT ON ALIENATION—REMOVAL BY STATUTE.

Act June 21, 1906, c. 3504, 34 Stat. 382, providing that the members of the Stockbridge and Munsee Tribe of Indians, who have not heretofore received patents for lands in their own right, shall, under the direction of the Secretary of the Interior, be given allotments of land and patents therefor in fee simple, and declaring it obligatory on a member who has made a selection of land in the reservation to accept it as an allotment, at once, makes one who has already made his selection, pursuant to the provisions of the Stockbridge and Munsee Treaty of February 5, 1856 (11 Stat. 663), for allotment, owner of such land in fee simple, discharged of any power of restraint on alienation in the President or the Secretary of the Interior, and makes the issuance of a patent only a ministerial duty, so that such allottee's deed of his land, before issuance of patent, conveys the fee to the grantee, to whose benefit the subsequently issued patent inures.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. ⇐15.]

In Equity. Suit by the United States against August Anderson. Decree for defendant.

Guy D. Goff, U. S. Atty., and Otto H. Breidenbach, Asst. U. S. Atty., both of Milwaukee, Wis.

A. S. Larson, of Shawano, Wis., for defendant.

GEIGER, District Judge. The government has instituted this suit to annul a conveyance made by Mary Butler Tousey, formerly a member of the Stockbridge and Munsee Tribe of Indians, to the defendant, Anderson, of lands described in the complaint. The facts are simple and practically without dispute, though they involve consideration of the legislative and executive relations of the government with the named tribe. Preliminarily, and as an introduction to references to such relations, it suffices to say that Mary Butler Tousey's mother was a white woman. Her father was the issue of a marriage of a white man to a female quarter blood. Mary, her father, and her mother were born off the reservation, were and are citizens, and have spent little of their time with the Indians. The Stockbridge and Munsee reservation, created by treaty and congressional acts, has been dissolved through the patenting in fee simple of the lands comprising the same to the members of the tribe, pursuant to Act Cong. June 21, 1906, hereafter referred to. Such patents convey to the respective members of the tribe absolute fee-simple titles without any restrictions upon alienation. Mary Butler Tousey's deed to the defendant, Anderson, was executed and delivered July 24, 1909, for a consideration of $650, conceded to be full value. The government patent to her—which is like others above referred to—was not actually executed until April 4, 1910. This suit was begun July 31, 1913.

The case therefore necessitates an inquiry into the status of Mary Butler Tousey, with respect to the lands in question, at the time of her conveyance to Anderson; and this inquiry may well start with an

examination of the treaty concluded in 1856 between the United States and this tribe of Indians. 11 Stat. 663. Prior to and since that time, the history of the tribe seems to have been one of dissension, inter-tribal, as well as with the government, and in many respects the relations subsisting between the tribe and the government have the impress of confusion and contradiction; but upon the question here presented it is believed—particularly in view of adjudications by this court to which reference will be made—the status of the Indians under the treaty and successive congressional acts, in and to their lands, can be made consistent throughout. The preamble of the treaty recites prior conventions between the Indians and government, congressional acts, the tribal dissensions and disputes, the desire of the government to pursue a liberal policy, to the end that citizenship may be conferred upon the Indians, etc., whereupon stipulations are entered for valuable retrocessions and releases by the Indians to the United States, in consideration whereof the latter reserves—

"a tract of land near the south boundary of the Menominee reservation of sufficient extent for each head of family and others lots of land of eighty and forty acres as hereinafter provided."

The treaty continues:

"Article III. As soon as practicable after the selection of the lands set aside for these Indians by the preceding article, the United States shall cause the same to be surveyed into sections, half and quarter sections, to correspond with the public surveys, and the Council of the Stockbridges and Munsees shall under the direction of the Superintendent of Indian Affairs for the northern superintendency, make a fair and just allotment among the individuals and families of their tribes. Each head of a family shall be entitled to eighty acres of land, and in case his or her family consists of more than four members, if thought expedient by the said council, eighty acres more may be allotted to him or her; each single male person above eighteen years of age shall be entitled to eighty acres; and each female person above eighteen years of age, not belonging to any family, and each orphan child, to forty acres; and sufficient land shall be reserved for the rising generation.

"After the said allotment is made, the persons entitled to land may take immediate possession thereof, and the United States will thenceforth and until the issuing of the patents, as hereinafter provided, hold the same in trust for such persons, and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land; but such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein. After the expiration of ten years upon the application of the holder of such certificate, made with the consent of the said Stockbridge and Munsee Council, and when it shall appear prudent and for his or her welfare, the President of the United States may direct, that such restriction on the power of sale, shall be withdrawn and a patent issued in the usual form."

"Article XI. The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient, from causes which cannot now be foreseen, to effect these ends, that the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs, as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provision by law, as experience shall prove to be necessary."

In United States v. Torrey Cedar Co. and United States v. Paine Lumber Co. (C. C.) 154 Fed. 263, the late Judge Seaman had before him the question whether under this treaty, and the congressional act

next to be referred to, the Indian allottees were vested with a sufficient title in their allotments to authorize the cutting of timber for sale and not by way of improvement, without the consent of the Department of the Interior. In answering the question affirmatively—his view subsequently receiving the approval of the Supreme Court (206 U. S. 469, 27 Sup. Ct. 697, 51 L. Ed. 1139)—he gave the treaty this effect:

"Under the terms of this treaty, the policy of earlier treaties, to reserve to the Indians 'to be held as other Indian lands are held'—a mere right of occupancy—was changed to intend an ultimate title in fee simple. Pending the patent, while the legal title is in the United States, the allottee was vested with the equitable title contemplated by the treaty (Crews v. Burcham, 1 Black, 352, 356, 17 L. Ed. 91), unless modified by act of Congress, or by concurrent action of the President and Senate, if therein subject to modification. The provision in restraint of alienation meantime 'is not inconsistent with a fee simple estate.' Libby v. Clark, 118 U. S. 250, 255, 6 Sup. Ct. 1045, 30 L. Ed. 133. Assuming, as suggested in the argument (but not so ruling), that the provision for title to go to the tribe in default of heirs would turn it into a base or qualified fee, the allottee living 'has the same rights and privileges over his estate as if it were a fee simple' (11 Am. & Eng. Ency. of Law [2d Ed.] 369, and citations), and is not liable for waste (Id. 374). See U. S. v. Reese, 5 Dill. 405, Fed. Cas. No. 16,137."

On January 25, 1871, there was passed a further act "for the relief of the Stockbridge and Munsee Tribe of Indians." Act Feb. 6, 1871, c. 38, 16 Stat. 404. It dealt with a situation of dissension presenting two factions, the "citizen" and the "Indian" parties, and made provision for the sale of the lands of the reservation, the distribution of proceeds to, and the surrender by, the members of the citizen party of all their claims, and for the recognition of the Indian party thereafter as the "Stockbridge Tribe of Indians," and their assignment to a "permanent reservation." Of the portion of the act relating to the latter, Judge Seaman, in the cases supra, expressed this view:

"This act expressly recognized the rights of allottees under the treaty, declared the 'lands assigned and allotted to be held inalienable,' and on 'reversion to become the common property of the tribe,' and that the title be held by the United States, until patent issues, 'in trust for the individuals and their heirs to whom the same were allotted.' A prior act of 1865 (13 Stat. 562) authorized homestead entries and application for citizenship by members of this tribe, but does not touch the present inquiry, and no other congressional action appears in reference to the reservation or allotments therein."

It may be noted that an act of March 3, 1893, was passed (27 Stat. 744) to meet the departmental construction whereby certain Indians who were beneficiaries under the treaty of 1856 were excluded from the act of 1871 last above referred to, and by such act of 1893, the treaty benefits were expressly restored to them. The act is significant, however, in its declaration that all members of the tribe—

"who entered into possession of lands under the allotments of 1856 (the treaty), and the act of 1871 (above referred to), and who, by themselves or their lawful heirs, have resided on said lands continuously since, are *hereby declared to be* owners of such lands *in fee simple, in severalty,* and the government *shall issue* patents *to them therefor.*"

I say this is significant, in view of the claim of the defendant, that the whole history of the legislative and executive action discloses suc-

cessive relaxation as well as surrender from time to time of the restraints originally imposed by the treaty, and, as is now claimed, culminating in the act of 1906 in a final discharge of any discretionary reservation thereof by the government, leaving, so it is urged, the performance of the ministerial act of delivering evidences of title, except as to those members of the tribe whose rights in and to particular selections or descriptions had not become fixed and ascertained, and with respect to whom further tribal or departmental action by way of making actual allotment was necessary.

Certain further observations are here necessary before considering the legislative steps next taken, and which present the crucial point in the case. It will be recalled that the treaty of 1856 vested in the "Council of the Stockbridge and Munsees, under the direction of the Superintendent of Indian Affairs," the power to make a "fair and just allotment among the individuals and families of their tribes." Further provision was made for the issuance of certificates to the respective allottees "in suitable form guaranteeing and securing to the holders their possession and an ultimate title to the land." It appears without controversy that, obediently to this provision and pursuant to the congressional acts referred to, the tribal council—or, as it has been called in this case, the business committee of the tribe—has exercised the granted authority, and allotments or selections have been made and adopted by the government from time to time as complying with this provision. Although certificates of allotment containing the treaty guaranty have not been issued, this failure or default on the part of the government in no degree detracted from or impaired the title otherwise flowing from the act of allotment or selection conformably to the treaty. United States v. Torrey Cedar Co., supra.

In fact, the Indian agent in charge of this reservation and its agency when the allotment to Mary Butler Tousey was made—and it is undisputed that the tract in question here was selected by and allotted to her in 1899—testified in this case that at the time and for some years thereafter no other method of making allotments was known, and that he protected the Indians in the selection and allotments thus made through the council or business committee and entered on the tribal record and communicated to the agency or department in connection with the general affairs to the tribe and its or their property relations with the government. The Indians, in making selections in this manner, thereby became "entitled to recognition as allottees, *with all the rights intended by the treaty, pending the issue of a patent.*" United States v. Torrey Cedar Co., supra. So it may be taken as established that Mary Butler Tousey, as early as 1899, acquired a status as an allottee, with the rights last noted.

One further fact, properly to be alluded to, is: Prior to 1900, the members of the Stockbridge Tribe petitioned the United States government, acting through its Indian office, for a final dissolution of the tribe and a distribution of the tribal property, the latter to include the patenting of the lands in fee simple. Thereupon a representative of the government was sent to the tribe and entered into an agreement, signed by a majority of the adult male members, entitled "Proposed Plan of Settlement with the Stockbridge and Munsee Tribe of In-

dians." Such agreement is now referred to, principally because defendant claims it to have been the basis of the act of June 21, 1906, and such claim seems conclusively supported by the fact that the following portion of the proposed agreement is incorporated almost literally in said act, viz.:

"Provided, however, that in all cases where members of said tribe have made selections whether filed with the business committee of said tribe, or otherwise, it shall be obligatory upon such member or members to accept said selections, not to exceed the acreage pro rated as above, and that in all other cases it shall be optional with such members to accept such allotment, or in lieu thereof the sum of two dollars per acre, which sum is hereby agreed to be the equivalent of said land."

We are now brought to the act of June 21, 1906 (34 Stat. pt. 1, p. 382, c. 3504), entitled:

"An act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1907."

"That the members of the Stockbridge and Munsee Tribe of Indians, as the same appear upon the official roll of said tribe, made in conformity with the provisions of the act [March 3, 1893, supra], * * * and their descendants, who are living and in being on the first day of July, 1904, and *who have not heretofore* received patents for land in *their own right*, shall, under the direction of the Secretary of the Interior, *be given allotments of land and patents therefor in fee simple*, * * * as follows. * * *

"That as there is not sufficient land within the limits of the Stockbridge and Munsee reservation to make the allotments in the quantities above specified, all available land in said reservation shall first be allotted to the heads of families and single persons residing thereon, until said reservation land shall be exhausted, the additional land that may be required to complete the allotments to be obtained in the manner hereinafter specified: Provided, that the Secretary of the Interior may make such rules and regulations as he may deem necessary to carry out the requirements of this Act as to making and designating allotments.

"*That it shall be obligatory upon any member of said tribe who has made a selection of land within the reservation, whether filed with the tribal authorities or otherwise, to accept such selection as an allotment, except that the same shall be allotted in quantity not to exceed that hereinbefore authorized: Provided, that where such selection does not equal in quantity the allotment hereinbefore authorized, the allottee may elect to take out of the lands obtained under the provisions of this act the additional land needed to complete his or her quota of land, or in lieu thereof shall be entitled to receive the commuted value of said additional land in cash, at the rate of two dollars per acre, out of the moneys hereinafter appropriated.*[1]

"That those members of said tribe who have not made selections within the reservation shall be entitled to the option of either taking an allotment under the provisions of this act, or of having the same commuted in cash, at the rate of two dollars per acre, out of the moneys hereinafter appropriated: Provided, that the election of any member to take cash in lieu of land shall be made within sixty days after the date of the approval of this act.

"That for the purpose of obtaining the additional land necessary to complete the allotments herein provided for the Secretary of the Interior is hereby authorized and directed to negotiate, through an Indian inspector, with the Menominee Tribe of Indians of Wisconsin for the cession and relinquishment to the United States of a portion of the surplus land of the Menominee reservation in said state, or to negotiate with the authorities of said state, or with any corporation, firm, or individual, for the purchase of said additional land: Provided, however, that in no event shall any agree-

[1] NOTE.—Compare this italicized clause with excerpt from "Proposed Plan of Settlement," etc., supra.

ment of cession or contract of purchase so negotiated stipulate that a sum greater than two dollars per acre shall be paid for the land so obtained: And provided further, that no such agreement or contract shall have any force or validity unless the same shall be approved by the Secretary of the Interior; or said Secretary may, in his discretion, utilize such unappropriated public lands of the United States as may be required to complete the allotments.

"That certain members of the Stockbridge and Munsee Tribe having made selections of land on tracts patented to the state of Wisconsin under the swamp-land acts, and having made valuable improvements thereon, the Secretary of the Interior is hereby authorized to cause said improvements to be appraised by an inspector or special agent or Indian agent of his department and to pay to the owners, as their interests may appear, the appraised value of said improvements, in all not to exceed the sum of one thousand dollars, out of the moneys hereinafter appropriated.

"That the sum necessary to carry out the provisions hereof the Secretary of the Treasury is directed to pay out of the Stockbridge consolidated fund in the Treasury of the United States, which fund on the thirty-first of October, nineteen hundred and four, amounted to seventy-five thousand nine hundred and eighty-eight dollars and sixty cents, under the direction and upon the warrant of the Secretary of the Interior."

When this act is read in the light of the treaty, the successive congressional and executive steps affecting the government's relation to this tribe, its opening declaration, that the enrolled members who have *not heretofore* received patents *"in their own right, shall be* given allotments of land, and *patents* therefor *in fee simple,"* evinces conclusively, so it seems to me, the legislative purpose to surrender, finally, any reserved discretionary power of the government over lands to be given to these Indians. It must be borne in mind that we are not now concerned with the question whether the government intended by this act to sever all its relations with the Indians, or whether the act in and of itself is sufficient to free the members of the tribe from their status as Indians who might otherwise be affected by acts pertaining to their social welfare, e. g. the liquor statutes and the like; but the only question is that respecting the freedom of the several Indians who had allotments of land to dispose of their title under the treaty and the various legislative acts as a *fee-simple, unrestricted title.* This act, while obviously in the interest of those generally designated as not having theretofore received "patents in their own right," clearly recognizes such individuals as of the two subclasses: (1) Those who had theretofore received *allotments* but not patents; (2) those who had theretofore received neither allotments nor patents. Mary Butler Tousey, as one who had selected the tract in question at the time of the passage of this act, also became bound by its obligations "upon any member of said tribe who has made a selection of land within the reservation, whether filed with the tribal authorities or otherwise *to accept such selection as an allotment,"* etc. Now, by article 3 of the treaty of 1856, supra, the discretionary power of withdrawing the restriction upon alienation was vested in the President; but by article 11, supra, there was committed to him, apparently, the larger discretionary power of adopting any policy respecting the management of the tribal affairs as in his judgment may be most beneficial to advance the "welfare and improvement of said Indians," or, the article continues, "Congress may, hereafter, make such provision by law, as experience shall prove to be necessary."

The history of the relations of the government to these Indians subsequent to the treaty, as shown in the successive laws for their "relief," certainly indicates the assumption by Congress of the power granted by the treaty to be exercised in the alternative, either by the Executive or by the Congress. Can it be that these successive acts, culminating in the act of 1906, did not and do not evidence the exercise of such power to the exclusion of executive exercise of the same power upon the same subject? Can it be that, while Congress expressly raised the restriction on alienation by obligating those who had made *selections to accept* them as *allotments,* and mandatorily directed the issuance of patents by the Executive department, the President still retained his full discretionary power under the treaty? It is said, by way of answering these questions, that the language of the act—"*shall be given* allotments of land, and patents therefor"—indicates futurity in the taking effect of the act, and that in the interim the old stipulations respecting alienability can consistently remain in force until actually surrendered by a delivery of the paper evidence of an absolute title. This might be more persuasive than it is, if the history of the policy latterly pursued by the government, not only toward the Stockbridges, but quite generally toward all tribes, did not indicate that *Congress,* and not the Executive, presumes to speak in the first instance upon the matter of lifting these restraints.

Many instances can be cited, either under special or general acts relating to the Indians, where it appears that a discretion resides in the President or the Secretary of the Interior to determine when or under what conditions such restraints may be lifted. But it will be found that such discretion was there lodged either by congressional enactment or by treaty. The Stockbridge and Munsee Treaty of 1856 so lodged it in the President. But, as we have already observed, Congress, either by virtue of the alternative grant of that treaty or by virtue of its inherent power to pass upon it as a question affecting the social and political status of Indians, has assumed throughout the past 50 years, from time to time, to pass upon this very matter, and has declared in the acts referred to—and which declarations have been treated as mandatory—that certain specified members of the tribe be given fee simple patents. However, the language of futurity referred to must be considered in connection with the clause imposing upon those members who had made selections, the obligation to *accept them* as allotments. This, in my judgment, absolutely removed those members from the necessity of any further or other consideration, except that of *verifying* their selection to be in conformity with their right and issuing a patent therefor.

It is suggested by the government that this provision was binding upon such members *at the option of the government.* It seems to me that this construction would not only be repugnant to the situation with which Congress was endeavoring to deal, but would be singularly violative, by the government, of its treaty obligations. These allotments or selections having been made, as stipulated by the treaty they could be made, and having the quality which, by judicial interpretation of such treaty and congressional acts, they were said to have

(the Torrey and Paine Cases, supra), we cannot ascribe to Congress any intent to do other than to recognize the situation just as it existed and to give to each allottee no more and no less than of right he was entitled to have. Therefore there is included in the proviso a clause for cutting down excessive, likewise for filling "short," allotments or selections. I view the proviso as a plain *confirmatory* declaration, binding both government and the tribe, to adhere to selections theretofore made as a fulfillment of treaty stipulations for allotments; and, instead of being a grant of authority to the executive officers charged with supervision of these allotments, it serves—as to selections made prior to the passage of the act—as a plain limitation on both parties. Of course, with respect to those members of the tribe who, when the act was passed, had not made selections, or whose selections were in excess or short of their right, the law gives authority to proceed; and it will not be contended that a member of the tribe who had not made a selection, had any right in severalty in the lands subject to allotment. But it seems clear that the purpose of the act was to accomplish—it would seem forthwith, just what has in fact been accomplished—the actual distribution of the tribal lands in fee simple, and to finally discharge the subsisting relation of guardian and ward, in so far, at least, as it involved a restriction upon the disposition of lands.

As heretofore observed, this necessitated, fundamentally, a declaration, either expressly or by implication, by the branch of the government having the power, that the restriction *be removed;* and it cannot be doubted that Congress not only had the power, but intended to and did exercise it in this enactment of 1906. The situation is not like that presented when Congress, instead of exercising its own discretionary power to remove the restriction, delegates it to the executive officials, with authority to exercise it by issuing a patent. In other words, Congress can, and in many instances does, either direct the issuance of patents which upon their face show the restraint imposed and the duration thereof, or, in like manner, the issuance of allotments with power, thereafter, in the Secretary of the Interior, *in his discretion,* to issue patents. In the former the restraint lifts automatically with the expiration of the time prescribed; in the latter, usually by the act of the executive official in issuing the patent as the evidence of the exercise of his discretion. But when Congress itself assumes to exercise the discretion, there can be no other way of evidencing it than by passing a law directing the issuance of an absolute patent. The law itself is the final act of surrender by the government of its reserved discretionary power over the land. The government had nothing to do, as between itself and the Indians who had actually received allotments, except to continue or to release the restriction. Suppose, for example, the original terms of the treaty giving to the President the power, after 10 years, or generally, the right, in his discretion, to raise the restriction, had been deemed in force. Manifestly, he might have exercised the power by merely issuing a patent to an individual allottee. But if, instead of doing so, he had issued a general proclamation declaring that the tribe had

advanced sufficiently to entitle the allottees to a discharge of the restrictions against their several lands, can there be any doubt that such a proclamation would have been the executive act of discharge, even though a patent never issued? And would not the patent, when issued, grant to the allottees what they owned, plus the discharge derived through the executive proclamation? What, if anything, do these present allottees acquire under their patents greater than that which Congress intended they should have the moment the act of 1906 received executive approval?

If by the treaty and prior legislative acts they had not acquired a status as owners, subject only to the restrictions against alienation, as indicated in the Paine and Torrey Cases, if Congress looked upon these Indians as occupiers, and did not intend by the act of 1906 to lift the restraints, then there was no occasion for the passage of the act. In other words, if, after its passage, the restraint was still to rest on the allotted lands until the President or the Secretary of the Interior, in his *discretion*, issued the patent, then the law added nothing to the situation. Putting the query last above made in another way: Upon the passage of this act of 1906, and when ascertaining the fact that Mary Butler Tousey made a selection in 1899, and therefore was an allottee within the express terms of the act, by what authority, and for how long could any executive official withhold the patent—what claim against her *right* to the patent could be asserted? Ballinger v. United States ex rel. Frost, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464. I am satisfied that nothing but the ministerial duty of issuing the patent remained to be discharged, and that such patent, no matter how long its issue may have been delayed, granted the fee as of the date of the congressional discharge of the restriction and the mandatory direction for patenting, and that the deed from her to the defendant conveyed the fee; that, the government control or reserved power over the alienation having been surrendered or exhausted, the patent, though issued and delivered later, in law inures to the benefit of the defendant, Anderson, and he must prevail in this suit.

Consideration of the other questions argued by counsel is therefore unnecessary. Whether the view expressed in this opinion leads to a decree dismissing the bill for want of equity, or for lack of jurisdiction, is a matter upon which further arguments can be presented when the decree is to be entered.

IRVINE v. BAKER et al.

SAME v. SIMPSON et al.

(District Court, S. D. New York. July 30, 1915.)

1. RECEIVERS ⟸210—POWERS—RIGHT TO SUE.

Under Ohio statute empowering receivers appointed by Ohio courts of insolvent corporations to sue in other states to collect stockholders' liabilities assessed against nonresident stockholders by the Ohio court, a receiver appointed by an Ohio court of an insolvent corporation has authority to sue in the federal court sitting in a sister state to recover assessments against stockholders made by the court of Ohio under the Constitution and statutes of Ohio defining the liability of stockholders.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 417–420; Dec. Dig. ⟸210.]

2. CORPORATIONS ⟸261—LIABILITY OF STOCKHOLDERS—ASSESSMENTS—CONCLUSIVENESS.

Personal notification and presence of stockholders are not necessary as far as the conclusiveness of an asssessment of their liability is concerned, and apart from defenses personal to them under statutes providing methods for the enforcement of the liability, unless the statute require personal notification and presence, and ordinarily the corporation represents the stockholders for the purposes of an assessment, and the presence of the corporation is the presence of the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1076–1083, 2273; Dec. Dig. ⟸261.]

3. CORPORATIONS ⟸259—INSOLVENT CORPORATIONS—LIABILITY OF STOCKHOLDERS—ACTIONS—STATUTES.

An action begun under Rev. St. Ohio 1890, § 3260, as amended by Act March 22, 1894 (91 Ohio Laws, p. 88), for the enforcement of an assessment against stockholders, by service on the corporation which appeared, and pending when the section was amended by Act April 16, 1900 (94 Ohio Laws, p. 359), changing the system of enforcing the liability of stockholders, and applicable to pending actions, will be deemed to have been prosecuted under the amendment of 1900, especially where the record indicates that the court proceeded under the act of 1900.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1050, 1052–1067, 2272; Dec. Dig. ⟸259.]

4. CORPORATIONS ⟸261—LIABILITY OF STOCKHOLDERS—STATUTORY PROVISIONS.

Rev. St. Ohio 1890, § 3260, as amended by Act April 16, 1900 (94 Ohio Laws, p. 359), providing for the enforcement of liability of stockholders of insolvent corporations and for the ascertainment of the amount of liability and the enforcement thereof by the receiver of the insolvent corporation, seeks to declare and enforce assessments, and the first may be accomplished by the presence of the insolvent corporation alone, but the second can be accomplished only when the stockholder is present or has been served, and, where a stockholder is served or appears, the assessment as to him may not only be declared, but enforced in the same suit, but the failure to properly notify a stockholder in the suit renders it necessary to sue him in an ancillary suit brought by the receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016–1023, 1068–1075, 2268–2271; Dec. Dig. ⟸261.]

5. CORPORATIONS ⟸264—COURTS ⟸368—STATUTES—APPLICABILITY.

Act Ohio April 29, 1902 (95 Ohio Laws, p. 312), providing that an action to enforce an assessment against stockholders can only be brought with-

in 18 months after the debt or obligation shall become enforceable against them, is a statute of limitations which is pleadable by stockholders in New York by virtue of Code Civ. Proc. § 390, but the construction placed on the act by the highest court of Ohio controls.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1084–1098, 2274; Dec. Dig. ⊂⊃264; Courts, Cent. Dig. § 951; Dec. Dig. ⊂⊃368.]

6. LIMITATION OF ACTIONS ⊂⊃2—INSOLVENT CORPORATIONS—LIABILITY OF STOCKHOLDERS—ENFORCEMENT.

Under Gen. Code Ohio, §§ 8686, 8687, declaring that stockholders of a corporation who are holders of stock at a time when its debts and liabilities are enforceable against them shall be liable equally and ratably in addition to their stock in an amount equal thereto to the creditors of the corporation, and section 8688, declaring that an action on the liability of stockholders under the two preceding sections can only be brought within 18 months after the debt or obligations "shall become enforceable against stockholders," and section 8695, providing that where a receiver is appointed the court may authorize him to prosecute such actions in his own name as receiver in other jurisdictions as become necessary to collect the amount due from stockholders, when construed together and in the light of the history of the legislation, limitations to suits by receivers in other jurisdictions are governed by the statutes of the states in which brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 4–8; Dec. Dig. ⊂⊃2.]

7. EXECUTORS AND ADMINISTRATORS ⊂⊃437—CLAIMS—LIABILITY AS STOCKHOLDER—PRESENTATION.

A lower court in Ohio made an assessment against stockholders of an insolvent corporation which was set aside in the Court of Appeals, which made a new assessment in double the amount, and the last assessment was set aside by the Supreme Court of Ohio and the original assessment reinstated. After the assessment by the lower court, but pending appeal, a demand for payment of the assessment was made against the estate of a deceased stockholder, which demand was rejected. *Held*, that the rejection did not start the running of limitations prescribed by Code Civ. Proc. N. Y., § 1822, declaring that suit on a claim against the estate of a decedent which has been disputed or rejected by his representative must be brought within six months from date of the dispute or rejection, since the rejection contemplated is one made at a time when suit could have been instituted immediately after it occurred by the claimant, and there could be no suit to collect the assessment until made final by the Supreme Court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1729–1761, 1764; Dec. Dig. ⊂⊃437.]

8. CORPORATIONS ⊂⊃244—INSOLVENT CORPORATIONS—LIABILITY OF STOCKHOLDERS—DEBTS AND LIABILITIES ENFORCEABLE.

Under Rev. St. Ohio 1890, § 3258, as amended by Act April 29, 1902 (95 Ohio Laws, p. 312), and by Act April 24, 1904 (97 Ohio Laws, p. 390), providing that no stockholder who transfers his stock in good faith, if made on the books of the company or on the back of the certificate of stock properly witnessed or tendered for transfer on the books of the company, prior to the time when debts and liabilities are enforceable against stockholders, shall be held to pay any portion thereof, the date of the insolvency of a corporation, and not the date of final assessment against stockholders, determines when the debts and obligations of the corporation become enforceable against stockholders, and any subsequent transfer by a stockholder of his stock does not relieve him from liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960–977; Dec. Dig. ⊂⊃244.]

9. CORPORATIONS ⊂=215—INSOLVENT CORPORATIONS—LIABILITY OF STOCKHOLDERS.

The additional liability imposed on stockholders by the Constitution and laws of Ohio is a secondary and contingent liability, and becomes a primary one and enforceable against the stockholders on the insolvency of the corporation having assets including unpaid stock subscriptions insufficient to satisfy its debts, and the first step for the enforcement of the additional liability is the proceeding to fix an assessment, and, until an assessment, no enforcement of liability is possible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826–828, 845–848, 852, 854; Dec. Dig. ⊂=215.]

10. CORPORATIONS ⊂=261—INSOLVENT CORPORATIONS—LIABILITY OF STOCKHOLDERS—ENFORCEMENT.

Nonjurisdictional irregularities in the levy of assessments against stockholders of an insolvent corporation by the courts of a sister state are not available to impair their validity in an action therefor by a receiver of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016–1023, 1068–1075, 2268–2271; Dec. Dig. ⊂=261.]

At Law. Actions by Ellsworth C. Irvine, as receiver of the Columbus, Hocking Valley & Sandusky Railroad Company, against Fisher A. Baker and another, and against John W. Simpson and another. Motions of plaintiff and of defendants to direct verdict. Verdict directed for plaintiff in each case.

Baldwin & Hutchins and McLaughlin, Russell, Coe & Sprague, all of New York City (R. W. Sprague, Jr., of New York City, of counsel), for plaintiff.

John S. Montgomery, of New York City, for defendants Baker and others.

Simpson, Thatcher & Bartlett, of New York City (Thomas M. Day, of New York City, of counsel), for defendants Simpson and others.

GRUBB, District Judge. These actions were submitted for decision together. They are both actions by a receiver, appointed by an Ohio court to recover assessments made by that court, in proceedings there pending, upon the double liability of the testators under the Ohio Constitution and statutes as stockholders in an insolvent corporation.

The right of the receiver to recover is assailed upon these grounds: (1) The capacity of the plaintiff to maintain the action in a foreign jurisdiction. (2) Defects in the notice given the testators, or their personal representatives, of the pendency of the parent suit in Ohio. (3) The bar of the Ohio statute of limitations of 18 months. (4) The bar of the New York statute of limitations of six months, from the date of rejection of the claim by the personal representatives—this ground applies only to the case of Irvine v. Simpson et al. (5) The transfer and indorsement of the stock alleged to have occurred before the debts and the liabilities became enforceable against stockholders—this also applies only to the case of Irvine v. Simpson et al.

[1] First. Conceding that a statutory receiver vested with title, as distinguished from a mere receiver in chancery, may maintain an ac-

tion for the recovery of property in a court of a jurisdiction other than that which appointed him, the defendants contend that the Ohio statute and the orders of the Ohio court, appointing the receiver and authorizing him to sue, are singly or together insufficient to vest title in the plaintiff or to authorize him to sue in New York.

The authority of a receiver, appointed by a Minnesota court under a statute of that state, to enforce a similar liability against nonresident stockholders in the states of their domicile, was upheld by the Supreme Court in the cases of Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, and Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. The language of the Ohio statute is not identical with that of the Minnesota statute, but it does empower receivers appointed by its courts to sue in other states to collect a stockholders' liability, assessed against nonresident stockholders by the Ohio court. The vesting of such authority in the receiver by the statute seems to be all that is required by the authorities. The right of this plaintiff, as receiver, to sue, has been sustained in the cases of Irvine v. Putnam (C. C.) 167 Fed. 174; Irvine v. Bankard (C. C.) 181 Fed. 206; Irvine v. Putnam (C. C.) 190 Fed. 321; Irvine v. Elliott (D. C.) 203 Fed. 82; and Blackburn v. Irvine, 205 Fed. 217, 123 C. C. A. 405. If there were doubt of the plaintiff's right to sue, it should be resolved in his favor by this court, in view of these numerous determinations of the federal courts. His authority to maintain the suit, under the power conferred upon him by the Ohio statute, without reference to the orders of the Ohio court, is reasonably clear, in view of the liberal construction in favor of an efficient remedy to enforce the statutory or constitutional liability, adopted by the Supreme Court in the two cases cited.

[2] Second. If the proceeding, which resulted in the assessment against the defendants, or their testators, was one of which they were required to be notified, and which could only proceed, as to them, while they were present in court, it is clear that the defendants in neither case were properly notified or personally present in court when the assessment was made.

It is settled that the personal notification and presence of the stockholder is not necessary, so far as the conclusiveness of the assessment is concerned, and apart from defenses personal to the stockholder, under statutes providing methods for the enforcement of such liability, unless the peculiar character of the statute requires it. Ordinarily the corporation represents the stockholders for such purposes, and the presence of the corporation is the presence of the stockholder for the purpose of the making of the assessment. Spargo v. Converse, 191 Fed. 823, 112 C. C. A. 337; Hamilton v. Simon (C. C.) 178 Fed. 130; Goss v. Carter, 156 Fed. 746, 84 C. C. A. 402; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292; and Selig v. Hamilton, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518.

[3] The defendants contend that the Ohio statute, under which the parent suit in Ohio was instituted, was not of a character to admit of

a representation of stockholders by the corporation, and did not even require the corporation to be made a party defendant to the suit to declare and enforce the stockholders' liability. When the parent suit was commenced in 1899 in Ohio, section 3260, as amended March 22, 1894 (91 Ohio Laws, p. 88), of the Ohio Revised Statutes, regulated the procedure for the enforcement of stockholders' liability under the Ohio laws. It seems to have contemplated an action between the creditors of the corporation, on the one side, and all of its stockholders as personal defendants, upon the other, with no requirement that the corporation be a defendant in the suit. The system then in force seems to have excluded the idea of representation by the corporation of its stockholders, and to have contemplated the personal presence of such stockholders as were sought to be held liable. Nonresident stockholders could not, then, be reached either for the purposes of assessment or the enforcement thereof. If this statutory system had remained in force until the decree in the parent cause, it would seem doubtful whether the assessment therein decreed would have bound stockholders who were not personally served or who did not voluntarily appear in the parent suit.

The system was changed on April 16, 1900, by the adoption in Ohio of an act to amend section 3260. Section 3260, as then amended, provided a system of assessing the stockholders' liability of Ohio corporations similar to that adopted in Minnesota in 1899, and which was held in the case of Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, and the cases which followed it, to sustain an assessment against stockholders not present or served, upon the idea of their representation by the corporation of which they were members. It is clear, if the parent case in Ohio came under the amended system at the time the decree was rendered in it, that the defendants would be concluded by the assessment, though they had no notice of the proceeding and did not voluntarily appear in the parent case. They contend that, as the original proceeding was instituted under the old system and progressed to a final hearing without amendment to the pleadings bringing it expressly under the new system, it must be construed to have been conducted to a conclusion under the old system, and not to have been binding on the defendants, who were not served and did not appear.

It is to be observed that the third and concluding section of the act of April 16, 1900, provided that the act should apply to pending actions. The parent suit was then pending in the Franklin county court of common pleas. The Columbus, Sandusky & Hocking Railroad Company was served and had appeared in each of the proceedings which, by consolidation, formed the parent suit, and was a party defendant to the consolidated suit. It is true that it took no part in any of those suits, except to object to the service; but its failure to act was its own default, and it was charged with what was done within the issues, as were those represented by it. The issues from the beginning of the suit included the determination of the amount of the necessary assessment against stockholders.

In the case of Converse v. Hamilton, 224 U. S. 243, 256, 32 Sup.

Ct. 415, 418 (56 L. Ed. 749, Ann. Cas. 1913D, 1292), the Supreme Court said:

"While the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder and as to him is amply sustained by the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts."

Prior to the amendatory act of April 16, 1900 (94 Ohio Laws, p. 359), it may be that the corporation did not and could not have represented its stockholders in the matter of the assessment of their liability. After the enactment of the amendatory act, it could, and legally did, by its mere presence in this suit, so represent them, since that act applied to pending actions. Nor would a change in the pleadings seem to be necessary to that end. The changed status of the corporation in the suit, after the amendment of section 3260, was not a matter to be accomplished by pleading, but was accomplished by the statute itself. By virtue of the terms of that act and its applicability to pending actions, the corporation, then—if it did not before—began to represent its stockholders for the purpose of the assessment.

That the Ohio court proceeded under the amended act, after its passage, is made clear by the fact that it appointed a receiver and sought to bring into the case as parties defendant, by publication, nonresident stockholders, for the doing of which there was no authority under the original section 3260. It is true that the corporation, though proceeded against from the start, was neither before nor after the amended statute proceeded against alone. The proceeding was against it and its stockholders, both resident and nonresident. It had a double aspect and a dual purpose. So far as its purpose was to declare the assessment, the presence of the corporation alone sufficed. So far as its purpose was to enforce the assessment, when declared, against each individual stockholder, whether resident or nonresident, it was necessary that the stockholders not only be made codefendants with the corporation, but that they be personally served with process or voluntarily appear in the case. It was possible that the nonresident stockholders might voluntarily appear in response to the published notice. In view of the second object to be attained by the parent suit, it cannot be said that the method of procedure adopted against the individual stockholders in the parent suit indicated that the new system, contained in the act of April 16, 1900, and applicable to the pending suit, was not adopted by the Ohio court in its conduct of the cause. To make the remedy effectual, the record will be construed as having followed the new remedy, if it can be reasonably done.

In the case of Bernheimer v. Converse, 206 U. S. 516, 531, 27 Sup. Ct. 755, 760 (51 L. Ed. 1163) the Supreme Court said of the Minnesota act of similar nature:

"It is obviously an act intended to make effectual the liability which is incurred by stockholders under the Constitution of the state, and it ought not to be rendered nugatory unless substantial objection exists against its enforcement."

The record in the parent suit has been construed by federal courts as having been conducted under the amendatory act, which made the personal service or voluntary appearance of the stockholder unnecessary and made the corporation their representative as far as the assessment was concerned. This settled construction should be now departed from, in this court, only for good reason. The cases of Irvine v. Putnam (C. C.) 167 Fed. 174, Irvine v. Putnam (C. C.) 190 Fed. 321, and Irvine v. Elliott (D. C.) 203 Fed. 82, all expressly held that the corporation represented its stockholders in the parent suit in Ohio and that personal service or voluntary appearance was for that reason unnecessary. The cases of Irvine v. Bankard (C. C.) 181 Fed. 206, Irvine v. Church & Co. (Eastern District of New York) 227 Fed. 252, and Blackburn v. Irvine, 205 Fed. 217, 123 C. C. A. 405, by sustaining the assessment, impliedly so held. The overruling of the demurrer in the case at bar also is inconsistent with defendants' contention in this respect.

[4] The defendants distinguish the Ohio statute, which directs the giving of notice to nonresident stockholders, from the Minnesota act, which it is claimed does not require the giving of notice, and so seek to distinguish the cases decided by the Supreme Court under the Minnesota act from those arising under the Ohio act. The distinction sought to be drawn fails for these reasons. The Minnesota act does direct the giving of such notice of the hearing as the court in its discretion may designate. The Minnesota court in the Minnesota cases did direct the giving of notice of the hearing to stockholders, who lived out of the state. The direction of the Ohio statute was therefore no more imperative than that of the Minnesota statute, re-enforced by the decree of the Minnesota court directing notice to be given. The Supreme Court sustained the assessment of the Minnesota court because it held that the stockholders were represented by the corporation and that the matter of notice, whether required or not, was therefore of no consequence to the validity of the assessment. It is quite clear, if the Ohio statute suffices to make the corporation the representative of its stockholders for the purpose of making the assessment, then all stockholders are in court for that purpose, without notice, service, or appearance, and the want of proper notice to nonresidents cannot be material upon the validity of the assessment decree. The Ohio statute has a dual purpose. It seeks (1) to declare and (2) to enforce the assessment. The first purpose may be amply accomplished in the absence of the stockholder, if the corporation be present. The second purpose can be accomplished only when the stockholder is present or has been served. The Ohio statute requires personal service on resident stockholders and notice by publication to nonresident stockholders for the purpose of accomplishing the second—not the first—of the two objects. If a stockholder is served or appears, the assessment, as to him, may not only be declared, but enforced, in the parent suit. The failure to serve or notify a stockholder does not affect the right of the court to declare the assessment, but only its right to proceed to collect the assessment when declared in the parent suit against such stockholder. The failure to personally notify the de-

fendants in the parent suit made it necessary, in order to collect the assessment, to sue them in the ancillary suits brought by the receiver in New York, but did not affect the validity of the assessment decree, even as to them. Inasmuch as no notice was essential to the validity of the assessment in the parent suit, the defendant corporation representing its stockholders in that behalf, and, its presence sufficing to the court's jurisdiction to assess its stockholders, no irregularity or insufficiency in the notice actually given in either of the cases submitted for decision can avail to avoid the judgment declaring the assessment.

[5] Third. The 18 months' statute of limitations of Ohio, in connection with section 390a of the Civil Code of New York, is pleaded in the suits by the receiver to enforce the assessment in New York. The defendants rely upon the decision of the Court of Appeals in New York in the case of Shipman v. Treadwell, 208 N. Y. 404, 102 N. E. 634. The plaintiff relies upon the case of Blackburn v. Irvine, 205 Fed. 217, 123 C. C. A. 405, decided by the Circuit Court of Appeals for the Third Circuit, and the unreported case of Irvine v. McCoy, decided by the common pleas court of Franklin county, Ohio, affirmed by the Ohio Court of Appeals, and intermediate appellate court, from whose judgment of affirmance a writ of certiorari was denied by the Supreme Court of Ohio.

The question for decision is whether the Ohio act of April 29, 1902 (95 Ohio Laws, p. 312), which provides that "an action upon the liability of stockholders can only be brought within eighteen months after the debt or obligation shall become enforceable against stockholders," applies to an action brought by a receiver to enforce an assessment against an individual nonresident stockholder, or only to the parent suit in which the assessment is declared. If it were held to apply to the initial suit, generally, it could not apply to the parent suit in this case, since the Ohio act was not passed till after the parent suit was instituted, and no time would have been allowed for the bringing of the suit within the 18 months; that period having already elapsed before the statute was enacted.

It seems to be established that the statute of Ohio is a statute of limitations which is pleadable in New York by virtue of the cited section of the New York Civil Code. Being an Ohio statute, the benefit of which merely is allowed persons sued in New York by the law of New York, it would be adopted into New York with the construction placed upon it in Ohio by its court of last resort, if it there had a settled construction. The Supreme Court of Ohio has passed upon the question only by denying the application for a writ of certiorari to the Court of Appeals from a judgment of that court, affirming a judgment of the common pleas court of Ohio, holding that the 18 months' statute did not apply to an ancillary suit by a receiver. The cases of Shipman v. Treadwell, supra, and Blackburn v. Irvine, supra, were cited in the Court of Appeals opinion on affirmance, and the conflict between these cases was relied upon in applying for the certiorari. The New York case was decided before the Ohio case, and the New York court did not have that case before it when it decided the case of Shipman v. Treadwell, supra. As a matter of authority, in view

of the fact that the statute is a local statute of Ohio, it seems that the Ohio case and the case of Blackburn v. Irvine, supra, expressing the view of a federal appellate court, should be followed, rather than the New York case.

[6] The act itself provides (section 3258a) that:

"An action upon the liability of stockholders can only be brought within eighteen months after the debt or obligation shall become enforceable against stockholders."

If the words "shall become enforceable against stockholders" refer to the time of the declaration of an assessment, the limitation could, of course, apply only to the action by a receiver to enforce the assessment. Section 3258, as amended April 29, 1902, provides that:

"The stockholders of a corporation who are the holders of its shares at a time when its debts or liabilities are enforceable against them, shall be deemed and held liable," etc.

The same words "enforceable against them" are used in section 3258 in declaring the liability and in section 3258a in prescribing the limitation, and in the same act. They were doubtless used in the same sense and are to be so construed. In section 3258, declaring the stockholders' liability, these words must refer to the time when the corporation becomes insolvent and unable to satisfy its creditors except by resort to the additional liability of its stockholders. If the words, as used in section 3258, be construed to refer to the date of the assessment, the statute would be useless, since stockholders would transfer their shares before the declaration of the assessment by the court and so escape liability on them. If the words are not to be given this significance in section 3258, they should not be given a like meaning when used in section 3258a. If they there mean the date of declared corporate insolvency, rather than the date of actual assessment, the limitation must be held to apply only to the parent suit, since the ancillary suit cannot be brought until after the final assessment, and the interval between declared insolvency and the date of the final assessment would itself likely exceed a period of 18 months, though the parent suit were properly brought and diligently prosecuted.

The amendatory act of April 29, 1902, relates only to the declaration of the stockholders' liability, and not to any method for its enforcement. It contains no provision for the appointment of a receiver or authorization of suits by a receiver in foreign or domestic jurisdictions. The Legislature's attention was then fixed only upon the general liability of the stockholder, and the limitation should be held to apply to the general liability, rather than to a specific remedy against stockholders not served or appearing in the parent suit. The subject-matter of the amendatory act did not relate to ancillary suits by receivers at all.

Section 3258 was re-enacted and amended on April 25, 1904 (97 Ohio Laws, p. 390), together with section 3258a. In the latter the words "under the last preceding section" were inserted, referring to section 3258, which provides only for the general liability of all stockholders, as it did originally. Section 3258a, was codified in the General Code of

Ohio of 1910 as section 8688. It contained the words "under the two next preceding sections." Section 3258 had been divided into two sections, numbered 8686 and 8687. The repetition of this language indicated the purpose of the Legislature to apply the limitation prescribed by section 8688 to the liability declared by sections 8686 and 8687, as before. Section 8695, following section 8688, is the first section of the revision that refers to the authority of a receiver to sue to collect the amount found due from a stockholder. The arrangement of the sections and the comparative positions of sections 8686 and 8687 with 8688, on the one hand, and with section 8695, on the other, show that the limitation contained in section 8688 related to the general liability as declared in sections 8686 and 8687, rather than to the specific and partial remedy provided by section 8695. The Legislature was content to leave the matter of the period of limitation in suits brought by receivers in other jurisdictions to the local applicable statutes of the states in which the suits were brought. In re-enacting the double liability as to past transactions, which had been abolished as to future transactions by the constitutional amendment of November, 1903, the Legislature, following the policy of the state indicated by the constitutional amendment, not being able to affect the right, placed severe restrictions upon the remedy as to the time within which it was to be exercised.

[7] Fourth. Reliance is placed by the defendants in the case of Irvine v. Simpson et al., upon section 1822, New York Code of Civil Procedure, which provides that suit upon a claim against the estate of a decedent, which has been disputed or rejected by an executor or administrator, must be brought within six months from the date of such dispute or rejection. This defense is based on correspondence between the receiver and the firm of Simpson, Thatcher & Bartlett, attached to the stipulation. This correspondence occurred in the year 1908, after the assessment had been declared in the Franklin common pleas court and set aside in the circuit court and a new assessment in double the amount then declared. This last assessment was set aside by the Supreme Court of Ohio and the original assessment declared by the common pleas court reinstated on May 11, 1909. The claim presented to the executors and said to have been rejected was based on the 50 per cent. assessment of the circuit court of Franklin county.

It may admit of doubt whether the correspondence shows a rejection of the claim presented by the receiver. There is also a question raised as to whether the 50 per cent. assessment, and the 25 per cent. assessment constituted one and the same claim, so that the rejection of the former would be the rejection of the latter. At the time of the presentation in 1908 and of the alleged rejection, there was no final assessment in any amount existent. The case was pending on appeal to the Supreme Court, which afterwards set aside the 50 per cent. assessment made by the circuit court, and confirmed the 25 per cent. assessment of the common pleas court. This was in May, 1909, and prior to this there was no final assessment. It is conceded that no suit to collect the assessment could have been instituted until the as-

sessment was made final by the Supreme Court of Ohio, which was May 11, 1909. Any presentation of the claim until that time would have been premature, and no rejection by the executors before that time could have set the six months' statute of limitations in operation. No suit could have been instituted prior to May 11, 1909, on the assessment. The statute of limitations would not begin to run at a time when no suit could have been brought to enforce the assessment. The rejection contemplated by section 1822, New York Code of Civil Procedure, is one made at a time when suit could have been instituted, immediately after it occurred, by the claimant. Otherwise, the six months' period after the claim was rejected might elapse before the claimant was in a legal position to sue on the assessment. The commencement of the running of the statute cannot antedate the right to sue. A rejection of a kind to put the statute in operation must be one that would authorize the immediate bringing of a suit. Such a rejection in this case could not have occurred earlier than May 11, 1909, when a final assessment on which suit could be brought first came into existence. The only rejection relied upon, however, occurred prior to that date, and was, for that reason, insufficient to put the six months' statute in operation.

[8] Fifth. The defendants Simpson and Thatcher also rely on a transfer of the stock owned by their testator made by them on February 21, 1905, to R. M. Smythe, and the acts of the General Assembly of Ohio amending section 3258 of the Revised Statutes of Ohio, enacted April 29, 1902, and April 24, 1904, respectively. These acts contain this provision:

"And no stockholder, who shall transfer his stock in good faith, and such transfer is made on the books of the company or on the back of the certificate of stock, properly witnessed or tendered for transfer on the books of the company, prior to the time when such debts and liabilities are so enforceable, shall be held to pay any portion thereof."

The question in this case is whether the debts and liabilities had become enforceable as against stockholders before February 21, 1905, the date of the transfer by the executors of Moore of the stock owned by their testator. If the debts of the corporation first became enforceable against the stockholders when the assessment was declared, either in the lower court or in the Supreme Court, the transfer was in time to bring the case within the exemption of the statute. If, however, the debts and liabilities of the corporation became enforceable against stockholders upon the insolvency of the corporation, in such sense as that resort to the stockholders' additional liability was necessary to satisfy corporate debts, then the transfer occurred after the debts and liabilities of the corporation became enforceable against stockholders. Insolvency of the corporation in the sense necessary had occurred as early as June 2, 1897, when the foreclosure proceedings were instituted in the Ohio court and a receiver appointed in them. The question depends upon the meaning to be given the words "when such debts and liabilities are so enforceable," in the acts of 1902 and 1904, amending section 3258 of the Ohio Revised Statutes. These

words in the proviso evidently refer back to the same words where they first occur in the respective acts.

[9] The additional liability of stockholders, which was created by the Constitution and laws of Ohio, was a secondary and contingent liability. It became a primary one and enforceable against stockholders upon the insolvency of the corporation, having assets, including unpaid stock subscriptions, insufficient to satisfy its debts. The first step, looking to the enforcement of the additional liability of stockholders under the Ohio law, is the proceeding to fix the assessment. The fixing of the assessment is by its nature a step to enforce the liability. It is as essential to that end as are the subsequent proceedings to collect the assessment, when fixed. Until the amount of the liability of each stockholder is determined by the assessment, no enforcement of collection is possible. The parent suit in Ohio had two purposes: First, as to all stockholders, the determination of their liability and its amount by an assessment; and, second, as to stockholders personally served or voluntarily appearing, the collection of the amount due from them, as fixed by the assessment. Against stockholders not served or appearing, the second step for the enforcement of the liability could not be taken in the parent suit. The stockholder is not concluded as to certain personal defenses by a decree obtained in his absence and without service. As to such defenses he is not represented by the presence of the corporation in the proceeding. For this reason, the amended statutory system provided for a receiver and empowered the receiver to bring suit against stockholders, who were not served and had not appeared in the parent suit, in the jurisdiction of their respective domiciles where service could be obtained. These ancillary suits constituted the second step to enforce the liability in case of stockholders not so reached in the parent suit.

While it is true that actual collection of the liability in the parent suit could not be had, nor suits for that purpose be instituted by the receiver, until after a final assessment was had, and that the statute of limitations as against such independent suits would not begin to run until the suit could be legally commenced, which would be only after the date the assessment was made final, yet it does not follow that the liability against the stockholders first became enforceable at the date of the final assessment. If the fixing of the assessment is but a step towards the enforcement of the liability, then the liability must have become enforceable before the assessment was fixed. If it became enforceable before the final assessment, then it must have become enforceable at the time the debts and liabilities ceased to be secondary obligations of the stockholders and became their primary obligations, and this was the date of the insolvency of the corporation. So long as the liability continued a contingent one, it was not an enforceable one. When it ceased to be contingent and became fixed and absolute against stockholders, it immediately became enforceable against them, subject to future liquidation as to amount by assessment. The necessity for liquidating the amount before it could be collected from the stockholder did not postpone the time when the liability became enforceable, but only made necessary a preliminary

step before its collection was possible; and this preliminary step was itself taken for the purpose of enforcing the liability.

The words "after the debt or obligation (or liability) shall become enforceable against stockholders" are used several times in the acts of 1902 and 1904, and should be construed the same way in each instance. The more reasonable construction in each instance would seem to be to give to these words the meaning here attributed to them, i. e., the time when the debts and obligations of the corporation became the primary and fixed liabilities of the stockholders, rather than the time of the fixing of the amount of such liability of each stockholder. Adopting this construction, the date of insolvency, and not the date of final assessment, would determine when the debts and obligations of the corporation became enforceable against the stockholders of the corporation. At the date of the declared and confessed insolvency of the corporation, June 2, 1897, no transfer of the shares owned by defendants' testator had been made by the testator or by his personal representatives.

[10] Other criticisms of the assessment are relied upon in the memorandum of defendants, but they constitute only nonjurisdictional irregularities, which cannot avail to impair the validity of the assessment upon this collateral attack, and need not be further considered. Irvine v. Elliott (D. C.) 203 Fed. 82; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

The plaintiff is entitled to a judgment in each case for the agreed amount, and a verdict therefor is directed.

UNITED STATES v. SIXTY BARRELS OF WINE.

(District Court, W. D. Missouri. September 16, 1915.)

No. 4146.

1. FOOD ⊂=24—FOOD AND DRUGS ACT—MISBRANDING WINE—BURDEN OF PROOF.

In the government's libel, charging misbranding of wine under Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1913, §§ 8717–8728), it must establish by a fair preponderance of the evidence that the content of the libeled barrels was not "Ohio Claret Wine," as labeled, within the law and the definition of the Food Department, accepted by the claimant, and also that the contents of the barrels was a pomace wine, as charged, outright, or that a pomace wine was substituted in whole or in part for "Ohio Claret Wine."

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. ⊂=24.]

2. FOOD ⊂=15—FOOD AND DRUGS ACT—"POMACE WINE."

A "pomace wine," under the Food and Drugs Act, within Ohio and Missouri, is any product made by the addition of water and sugar to the pomace of grapes from which the juice has been partially expressed, and by fermenting the mixture until a fermented beverage is produced.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⊂=15.]

3. EVIDENCE ⊂=588—CONTRADICTION BY PHYSICAL FACTS.

Where the testimony of a witness is positively contradicted by the physical facts, neither court nor jury can be allowed to credit it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. ⊂=588.]

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4. FOOD ⊂⊃24—MISBRANDING—SUFFICIENCY OF EVIDENCE.
In the government's libel against 60 barrels of wine, charging misbranding, evidence *held* sufficient to show that they contained pomace wine, instead of claret, as labeled.
[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. ⊂⊃24.]

Libel for Misbranding and Adulteration under Food and Drugs Act.

Libel by the United States against Sixty Barrels of Wine, charging misbranding of wine, claimed by the Engles & Krudwig Wine Company. Decree for the United States.

Francis M. Wilson, U. S. Atty., of Kansas City, Mo.

Thomas E. Lannen, of Chicago, Ill., and Scarritt, Scarritt, Jones & Miller, of Kansas City, Mo., for claimant.

VAN VALKENBURGH, District Judge. Succinctly stated, the libel of the government charges that the wine in question was misbranded, in that the brands and labels on the barrels represented and stated the contents thereof to be "Ohio Claret Wine," when, in truth and in fact, it was not Ohio Claret Wine, but was a pomace wine, either in whole or in part, by substitution or otherwise. The defense is that the wine is Ohio Claret Wine, and denies that said barrels contained pomace wine, or that pomace wine has been substituted, in whole or in part, for claret wine in said barrels, or any of them. Claimant further asserts that said wine was made from red grapes, that a sugar solution was added, and also a small amount of artificial coloring, all in conformity to Food Inspection Decision 120 of the United States Department of Agriculture. Both the government and the claimant rely upon said Decision 120 in connection with the general provisions of the act in support of their variant contentions.

[1] A great amount of testimony, expert and otherwise, was taken at the hearing. The issue framed is, however, not a complex one. It is incumbent upon the government to establish, by a fair preponderance of the evidence, to the satisfaction of the court: First, that the content of the barrels libeled was not Ohio Claret Wine, within the purview of the law, and of the definition established by the Food Department, and accepted and invoked by the claimant; second, that the content of said barrels was a pomace wine outright, or that a pomace wine had been substituted, in whole or in part, for Ohio Claret Wine. It will be readily seen, therefore, that the determination of the controversy must depend upon what the court finds the article to be, and it is to the solution of this disputed question that the evidence is directed. It follows that it is necessary, first, to determine what a legitimate claret wine must be; second, what the content of these barrels has been shown to be. Great prolixity of statement on the part of witnesses, and the technical character of the expert chemical testimony introduced, renders impracticable an extended analysis, in this memorandum, of the evidence produced at the trial. It will be sufficient if the court adverts with sufficient exactness to the essentials disclosed which control the conclusions reached.

Decision No. 120, above referred to, permits the addition of a

sugar solution to grape must before fermentation. If the resulting product by complete fermentation of the must under proper cellar treatment does not contain less than 5 parts per 1,000 acid and not more than 13 per cent. of alcohol after complete fermentation, that product may be labeled "Ohio Wine," qualified by the name of the particular kind or type to which it belongs. Respecting pomace wine, said Decision No. 120 has this to say:

"The product made in Ohio and Missouri by the addition of water and sugar to the pomace of grapes from which the juice has been partially expressed, and by fermenting the mixture until a fermented beverage is produced, may be labeled as 'Ohio Pomace Wine' or 'Missouri Pomace Wine' as the case may be. If a sugar solution be added to such products for the purpose of sweetening after fermentation they should be characterized as 'Sweet Pomace Wines.' The addition to such products of any artificial coloring matter or sweetening or preservative other than sugar must be declared plainly on the label to render such products free from exception under the Food and Drugs Act."

We have, then, comprehended within the same decision the definition of Ohio Claret Wine and of Ohio Pomace Wine, which must govern this discussion, and to which, in fact, both parties appeal for justification. It will be noted that the permission to add artificial coloring matter is necessarily confined, by construction and context, to pomace wine. It appears, in view of the earlier clauses of the decision, to wit:

"It has been decided after a careful review that the previous announcement is correct, and that the term 'wine' without further characterization must be restricted to products made from untreated must without other addition or abstraction than that which may occur in the usual cellar treatment for clarifying and aging,"

—that, with the exception of the addition of the sugar solution thereafter expressly permitted, all other additions and abstractions are excluded. Claret wine made from the entire content of the grape is conceived to require no addition of artificial coloring. Pomace wine made from the impoverished content remaining after the partial expression of the juice requires such coloring to render it merchantable, and to such the use of harmless coloring matter is restricted. No offense is charged because of the addition of the coloring matter, if the product should be held to be a claret wine; but this state of the law is pertinent as bearing upon the identity of this product. It is a matter to be considered by the court whether parties familiar with the law would be presumed to add coloring matter to a product from which, by the terms of the act, it is, at least inferentially, excluded, and whether they would not, in like manner, be presumed to add coloring to a product for which it is expressly permitted.

[2] A pomace wine, then, under this act and within the designated territory, is any product made by the addition of water and sugar to the pomace of grapes from which the juice has theretofore been partially expressed and by fermenting the mixture until a fermented beverage is produced. Under this definition it is immaterial to what extent the juice has been partially expressed—whether to a limited degree or almost entirely. The resulting product, made in other respects,

as it is contended and admitted that this article was made, would be a pomace wine, and if such a situation is established by the evidence, then the charge in the libel is sustained, as also if a product thus falling within the definition of pomace wine has been added to or substituted for an unimpeachable Ohio Claret Wine.

[3, 4] It is necessary, as well as desirable, then, at the outset, to determine, if possible, some characteristic of Ohio Claret Wine which stamps and identifies it as the legitimate product, and the absence of which condemns the product as spurious in the eye of the law. The government, in this case, takes the positive ground that that essential characteristic is total tartaric acid, whether free or in the form of cream of tartar, or both; that in the finished wine, made in accordance with law, that constituent must not fall below a minimum fixed as .2 per mille. If it is found in appreciably less quantity than that, its absence indicates that a part of the total grape content has been withdrawn. In other words, that the product has been made from a pomace of grapes from which the juice containing the missing percentage of this characteristic acid has been partially expressed. This contention is, of course, combatted by the claimant.

The so-called wine under discussion was made by the claimant company at Sandusky, Ohio, from red grapes alleged to have been of Concord and Ives varieties in about equal proportions. These grapes were said to be not quite up to the standard, in that they were a little light in color, with a few berries, on some of the bunches, evidencing a slight effect of hail. They were, however, of fair quality and were up to the standard in that particular district for that year. They were delivered at the winery in the early part of October, 1912, and were treated and are alleged to have been made into wine that fall. About one year thereafter, to wit, October 13, 1913, claimant shipped 60 barrels of this product to Antonio Basile & Co., Italian wine merchants, located in the north part of Kansas City, Mo. It was sold for 32 cents per gallon, being 5 or 5½ cents less than the average price of Ohio Claret Wine at that time, and 4 cents more than the average price of pomace wine. This shipment was received in Kansas City 10 days thereafter, and, before storage by the purchaser, a food and drug inspector drew from one of the barrels four full quart bottles. These bottles were securely corked and the seal of the Bureau of Chemistry placed thereon. An analysis was made of two parts of this sample by Mr. Engel, a chemist of the Bureau of Chemistry, on the 23d day of November, 1913. This analysis resulted, December 2, 1913, in the seizure upon which this libel is based. This chemist, Engel, was not at the trial, and after some debate between counsel his analysis was not introduced in evidence. However, on January 27, 1914, another chemist of the Department, named Hartman, analyzed one of the four bottles thus taken. He testifies that this bottle was full, well corked, and in good condition when his analysis was made. The samples taken had been carefully packed and forwarded by express to the Bureau of Chemistry of the United States Department of Agriculture at Washington. One of these bottles was, in like manner, delivered to the claimant company, and by it transmitted to its chemist, Robinson. Dr. Robinson also made his analysis thereof on April 2,

1914. He testifies that this bottle, when he received it, had leaked, and that, from the condition of the cork, air had been admitted. The bottle itself, when produced, bore evidences of this condition.

The final result of the testimony was that Dr. Hartman's analysis is, and is substantially conceded to be, correct. Dr. Robinson, on behalf of claimant, stated that he had no reason to criticize it; that such differences as existed between it and his own, aside from those due to the usual differences in computation by different analysts, would be naturally accounted for by what might be presumed to be the difference in condition of the bottles when received by the respective chemists. So that we may start with the presumption that the analysis made by Dr. Hartman, on behalf of the government, was substantially correct. This analysis showed that the product contained a total acidity of .649 and total tartaric acid of .05. It will be noted that the total tartaric acid was but one-fourth of the amount fixed by the government as the necessary minimum of a true wine product. The total acid agrees substantially with that testified by the claimant as having been shown at the winery by acidimeter test. The wine left Sandusky presumably properly prepared for transportation by experienced dealers. The railroad company presumably handled it in accordance with approved methods. These presumptions stand uncontradicted in the record. But ten days had elapsed between the date of this shipment and that on which the analysts' samples were taken. It may fairly be assumed that on the latter date it was in substantially the same condition as when it started; and the analysis, as respects the total acid content, confirms this presumption. Of that total acid content, but .05 was tartaric acid in any form. The government regards this as determinative of the controversy. The defense minimizes its importance.

All of the chemists finally agree, substantially, that tartaric acid is the characteristic acid of the grape. It is that which distinguishes it from other fruits. This fruit alone contains this type of acid in marked degree. It is the predominant and identifying acid of the grape. Dr. Alwood, on behalf of the government, states that tartaric acid in no less percentage than .2 must be found in any authentic Ohio Claret Wine. Dr. Robinson says that the presence of tartaric acid in any fixed amount is no test of purity. The experience and qualifications of Dr. Alwood are fully set forth in the record and will not be repeated here. It may be sufficient to say that he has been for many years attached to the Bureau of Chemistry; that he is an expert in viniculture of international reputation; that he has spent approximately seven years at the head of the government's experimental station for the express purpose, among other things, of determining the exact characteristics of authentic wines, particularly in the Sandusky, Ohio, district. This service had no commercial object in view. The purpose was to establish, by unimpeachable experimentation, the exact qualities and characteristics of true wines such as the Food and Drug Department has to deal with. He has made a vast number of experiments under conditions calculated to produce exact and practical results. From these he states with great positiveness that no true Ohio Claret Wine can possibly contain less than .2 of tartaric acid,

even when aged to the extent of three years and under exacting filtration; that in the wines he has made he has never found it so low as that, but usually about .3, and even as high as .5; that in no condition, here shown to exist, or which we are justified in assuming in connection with this discussion, can that tartaric acid disappear to any appreciable extent. The minimum of .2 is placed arbitrarily as a matter of extreme concession in the interest of justice, although he freely states that he does not believe it can fall that low in an authentic wine. In addition to his own manufacture of wines he has examined a large number of commercial samples and finds that the great majority corroborate his own experiments. It is true that in some a smaller percentage of tartaric acid is found, but they were, as has been said, from commercial samples not authenticated and subject to legitimate suspicion as to the methods employed in their manufacture.

Dr. Robinson, the chemist employed by claimant, has analyzed a great many samples of the wines of commerce bought in the usual manner upon the market and otherwise unauthenticated and of unknown history. From such experiments he draws the deduction that the presence of tartaric acid is too inconstant to serve as a dependable test of purity. He also cites text-books, compilations, etc., which do not affirmatively prescribe this test, and some of which do not disclose the presence of the percentage insisted upon by the government. Dr. Alwood, in his rebuttal testimony, has to a very large extent explained and reconciled this apparent discrepancy. It may be sufficient to observe that none of the text-writers submitted are shown to have been wine experts. Moreover, nearly all the data collected come from widely separated territories and involve conditions and methods which differ greatly from those to be found in the Ohio district. They also very greatly antedate the passage of the Food and Drug Act. They concern a period when the objects to be attained by that act were not prominently in mind and when the very practices may be presumed to exist which that law was enacted to remedy. We may likewise not ignore the possibility, if not the probability, that practices still exist, as exemplified in commercial products, that are in conflict with the provisions of the Food and Drug Act. Experiments made from such products can in no sense compare with those made by Dr. Alwood, with the sole object of establishing dependable scientific standards.

As has been said, Mr. Krudwig, for the defense, testified that the grapes used were not quite up to the standard, in that they were a little light in color, with a few berries on some of the bunches evidencing a slight effect of hail. They were, however, stated to be of fair quality, and were up to the standard for that particular district for that year. This being so, their inferiority, if they were appreciably inferior, could not account for the low tartaric acid content, and it conclusively appears from the testimony that grapes a little underripe carry even a higher percentage of that acid. It must be remembered, also, that this wine was but a year old, and had not been subjected to the severer processes of filtration applied by Dr. Alwood in his tests, which were made with wine at least three years old. A higher percentage of the characteristic fruit acid should be found in the younger wine.

Dr. Robinson, on behalf of claimant, having stated it to be his opinion that tartaric acid in claret wine varied so greatly in amount that it should be disregarded as a test of purity, proceeded to detail other chemical properties by which the character of wine could be determined. The following questions and answers were propounded and returned:

"The Court: Doctor, in view of the matters which you have eliminated as proving nothing respecting the contents of the product and its relation to whether it was or was not a fruit juice, what have you left there in chemical analysis which stamps the product as the pure product of the grape? A. Well, the total solids, the non-sugar solids, the ash, and the character of the ash, the natural color, flavor, and aroma.

"The Court: Laying aside the color, the aroma, and that sort of thing, might not those other abstract properties which you have referred to be produced from other than grape or fruit products? A. Well, that is possible to some extent.

"By Counsel: Do you have any reason to question the accuracy of the government chemists' analysis of this wine? A. No, sir; not in the least. Q. Have you ever found a single instance in which said grape juice did not contain tartaric acid? A. Grape juice; as I said before, I never found a single instance in which tartaric acid was entirely out of grape juice."

If we accept the contention of the claimant in this regard, these anomalies are presented: Tartaric acid is the characteristic acid of the grape; it is the predominant acid, distinguishing the grape from other fruits. Nevertheless, we are told that it is not necessarily found in any marked degree in a grape wine product. We are left, in the matter of chemical analysis, to other abstract properties which may be found as well in other than grape or fruit products. In other words, we may and must disregard the characteristic, distinctive, and predominant ingredient—the very essence, as it were—of the grape. This is to say that we are left without the most obvious and convincing means of identifying a true claret wine. I cannot accept such a paradox.

Other matters were dwelt upon in the testimony; notably, the pentosans and the alkalinity of the ash. I do not base my decision upon this branch of the testimony. It is sufficient to say, however, that its ultimate effect tends strongly to corroborate and confirm the conclusion based upon the crucial tartaric acid test. Wine experts were produced who applied the tests of taste and smell to the libeled product. The consensus of their testimony was that that product was not a claret wine. Claimant's explanation of this was that the wine had spoiled, that destructive acetic acid fermentation had set in to such extent as to render such tests untrustworthy. This, so far as the court can perceive, is the full effect of what has been spoken of as the defense of acetic acid. The testimony does not justify the inference that the wine differed materially, in acetic acid content, at the time the first samples were withdrawn, compared with its condition on the date of shipment. The cooperage of the barrels from which the later samples were taken was unimpaired. This subject, as dealt with by the chemists, requires no elaboration here. In view of all the circumstances, nothing in that defense accounts for the absence of the predominant acid of the grape as shown by the analyses.

In further defense claimant produced two witnesses, Mr. Krudwig, a member of the claimant company, and Mr. Grathwal, its foreman, who testified positively that the content of the barrels is Ohio Claret Wine, and not pomace wine, in whole or in part. With respect to these witnesses, the court, in all kindness, must point out that their claim of scrupulous personal attention to every detail affecting this wine from the time the grapes went into the press until the shipment, a year later, presents a remarkable departure from the ordinary and usual course of business, even at their own winery. Their recollection of each step taken, at a time so far removed from the actual occurrences, is not less remarkable. Their interest is, of course, conceded, and the fact that there were at that time in the winery at lease 25,000 gallons of pomace wine used, among other things, for blending purposes. To reject or in any sense to discredit the positive testimony of an individual witness is never a pleasant duty for the court; but it is the settled rule of the Court of Appeals of this Circuit, and, I believe, in practically all federal and state jurisdictions, that where the testimony of a witness is positively contradicted by the physical facts, neither the court nor a jury can be permitted to credit it. Missouri, Kansas & Texas Ry. Co. v. Collier, 157 Fed. 347, 88 C. C. A. 127.

If these barrels, otherwise shown to be intact, had been found to contain pork, no witness could be indulged in the statement that he personally packed them with beef. To my mind, the proof that the contents of these barrels is not an Ohio Claret Wine, as concededly defined, is not less positive and convincing. The testimony of Dr. Alwood and Dr. Hartman as to the contents of these barrels, chemically considered, is not opinion testimony. It is scientific testimony, based upon actual facts. By exhaustive experimentation they have determined, as other facts are determined, that grapes in this district produce a certain reasonably definite wine product. On the other hand, when they pronounced this to be a pomace wine, in the state of the record, they entered the realm of opinion testimony. The court accepts it as such, persuasive or conclusive in its effect as the circumstances may warrant. I am firmly of the opinion that the contents of these barrels, as shown by the analysis, are not and cannot be Ohio Claret Wine; that they are pomace wine, in whole or in part, as defined in Food Inspection Decision No. 120, seems clearly established, because, in no other manner than by partial expression of the juice and subsequent fermentation, as described in that decision, can the absence of the characteristic grape content be explained. If the product has been reduced in quality by the addition of pomace wine, the charge in the libel is equally sustained.

The government has established its case in every substantial particular by a fair preponderance of the testimony, which must be credited by the court, and a decree will be entered accordingly.

UNITED STATES v. EXPLORATION CO., Limited, et al.

(District Court, D. Colorado. August 9, 1915.)

No. 5663.

1. LIMITATION OF ACTIONS ⟸100—CANCELLATION OF PATENTS—FRAUD—STATUTE OF LIMITATION.

A foreign mining company, being unable, under the laws of the United States, to acquire coal lands which were part of the public domain, arranged that individuals should obtain title by entry to such lands, the accumulated holdings coming through various mesne conveyances into the hands of a trustee for the agent of the corporation in this country, there being no affirmative acts of concealment of the illegal practices; the patents to the land being issued in September, 1902, no facts having become known to the government that the patents to the lands had been obtained by false affidavits until 1909, when the discovery was made upon investigation of all public coal land patents. Suit was brought within two years thereafter for the cancellation of the patents. *Held*, that recovery by the United States was not barred by the six-year statute of limitations of Act March 2, 1896, c. 39, 29 Stat. 42 (Comp. St. 1913, §§ 4901–4903), providing that suit by the United States to vacate and annul any patent to lands hereafter issued shall only be brought within six years after date of issuance.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. ⟸100.]

2. MINES AND MINERALS ⟸45—CANCELLATION OF PATENTS—PARTY DEFENDANT.

Where the government sued a foreign corporation to annul patents to coal lands which it had fraudulently secured, the lands in controversy having been entered by individuals for the benefit of an old foreign corporation of the same name as defendant, defendant having been organized with the same officers as the old company to hold all assets of such company that were of doubtful value, it was wholly immaterial that the government's suit was against defendant, and not against the old company, for which the lands were held in trust by an individual, since no such expedient of separate corporate entities could avoid the consequences of fraud, while good faith on part of defendant required that such defense should have been called to the attention of plaintiff by defendant's pleading.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 131; Dec. Dig. ⟸45.]

In Equity. Suit by the United States against the Exploration Company, Limited, and another. Decree for the United States.

Frank Hall, Sp. Asst. Atty. Gen., for the United States.

Henry McAllister, Jr., and George E. Tralles, both of Denver, Colo., for defendants.

TRIEBER, District Judge. This is an action by the government to cancel and set aside patents issued for a number of tracts of land obtained under the coal land statutes, on the ground that they were obtained by fraud. The material allegations of the complaint are set out fully in the opinion of the United States Circuit Court of Appeals, when this case was in that court on appeal from a decree sustaining the demurrer to the complaint (203 Fed. 387, 121 C. C. A. 491), and need not be set out here. The answer of the defendants de-

nies all the material allegations, but no claim is made that the defendants are bona fide purchasers. There was very little conflict in the evidence, and the court finds the facts to be as follows:

The defendant, which will be referred to herein as the Exploration Company, is a corporation existing under the laws of Great Britain, authorized by its articles of incorporation to purchase, own, and operate mines, and purchase and own shares of stock in mines, in all parts of the world. That it was the owner of mines and mining lands in different parts of the world, and also of the shares of corporations engaged in mining in the United States and other countries. In 1901, and for several years thereafter, it had a representative in the United States by the name of Charles A. Molson, to whom it had executed a general power of attorney to represent it in all matters in the United States. This agent resided at Salt Lake City, Utah. The exploration Company, being desirous of acquiring coal lands in the state of Colorado, which were a part of the public domain of the United States, and being unable to do so, by reason of the fact that it was a foreign corporation, and besides, desiring more of these coal lands than it could, even if it were a domestic corporation, obtain under the laws of the United States, it conceived and carried into effect the following scheme for the purpose of acquiring them:

Mr. Molson employed one Henry Burrell to obtain the title to these lands. Burrell employed other agents, who were sent to residents of the state of Colorado, who, under the laws, could acquire public coal lands from the United States, and induced them to make entries of such lands as were pointed out to them by these agents of the Exploration Company, and which were supposed to contain valuable veins of coal. A large number of such entries were made on such lands, which were lying in the counties of Gunnison and Delta; the parties filing declaratory statements, as required by law. Many of these lands thus filed on were abandoned and no patents applied for, as, upon investigation, they were found not to contain sufficient coal to justify their purchase; but the filings on the lands in controversy were paid for and patents therefor secured. Henry Burrell was a witness in most, if not all, of these entries. The parties who made these entries were promised the sum of $25 for their services. All fees, as well as the purchase money, were to be paid by Burrell with money furnished by the Exploration Company. As soon as the final proofs were made and the money paid by the agent of the Exploration Company to the respective officers of the land offices within whose jurisdiction the lands were situated, the entry men and women executed deeds of conveyance for their respective tracts of land and delivered them to Henry Burrell. These deeds Henry Burrell caused to be made to Alexander Burrell, his brother. Some time later Alexander Burrell conveyed these lands to one Albert L. Smith, a banker in Helena, Mont., without any consideration except the promise of Smith to hold them in trust for and to convey them to any person designated by the agent of the Exploration Company. Charles A. Molson, the agent, having died, the Exploration Company appointed the defendant Philip L. Foster as its general agent in the United States, with a power of attorney to act generally in its behalf. Thereupon Albert L. Smith,

at the request of the defendant's agents, conveyed these lands to Mr. Foster without any other consideration. The legal title has ever since been in Mr. Foster, who holds it in secret trust for the Exploration Company.

The patents to these lands were issued by the government in September, 1902, but the fact that they were secured by false affidavits, and not for the benefit of the entry men and women, but for the sole benefit of the Exploration Company, and that the purchase money paid to the government was the Exploration Company's money, was kept secret, and did not become known to any of the officers of the government, nor did any facts become known to them which could arouse the suspicion of one exercising reasonable diligence that the patents to these lands had been obtained by false affidavits and for the benefit of the defendant Exploration Company, until 1909, more than six years after the patents had been issued, and then it only became known to the officers of the government by reason of the fact that a Utah corporation had acquired a great many of the public coal lands in the same manner as these lands were obtained, and that being discovered in 1909, the Secretary of the Interior directed in that year an examination of all coal entries made in the states of Utah and Colorado. When these investigations were made, the facts were for the first time discovered as hereinbefore recited. There was nothing in the records, or on file in the General Land Office of the United States or the Department of the Interior which could possibly have aroused a suspicion that these lands had been obtained for the benefit of the Exploration Company, until the reports of the special agents of the General Land Office were made the latter part of 1909. As soon as the facts were ascertained, the Secretary of the Interior transmitted them to the Department of Justice with the request to institute suits to set aside the patents, and this suit was filed on March 3, 1911, within several months less than two years after the discovery of the alleged fraudulent acts.

The court also finds that the defendants did not actively conceal the facts which constitute the frauds in this case, by enjoining silence on the entry men and patentees, or directing them or the agents who acted for it to refuse to give any information relating to these entries, if asked by the officers of the government, but were only guilty of a passive concealment. When the investigation was made by the special agents of the General Land Office, in 1909, in relation to these entries, the patentees as well as the company's agents stated the facts truthfully, but until that time the fact that the entries were all made for the benefit of the company, and that the legal title held by the defendant Foster was for the benefit of the Exploration Company, was concealed; nor were there any facts or circumstances within the knowledge of any official of the government, prior to the investigation in 1909, which could arouse even a bare suspicion that these entries were made in the manner and for the benefit of the Exploration Company, as hereinbefore set out.

Counsel for the defendants concede that the decision of the Circuit Court of Appeals in this case is conclusive, so far as this court is concerned, that Act March 2, 1896, c. 39, 29 Stat. 42, does not bar an action to set aside a patent for public lands, on the ground of

fraud, after the expiration of six years, if the parties who perpetrated the frauds and their beneficiaries have concealed it for the period of limitations, and the government has not been guilty of any want of diligence or care to discover it if the action is brought within proper time after the discovery of the fraud. But it is contended that as the only question before the court on that appeal was the sufficiency of the complaint, to which a demurrer had been sustained by the District Court (190 Fed. 405), the decision must be limited to the facts as they were alleged in the complaint; that the complaint charged in specific terms that the ignorance of the fraud had been caused by affirmative acts of concealment of the guilty parties, while at the hearing the evidence shows, and the court so finds, that the parties were not guilty of any active or affirmative concealment of their acts which are alleged to constitute the fraud for which the patent should be set aside, but were only guilty of passive concealment.

The authorities upon which counsel for both sides rely to sustain their respective contentions are quite numerous, many of them being decisions of the Circuit and District Courts of the United States, as well as of the highest courts of a number of states. In view of the fact that in the opinion of this court this question has been conclusively determined by numerous decisions of the Supreme Court of the United States, the court will confine itself to a review of the decisions of that court only.

The English courts had long ago uniformly held that where a person has been injured by the fraud of another, and the facts constituting such fraud do not come to the knowledge of the person injured until some time afterward, the statute of limitations will not commence to run until the discovery of those facts, or until, by reasonable diligence they might have been discovered, if relief is sought in a court of equity. Booth v. Lord Warrington, 4 Bro. Parliamentary Cases, 163; South Sea Co. v. Wymondsell, 3 P. Wms. 143; Hovenden v. Lord Annesley, 2 Schoales & Lefroy, 607, 631; Blennerhassett v. Day, 2 Ball & Beatty, 104, 129. This rule has been followed by the Supreme Court in numerous cases.

[1] A leading case on this subject, and which has never been questioned, is Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636. As stated by Mr. Justice Wood in delivering the unanimous opinion of the Supreme Court in Traer v. Clews, 115 U. S. 528, 538, 6 Sup. Ct. 155, 159, 29 L. Ed. 467:

"It has never been overruled, doubted, or modified by this court."

In that case the court reviews the English cases, as well as its former decisions, and the conclusion there reached was:

"In suits in equity, where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though

there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. Booth v. Lord Warrington, 4 Brown's Parliamentary Cases, 163; South Sea Co. v. Wymondsell, 3 Peere Williams, 143; Hovenden v. Lord Annesley, 2 Schoales & Lefroy, 634; Stearns v. Page, 7 How. 819, 12 L. Ed. 928; Moore v. Greene, 19 How. 69, 15 L. Ed. 533; Sherwood v. Sutton, 5 Mason, 143, Fed. Cas. No. 12,782; Snodgrass v. Bank of Decatur, 25 Ala. 161, 60 Am. Dec. 505. * * * And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds—to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

Other cases to the same effect are Rosenthal v. Walker, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; Traer v. Clews, supra; Kirby v. Lake Shore, etc., Railroad Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569, and quoted with approval by the Circuit Court of Appeals when this case was decided on the former appeal. But it is claimed on behalf of the counsel for the defendants that Bailey v. Glover, although not expressly overruled, has been modified by later decisions which in effect overrule the principle involved in the instant case. The cases upon which he relies are Kirby v. Lake Shore, etc., Railroad Co., supra; United States v. Winona Railroad Co., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789; Felix v. Patrick, 145 U. S. 317, 12 Sup. Ct. 862, 36 L. Ed. 719; Pearsall v. Smith, 149 U. S. 231, 13 Sup. Ct. 833, 37 L. Ed. 713; United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881; Kinder v. Scharff, 231 U. S. 517, 34 Sup. Ct. 164, 58 L. Ed. 343; Burke v. Southern Pacific Railroad Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527. A careful examination of these authorities shows that this contention of counsel cannot be sustained.

Kirby v. Lake Shore, etc., Railroad Co. is clearly distinguishable upon the facts from this case. That case follows with approval what was decided in Bailey v. Glover; but as the plaintiff did not institute his action until the expiration of nearly 7 years after the fraud was discovered, while the statute of limitations of the state of New York, which was pleaded in that case, limited such an action to 6 years, the court held that, as the full period of limitations had expired after the discovery of the fraud, the action was not brought in time.

In Felix v. Patrick, it was held that, 27 years having elapsed from the time the cause of action accrued, the plaintiff was guilty of such laches as would prevent a court of equity from granting any relief.

In Pearsall v. Smith, it was held that, the complainant failing to state how he came to be so long ignorant of his rights, the means, if any, used by the defendants fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matters alleged in the bill, the bar of the statute was not tolled.

United States v. Winona Railroad Co. was shown by the Circuit Court of Appeals in its opinion in this case not to be applicable to the

facts in this case, and the reasons therefor are so fully stated there that it is unnecessary to repeat them here.

The Chandler-Dunbar Water Power Company Case can have no application to the facts in this case, for there the question involved was not one of fraud, but the claim of the government was that the land in controversy had been reserved from sale. The court held that such an error of judgment on the part of the officers of the government was intended to be barred by the act of Congress herein relied on.

In Kinder v. Scharff, which was on error to the Supreme Court of Louisiana, it had been found by the state court that during the pendency of the original proceeding the trustee suspected the alleged fraud, made some inquiries, but dropped the matter, because he thought it was not worth while; that is, that it would not pay to go further. He voluntarily abstained from availing himself of the means put in his hand by the law itself for the ascertainment of a suspected fact by examining the bankrupt and otherwise, and upon this finding of fact, which, on error to the highest court of the state, is conclusive, the court held that the plaintiff could not recover, distinguishing the case upon these facts from Bailey v. Glover.

In Burke v. Southern Pacific Railroad Company the patent was collaterally attacked by an adverse claimant. The case came before the court on certificate, and the fourth question certified was:

"If the reservation of mineral lands as expressed in the patent is void, then is the patent, upon a collateral attack, a conclusive and official declaration that the land is agricultural and that all the requirements preliminary to the issuance of the patent have been complied with?"

And the answer was:

"It is conclusive upon collateral attack."

It is true there were other questions certified to the court, and answered; but the case was not an action on the part of the government to set aside the patent for fraud, but a collateral attack upon the validity of the patent by one claiming the land as a settler.

Counsel also rely upon Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807. That was an action at law, and necessitated the construction of a statute of limitations of the state of Indiana, which had adopted the equitable rule ingrafted upon the statute by the English courts of equity. While there are some expressions to be found in that opinion which apparently sustain the contention of counsel for defendants, an examination of the facts set out in the opinion shows that it in no wise affects the principle established in Bailey v. Glover, or any of the later cases hereinbefore cited. The court said:

"Upon looking carefully into the reply, we find it sets forth that the concealment touching the cause of action was effected by the defendant by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and enunciation, and the same absence of specific details in both. No point in the complaint is omitted in the reply, but no new light is thrown in which tends to show the relation of cause and effect, or, in other words, with the protracted concealment, which is admitted, necessarily followed from the facts and circumstances which are said to have produced it.

It will be observed also that there is no averment that, during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Kellar were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clue in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he had to unearth them. It was his duty to make the effort. It should be borne in mind that when the judgments were assigned to Kellar the country was in the throes of the Civil War. Lee had not surrendered. Gold and silver, in the currency of the time, were at a high premium. All real property was largely depreciated. The future was uncertain. The transaction which then seemed wise and fortunate, a year later might be deemed greatly otherwise. It is hard to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another. The discovery of the cause of action, if such it may be termed, is thus set forth: 'And the plaintiff further avers that he had no knowledge of the facts so concealed by the defendant until the year 1872, and a few weeks only before the bringing of this suit.' There is nothing further upon the subject."

The court in its opinion quotes from numerous cases, and among others from Martin v. Smith, 1 Dill. 85, where the court held:

"The fraud intended by the section, which shall arrest the running of the statute, must be one that is secret and concealed."

In Rosenthal v. Walker, supra, the court distinguished Wood v. Carpenter from Bailey v. Glover, saying:

"Neither case refers to the opinion of the court in Bailey v. Glover, or can be held to overrule or modify it. The case of Bailey v. Glover has been often cited by this court, but has never been doubted or qualified."

Upon the facts found by the court, this action is not barred by the six-year statute.

[2] There is one other question raised by counsel for the defendants which requires consideration: It developed during the testimony that there were two separate corporations, called the Exploration Company, Limited, both organized under the laws of Great Britain, and having their domicile in London. For convenience they will be referred to as the old and the new companies. The old company was organized in 1896, and was the company for whose benefit the lands in controversy were entered, and by whom the money for them was furnished. In March, 1904, that company, having considerable assets which were considered of doubtful value, its officers and shareholders decided to organize two new corporations, one the Exploration Company, Limited, and the other the Exploration Assets Company. All the valuable assets, including the lands in controversy, to which it had the equitable title, the legal title being held in trust for it, as hereinbefore stated, were transferred to the new Exploration Company, while the other assets were transferred to the Exploration Assets Company. The first assets constituted three-fifths, and the other assets two-fifths, of the property belonging to the old company. The shareholders of the old company surrendered their shares to two liquidators, who

were officers of the old company as well as the new company, and received in exchange therefor, for every five shares they held in the old company, three shares in the new Exploration Company and two shares in the Assets Company. The officers elected for the new company were the same as those for the old company. The agent of the old company in the United States continued for a few months, when he died, and thereupon, on September 23, 1904, the defendant Foster was appointed as the agent of the new company for the United States, and the lands in controversy conveyed to him by Mr. Smith, to hold them in trust for the Exploration Company. The old company has no assets whatever, and has had none since the organization of the two new corporations. It is now claimed by one of the counsel for the defendants that it is the old company which entered its appearance in this case, and not the new company, and, as Mr. Foster holds the lands in trust for the new company, no decree can be rendered against that company.

As the Exploration Company had no agent in the state of Colorado upon whom service could be had, and Mr. Foster also resided out of the district of Colorado, they were brought into court under the provisions of section 8 of the Judiciary Act of March 3, 1875, 18 Stat. 472, c. 137 (Comp. St. 1913, § 1039). They entered their appearance, filed their answers, and are making this defense. Nothing was said about the two companies, either in the pleading or in any other way, until this final hearing. In view of the fact that both of these companies had the same name, the same officers, and the lands in controversy are held in trust for one of them, it is wholly immaterial that a new company was formed. If it was intended by the parties to avoid the consequences of their fraud and escape any liabilities incurred by the old company, it was a clumsy effort, which cannot prevail in a court of equity. Linn & Lane Timber Co. v. United States, 236 U. S. 575, 35 Sup. Ct. 440, L. Ed. ——. If such a defense was to be set up, the least that good faith required would have been that the attention of the plaintiff should have been called to the fact by the pleadings.

Upon the whole case the court is of the opinion that the plaintiff is entitled to a decree setting aside the patents to all the lands set out in the complaint, and the defendants be taxed with the costs of this proceeding.

CASE v. ATLANTA & C. A. L. RY. CO. et al.

(District Court, W. D. South Carolina. August 5, 1915.)

No. 9.

1. REMOVAL OF CAUSES ⊂=27—CITIZENSHIP OF CORPORATIONS—CONSOLIDATION.

Where a railroad extended through three states, the section in each state being owned by a corporation of such state, and such corporations consolidated under charters from all three states, the consolidated corporation was a citizen of any one state for purposes of federal jurisdiction of a suit against the company by a citizen of such state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 64–68; Dec. Dig. ⊂=27.]

2. RAILROADS ⊂=259—JOINDER OF DEFENDANTS—JOINT TORT-FEASORS.

Where plaintiff's intestate was killed by the train of one railroad company operating on a track which it leased from another, plaintiff had the legal right to join lessor and lessee as defendants as joint tort-feasors.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 802–816; Dec. Dig. ⊂=259.]

At Law. Action by Mrs. G. E. Case, as administratrix, against the Atlanta & Charlotte Air Line Railway Company and the Southern Railway Company. On motion to remand to the state court. Cause remanded.

Gwynn & Hannon, of Spartanburg, S. C., for plaintiff.
Sanders & De Pass, of Spartanburg, S. C., for defendants.

JOHNSON, District Judge. This is a motion to remand the above cause to the state court. The following are the facts:

The plaintiff began her action in the court of common pleas for Spartanburg county against the defendant Atlanta & Charlotte Air Line Railway Company for damages on account of the death of her intestate. It was alleged in the complaint:

"That the defendant, Atlanta & Charlotte Air Line Railway Company, is now, and was at the time hereinafter set forth, a corporation duly created and organized under the laws of the state of South Carolina, and at said time, and now, owns a railroad from Charlotte, N. C., running through the county of Gaston, N. C., and the town of East Kings Mountain in said county, and through the county of Spartanburg, S. C., to Atlanta, Ga., together with the tracks, cars, locomotives, passenger stations or depot station yards and all appurtenances thereto belonging, and operated a steam railway as a common carrier between the aforesaid cities of Charlotte, N. C., through the aforesaid counties of Gaston, N. C., and Spartanburg, S. C., and the incorporated town of East Kings Mountain and the city of Spartanburg, to Atlanta, Ga.; but prior to the 17th day of August, 1914, the defendant had leased under the authority of law its said line of railway to the Southern Railway Company, another railway corporation, and the said Southern Railway Company was on the 17th day of August, 1914, as now, operating the said line of railway from the said city of Charlotte through the incorporated town of East Kings Mountain, N. C., and Spartanburg, S. C., to the said city of Atlanta, Ga., as a common carrier of passenger and freight thereupon for hire."

The defendant answered the complaint. Thereafter, by leave of the court, the plaintiff amended her complaint by making the Southern

Railway Company a party together with the Atlanta & Charlotte Air Line Railway Company. It is alleged in the amended complaint:

"That the defendant Atlanta & Charlotte Air Line Railway Company is now, and was at the time hereinafter set forth, a corporation duly created and organized under the laws of the state of South Carolina, and at said time, and now, owns a railroad from Charlotte, N. C., running through the county of Gaston, N. C., and the town of East Kings Mountain in said county, and through the county of Spartanburg, S. C., to Atlanta, Ga., together with the tracks, cars, locomotives, passenger stations or depot station yards, and all appurtenances thereto belonging, and operating a steam railway as a common carrier between the aforesaid counties of Gaston, N. C., and Spartanburg, S. C., and the incorporated town of East Kings Mountain, and the city of Spartanburg, to Atlanta, Ga.; but prior to the 17th day of August, 1914, the defendant had leased under the authority of law its said line of railway to the Southern Railway Company, another railway corporation, and the Southern Railway Company was on the 17th day of August, 1914, as now, operating the said line of railway from the said city of Charlotte through the incorporated town of East Kings Mountain, N. C., and Spartanburg, S. C., to the city of Atlanta, Ga., as a common carrier of passenger and freight thereupon for hire."

Then follow other allegations of the complaint as to the negligence of the defendants in causing the death of plaintiff's intestate.

Southern Railway Company filed its petition for removal of the cause to this court. The petition, after stating that the Southern Railway Company was one of the defendants, that the time to answer had not expired, that the amount in controversy exceeds, exclusive of interests and costs, the sum and value of $3,000, proceeds to allege:

"That the line of railway on which plaintiff's decedent was killed is not now, and never was, owned or operated by the party defendant to this suit, Atlanta & Charlotte Air Line Railway Company, a corporation duly created and organized under and by virtue of the laws of the state of South Carolina, which at the beginning of this suit was and still is a resident and citizen of the state of South Carolina, and that said line of railway was never leased by this said Atlanta & Charlotte Air Line Railway Company, incorporated by the laws of South Carolina, to your petitioner, Southern Railway Company; but that said line of railway was owned at the time of the death of plaintiff's decedent, and has been owned up to and including the present time, and is now owned, by the Atlanta & Charlotte Air Line Railway Company, a corporation duly created and organized under and by virtue of the laws of the state of North Carolina, which said corporation is not now, and never has been, a party to this action, and that said line of railway was operated at the time of the death of plaintiff's decedent, and has been operated since that time, and is now being operated, by your petitioner, Southern Railway Company, under a lease from said Atlanta & Charlotte Air Line Railway Company, a corporation duly created and organized under and by virtue of the laws of the state of North Carolina, and your petitioner, Southern Railway Company, owned and operated the engine and cars which killed plaintiff's decedent."

And further alleges:

"That a line of railway extending from Charlotte, in the state of North Carolina, to Atlanta, in the state of Georgia, which line of railway comprises the line of railway in North Carolina, involved in this action, was sold in Atlanta, Ga., on or about 1876 by John B. Fisher, R. A. Lancaster, Alfred Austell, Trustees, to Moses Taylor, Belden B. McAlpine, and others. That thereafter these said purchasers of said line of railway proceeded in 1877 to reorganize by the organization of separate corporations in each of the three states through which the lines ran, to wit: That in Georgia a certificate of

reorganization was executed under the style of Georgia Air Line Railway Company, 'for the purpose of owning, possessing, maintaining and operating that portion of said railroad which is situated in the state of Georgia,' which certificate was filed with the Secretary of State of Georgia; that in South Carolina a certificate of reorganization was executed under the style of South Carolina Air Line Railway Company, 'for the purpose of owning, possessing, maintaining and operating that portion of said railroad which is situated in the state of South Carolina,' which certificate was filed with the Secretary of State of South Carolina; that in North Carolina a certificate of reorganization was executed under the style of North Carolina Air Line Railway Company, 'for the purpose of owning, maintaining and operating that part of said railroad which is situated within the state of North Carolina,' which certificate was recorded in the offices of the registers of Mecklenburg, Gaston, and Cleveland counties, N. C. That thereafter by agreement dated April 4, 1877, these three said corporations, Georgia Air Line Railway Company, South Carolina Air Line Railway Company, and North Carolina Air Line Railway Company, consolidated under the style of the Atlanta & Charlotte Air Line Railway Company; the agreement of consolidation reciting that each of the said party corporations was organized for the purpose of owning, possessing, maintaining, and operating that portion of said line of railway lying in the state of its incorporation, which said consolidation was authorized by the board of directors of each corporation and ratified by vote of the stockholders of each corporation. That said consolidation agreement was filed with the Secretaries of State of North Carolina, South Carolina, and Georgia. And that thereafter in 1877 Moses Taylor, Belden B. McAlpine, and the other owners of said line of railway from Atlanta, Ga., to Charlotte, N. C., conveyed it to the Atlanta & Charlotte Air Line Railway Company; said Moses Taylor, Belden B. McAlpine and others being the purchasers under decree of foreclosure of the Atlanta & Richmond Air Line Railway Company, which was the railroad extending from Atlanta, Ga., to Charlotte, N. C."

And further alleges:

"That it was and is an open and notorious fact that said line of railway in North Carolina is and was owned by the Atlanta & Charlotte Air Line Railway Company, a corporation of the state of North Carolina, and is not and never was owned by the Atlanta & Charlotte Air Line Railway Company, a corporation of the state of South Carolina; that said fact was and is shown in the public records of the state of South Carolina and could have been ascertained by the slightest of diligence. That the plaintiff was notified of said fact by the answer of Atlanta & Charlotte Air Line Railway Company, of South Carolina, denying that it owned said line of railway, which notice was given before the amendment to the action making your petitioner, Southern Railway Company, a party defendant; and that, in consequence thereof, the plaintiff ought to have known, if she did not know, that she had no cause of action against the Atlanta & Charlotte Air Line Railway Company, a corporation organized under the laws of the state of South Carolina; and your petitioner shows that said Atlanta & Charlotte Air Line Railway Company, a corporation of the state of South Carolina, was joined in the above action with your petitioner, Southern Railway Company, fraudulently and improperly for the purpose of preventing the removal of this action from the state to the federal court."

The other allegations of the petition are merely such as to bring it within the rules of court and are not material for the purposes of this decision.

On the hearing, certified copies of the charters of the North Carolina Air Line Railway Company, South Carolina Air Line Railway Company, and Georgia Air Line Railway Company were introduced in evidence. These companies were all formed in March, 1877. On April 4, 1877, the three railway companies, aforesaid, entered into an

agreement, wherein the incorporation of the aforesaid three railway companies was fully stated; and then follows this language:

"And whereas, the railroads of the said three railroad companies, parties to this agreement, are connected together and form a continuous line of railroad, extending from the said city of Atlanta in the state of Georgia, to the said city of Charlotte in the state of North Carolina, and each of the said railroad companies is desirous of consolidating its capital stock, property and franchises with the capital stock, property and franchises of the others of the said railroad companies, so as to form a single railroad corporation which shall embrace all of the capital stock, property and franchises, and have all of the rights, powers and privileges of the said three railroad companies respectively:

"Now, therefore, this agreement witnesseth, that the parties hereto in consideration of the premises, have mutually agreed, and do hereby mutually agree, that the said three railroad companies, parties to this agreement, shall and will consolidate their respective capital stocks, properties and franchises with the capital stocks, properties and franchises of the other and others of them, and that thus the said three railroad companies shall be consolidated into one corporation, which shall embrace all of their respective stocks, properties and franchises and have all of their respective rights, powers and privileges, and that such consolidation shall take effect upon and shall continue from and after the sanction and adoption of this agreement by the stockholders of the said three railroad companies, as required by law, and shall so take effect and continue upon the terms and conditions hereinafter set forth.

"And for the purpose of effecting such consolidation and in consideration thereof, the said three railroad companies and their respective boards of directors do hereby agree each with the other, as follows, that is to say:

"Article 1. The name and style of the consolidated corporation hereby formed shall be 'The Atlanta & Charlotte Air Line Railway Company.'

"Article 2. All and singular the rights, franchises and property, possessed or enjoyed by, or belonging to each, respectively, and all of the said three railroad companies, parties to this agreement, shall be vested in and possessed and enjoyed by the consolidated corporation hereby created and shall be so vested in and possessed and enjoyed by, such consolidated corporation from and after the consummation of this agreement by the sanction and adoption thereof as aforesaid. * * *

"Article 7. [After providing the amount of the capital stock of the said consolidated corporation, also provided:] Such stock shall be issued share for share to the holders of the capital stock of the said three railroad companies (who are the purchasers of the said railroad and other property of the said Atlanta & Richmond Air Line Railway Company and the organizers of the said three railroad companies) in lieu of the capital stock of the said three railroad companies respectively held by them and in part payment of the consideration money for the said railroad and other property."

The agreement also has numerous provisions for the issuing of bonds and execution of mortgage to secure the same, none of which provisions are necessary for the present consideration.

The record shows that the directors of each one of the said three railroad companies had a meeting called for the purpose of entering into the consolidation agreement, and that this agreement was duly submitted to meetings of the stockholders of each of the said three railway companies, after due advertisement had been given of the time and place of holding the same, and the stockholders of each one of said three railway companies unanimously agreed to said consolidation, and the same was filed with the Secretary of State of South Carolina, Secretary of State of North Carolina, and Secretary of State of Georgia.

In a few days after the formation of this consolidated corporation, to wit, the Atlanta & Charlotte Air Line Railway Company, Moses Taylor, Belden B. McAlpine, and others, the purchasers at the foreclosure sale of the old Atlanta & Richmond Air Line Railway Company, a corporation extending from Atlanta, Ga., to Charlotte, N. C., conveyed to the Atlanta & Charlotte Air Line Railway Company, a railroad corporation existing under the laws of the states of Georgia, South Carolina, and North Carolina, and created by the consolidation into one corporation of the Georgia Air Line Railway Company, the South Carolina Air Line Railway Company, and the North Carolina Air Line Railway Company, all and singular the entire railroad heretofore of the Atlanta & Richmond Air Line Railway Company, extending from the city of Atlanta in the state of Georgia to the city of Charlotte in the state of North Carolina.

The defendant Southern Railway Company, created by and under the laws of the state of Virginia, has leased and is now operating the Atlanta & Charlotte Air Line Railway Company, the formation and incorporation of which is hereinabove set out.

There are two methods of determining whether or not an action is removable. In most cases that question is determined from the complaint.

[1] The real question in this case is: Was the joinder of the defendant Atlanta & Charlotte Air Line Railway Company, a corporation created by and under the laws of South Carolina, fraudulently made in order to deprive the defendant Southern Railway Company, a citizen of the state of Virginia, of its right to remove the cause to this court? The burden of proving the fraud is upon the Southern Railway Company, which alleges it in its petition. It is insisted in the petition and in the argument that an examination of the record would have shown that the allegations of the complaint are false and that the plaintiff did not have any cause of action against the defendant Atlanta & Charlotte Air Line Railway Company, a corporation created by and under the laws of the state of South Carolina, but that her cause of action was against the Atlanta & Charlotte Air Line Railway Company, a corporation created by and under the laws of the state of North Carolina. The determination of this matter requires an examination and consideration of the citizenship of railroad corporations. One line of cases, such as Hollingsworth v. Southern Ry. Co., and St. L. & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, holds that a railroad corporation once formed remains a citizen of the state of its creation, and that subsequent incorporation for the purpose of domestication, and in order to comply with local statutes and requirements, do not affect the citizenship, but that they remain citizens of the state of their original incorporation. That line of decisions has no application to this cause. The line of decisions with which we are concerned grows out of the consolidation of railroad companies incorporated in different states. The statutes of the various states which authorize such consolidation may differ in a few minor particulars, but they are all substantially the same. All the decisions and text-writers agree that, where one corporation is formed by the

consolidation of two or more corporations, the consolidated corporation is a citizen of each state in which any one of the constituent companies was a citizen. Upon this point there is marked unanimity.

Morawetz on Private Corporations, at sections 1000 and 1001:

"A consolidation of several corporations into one involves the formation of a new corporation out of the united shareholders of the old. Companies originally chartered by different states may be thus united into a single corporation, by virtue of legislation passed in each of the states. In such case the new company becomes invested with all the rights and duties of a corporation in each state, but the franchises of the company in each state are derived from the legislation of that state alone. A corporation formed by consolidation of several companies under the laws of different states must, while in either state, be treated as a citizen of that state alone in determining the jurisdiction of the Circuit Courts of the United States. And such company will generally be considered in each state as a corporation created or chartered by that state, within the purview of its legislative enactments."

Dillon on Removal of Causes, at section 104:

"If a corporation is chartered in several states, it cannot, when sued in one of them, claim that it is likewise a citizen of another, and therefore entitled to remove the cause to the federal court on the ground of citizenship in such other state. * * * When a corporation created by the laws of one state becomes consolidated with corporations of other states, and changes its name, and is sued by the new name in a court of the state of its creation by a corporation of the same state, another one of the consolidated corporations, created by another state, cannot go into the state court and have the cause removed. In effect the general rule seems to be that, when a consolidated company is formed by the union of several corporations chartered by different states, it is presumed to be a citizen of each of the states which granted a charter to any one of its constituent companies, and therefore, when sued in one of those states by a citizen thereof, it cannot claim the right of removal."

From the authorities, it seems clear that the Atlanta & Charlotte Air Line Railway Company, formed by the consolidation of railroads chartered under and by virtue of the laws of the states of North Carolina, South Carolina, and Georgia, when sued in the courts of any one of the said three states, must be deemed to be a citizen of that state. It cannot deny its creator.

The New York, New Haven & Hartford Railroad Company is a corporation formed by the consolidation of a number of railroads in New York, Connecticut, Rhode Island, and Massachusetts. Under the authorities, it is deemed to be a corporation in each of said states. One Smith brought his action in Massachusetts for personal injury which had occurred to him in Connecticut. The defendant corporation insisted that the court of Massachusetts had no jurisdiction. It was held that the corporation was a citizen of Massachusetts, and the plaintiff was allowed to recover for the injury sustained in Connecticut. Smith v. New York, N. H. & H. R. Co. (C. C.) 96 Fed. 504.

In the case of Goodwin v. N. Y., N. H. & H. R. Co. (C. C.) 124 Fed. 358, plaintiff, a citizen of Massachusetts, brought his action in the Circuit Court of the United States for the District of Massachusetts against the defendant, alleging that it was a corporation created and existing under the laws of Connecticut. It was a consolidated railroad made by the consolidation of roads in New York, Rhode Island, Connecticut, and Massachusetts, and under all of the authorities is

deemed to be a citizen of each state, and in any court within the state of Connecticut, either state or federal, it would be deemed to be a citizen of Connecticut. The Circuit Court of the United States for the District of Massachusetts held that it was without jurisdiction, as plaintiff was a citizen of Massachusetts, and the consolidated railroad, in the courts of Massachusetts, state or federal, must be deemed a citizen of Massachusetts also. This case is bottomed upon Whitton v. Wabash Ry., 80 U. S. 270, 20 L. Ed. 271. There a citizen of Illinois brought his action against the railway company in the state courts of Wisconsin. While the action was pending the Removal Act of March 2, 1867, was passed, amending Act of March 27, 1866. It applied to actions then pending. Plaintiff then petitioned for the removal of his cause to the Circuit Court of the United States. The defendant company resisted the removal on the ground that it was incorporated in Illinois, Wisconsin, and Michigan, but that its entire line lying in the three states was managed and controlled as a single corporation; that all its franchises were exercised and its affairs managed by one board of directors and officers; that its principal office and place of business was in Chicago, in the state of Illinois; and that there was no office for the management and control of the corporation in Wisconsin. The court held that within the state of Wisconsin it was a corporation and citizen of the said state of Wisconsin. The corporation was not permitted in the courts of Wisconsin to set up its Illinois citizenship. Nor would it have been permitted in the courts of Illinois to set up its Wisconsin citizenship.

In Horne v. Boston & Maine Railroad (C. C.) 18 Fed. 50, the plaintiff, a citizen of New Hampshire, brought his action in the courts of New Hampshire for injuries inflicted in Massachusetts, alleging that defendant was incorporated under the laws of New Hampshire. It was also incorporated in Massachusetts and Maine, numerous roads in the three states having been consolidated into one. The railroad company sought to remove it into the federal court. Judge Lowell in remanding the case to the state court, in delivering the opinion of the court, said:

> **"The fiction which makes two or three corporations out of what is, in fact, one, is established only for the purpose of giving each state its legitimate control over the charters which it grants, and that the acts and neglects of the corporation are done by it as a whole. It is immaterial, in considering the question of jurisdiction, that the damage complained of was suffered within the limits of Massachusetts, and that the judgment will bind the corporation in that state."**

The invisible, intangible corporation, which in the courts of this state must be deemed to be a citizen of this state, is a very different thing from the tangible and visible railroad extending from Atlanta, Ga., to Charlotte, N. C. The invisible, intangible corporation owns and has leased all and every part of said railroad.

In the courts of the state of South Carolina, the Atlanta & Charlotte Air Line Railway Company is not only deemed to be a citizen of South Carolina, but it is likewise deemed to be the owner and lessor of all and every part of the railroad from Atlanta, Ga., to Charlotte,

N. C. Of course, as to any actions pending in the courts of North Carolina and Georgia, a like fiction obtains.

That the fiction that exists with respect to the corporation does not extend to the visible, tangible property, is shown by the case of Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207. An action was brought in the Circuit Court of the United States for the District of Iowa to foreclose a mortgage executed by a consolidated interstate railway company which was incorporated both in the state of Iowa and in the state of Missouri, and the railroad property lay in both states. It was held that the decree of foreclosure in the Circuit Court of Iowa would and did sell the property as a whole. To divide the visible property of an interstate consolidated railroad by state lines according to the fiction that obtains as to citizenship would destroy the value of such property. The proper interpretation of the laws will bring about no such result.

[2] The plaintiff had the legal right to join the lessor and the lessee as joint tort-feasors, and we cannot inquire into her motive for so doing.

The cause is remanded to the court of common pleas for Spartanburg county, whence it came.

In re F. J. HACKER & CO. et al.

(District Court, N. D. Iowa, E. D. August 24, 1915.)

No. 889.

BANKRUPTCY ⊂=354—PARTNERSHIP—RIGHTS OF PARTNERSHIP CREDITORS —RIGHTS OF CREDITORS OF PARTNERS INDIVIDUALLY—"PROVABLE DEBT."

The reduction of claims of creditors of a firm to judgment, either before or after filing of a petition in bankruptcy of the firm and the partners, does not change the character of the claims, within Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 547 (Comp. St. 1913, § 9589), declaring that the net proceeds of firm property shall be appropriated to the payment of firm debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, and section 63 (Comp. St. 1913, § 9647), providing that provable debts of a bankrupt are provable debts reduced to judgment, and an application of the individual estates of the partners to the payment of the firm creditors can only be made after individual creditors have been fully paid, and then only in the manner provided by section 5f, though the claims of the firm creditors may be allowed against the firm and the individual estates.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⊂=354.

For other definitions, see Words and Phrases, First and Second Series, Provable Debt.]

In Bankruptcy. In the matter of F. J. Hacker & Co., a partnership, and F. J. Hacker and S. J. Hacker, individual members thereof, bankrupts. Petition of Josephine and Joseph Hacker, as individual creditors of F. J. Hacker, a partner, for review of an order of the referee, overruling their objections to the allowance of claims of creditors of the partnership against the estate of its individual members and their

participating in the distribution of the assets of the individual estates equally with the individual creditors of the partners. Order of referee in part vacated and set aside.

Mark J. Butterfield, of Waterloo, Iowa, for petitioners.
Paul W. Smith, of Waterloo, Iowa, for partnership creditors.

REED, District Judge. F. J. Hacker & Co., a copartnership doing business under the name of F. J. Hacker & Co. (composed of F. J. Hacker and S. J. Hacker), and the individual members thereof, were each adjudicated bankrupts by this court on March 31, 1915. On March 22d preceding the Waterloo Register Company, a corporation, recovered two judgments in the district court of Iowa in and for Black Hawk county against the partnership and the individual members thereof, one of which is for $190.85, and the other for $414.35, both of which are based upon claims against the partnership only, but for which the individual members are also liable. On the same day, March 22, 1915, the Cutler Hardware Company, a corporation, recovered two judgments in the said district court of Black Hawk county against the partnership and the individual members thereof, based upon claims against the partnership only, but for which the individual members thereof were also liable, one of which judgments is for $2,273.55, and the other for $2,524. Edwards, Longley, Ransier & Smith, a firm of attorneys at Waterloo, also have a claim against the bankrupt for $146.50 as attorney's fee for procuring one or more of said judgments, which is included in the judgment as part of the costs.

At the date of these judgments it is alleged that the bankrupts (the partnership and the individual members thereof) were each insolvent, and it is agreed that neither of the bankrupt estates will pay in full the claims filed and allowed against it, exclusive of the claims in controversy in this proceeding. The Waterloo Register Company, the Cutler Hardware Company, and Edwards, Longley, Ransier & Smith have filed their respective judgments, or claims as stated, against the partnership estate, and also against the individual estate of each of the partners, asking that they be allowed as unsecured claims against each of the estates, and that they be permitted to participate in the distribution of the individual estates equally with the individual creditors of said estates. Josephine Hacker and Joseph Hacker, claiming to be individual creditors of F. J. Hacker, one of the bankrupts, have filed claims against his individual estate, the former in the sum of $6,500 and the latter for $602.70, and asked that they be allowed against the individual estate of said bankrupt, and that the assets of his individual estate be first applied to the payment of his individual indebtedness before applying any part thereof to the respective claims of the Waterloo Register Company, the Cutler Hardware Company, and Edwards, Longley, Ransier & Smith, as provided in section 5f of the Bankruptcy Act.

The referee denied the respective objections of Josephine and Joseph Hacker, so far as they ask that the individual estate of F. J. Hacker be first applied to the payment of his individual indebtedness before applying any part thereof to the partnership indebtedness, and ordered

that the claims of the Waterloo Register Company, the Cutler Hardware Company, and Edwards, Longley, Ransier & Smith shall share equally with the individual creditors of F. J. Hacker in the distribution of his individual estate. Josephine and Joseph Hacker excepted to this order, and petition for a review thereof.

Whether or not the bankrupt partnership left any assets, or there is any real estate of the bankrupts upon which the several judgments might be liens, does not appear from the record; but, if there is any such real estate, the bankruptcy following so soon after the rendition of the judgment will annul or dissolve the lien of the judgments, as the referee very properly held. Section 67f, Bankruptcy Act. After referring to section 5f and section 67 of the Bankruptcy Act, and some other authorities, the referee said:

"I find that, while the liens created by the judgments herein above referred to are destroyed and annulled by section 67f of the Bankruptcy Act, said judgments still remain adjudications of the rights of the parties, and they being against the individual members of the partnership, as well as the partnership itself, the said judgments may be proved and allowed against each and all of the estates herein to be administered, and that the Cutler Hardware Company, the Waterloo Register Company, and Edwards, Longley, Ransier & Smith shall be considered as individual creditors of the individual estates, as well as creditors of the partnership estate, in the distribution of dividends herein."

From this it seems that, because the partnership creditors have reduced their claims against the partnership to judgment, and the judgment is also against the individual members of the partnership, who is liable for partnership debts, section 5f of the Bankruptcy Act is annulled, or is inapplicable, in the opinion of the referee. That section provides:

(a) "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt. * * *"

(f) "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

(g) "The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

Section 63:

"Debts of the bankrupt which may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) found-

ed upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge," etc.

The reduction of their claims to judgment by the partnership creditors does not change the character of such indebtedness from a partnership debt to an individual debt, but changes the form of the debt only. Its character as a partnership debt remains as before, and for which each member of the partnership may be liable, if the partnership assets are insufficient to pay the sum; and section 5f of the Bankruptcy Act provides how the distribution of the assets of the partnership, and of the individual members thereof, shall be made among their creditors, and controls in the distribution of such assets.

Section 63 of the Bankruptcy Act recognizes that debts of the bankrupt which have been reduced to judgment may be proved and allowed against his estate, and the fact that the debts have been reduced to judgments, either before or after the filing of the petition in bankruptcy, does not change the rule of section 5f as to the distribution of the proceeds of partnership and individual estates. The referee's order in permitting these partnership creditors to share equally in the distributions of the individual assets with individual creditors is erroneous, and it is ordered, so far as it permits this to be done, that it be vacated and set aside. In re Wilcox (D. C.) 94 Fed. 84; Sargent v. Blake, 160 Fed. 57, 63, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58; In re Union Bank, 184 Fed. 224, 106 C. C. A. 366; In re Effinger (D. C.) 184 Fed. 728.

The individual liability of F. J. Hacker, one of the members of this copartnership, for the partnership indebtedness, arises only because he is a member of the copartnership, and not because he has separately undertaken to pay the partnership indebtedness. If a member of a copartnership should individually indorse, or otherwise individually agree to pay a partnership debt, his individual estate might be liable to the creditor to whom such promise was made, and it may be that the creditor holding such promise might share equally with other individual creditors of the member so undertaking—a question we are not now called upon to determine, for there is no such question here involved.

No objection is perceived to the allowance by the referee of the claims of the partnership creditors against both the partnership and the individual estates, as the individual members of the partnership are liable with the partnership for the partnership debts; but the distribution of the individual estates to the payment of the creditors of the partnership, and the application of the individual estates to the payment of partnership creditors, are only to be made after the individual creditors have been fully paid, and then in the manner provided by section 5f of the Bankruptcy Act.

The order of the referee, so far as it permits the partnership creditors to share in the distribution of the individual estate of F. J. Hacker equally with the individual creditors of such estate, is there-

fore vacated and set aside. The clerk will certify to the referee a copy of this opinion and order, and the referee will observe the same in ordering the distribution of the assets of the partnership and individual estates.

It is ordered accordingly.

In re B. A. LOCKWOOD GRAIN CO.

McFARLIN v. McFARLIN.

(District Court, S. D. Iowa, C. D. August 25, 1915.)

No. 2373.

BANKRUPTCY ⊂=267—DISTRIBUTION OF ASSETS—LIENS.

A creditor of the bankrupt, who was also the trustee, claimed a lien upon certain real estate belonging to the bankrupt. Such property, together with other property, real and personal, was sold in bulk by the referee's orders, after the submission of the claim of lien, but before the referee's decision. The claimant was present at the creditors' meeting and consented to the sale, which was made free and clear of all liens. Subsequently the referee decided that claimant had a valid lien, and that such lien followed the proceeds of the sale. *Held*, that the lien could not be established against the proceeds, since it was impossible to determine the amount received from the specific real estate subject to the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. ⊂=267.]

In Bankruptcy. In the matter of the bankruptcy of the B. A. Lockwood Grain Company. Suit by M. McFarlin against M. McFarlin, trustee, to establish a lien. On petition to review the decision of the referee establishing the lien. Reversed and remanded.

Parsons & Mills, of Des Moines, Iowa, for petitioning creditor

W. G. Harvison, of Des Moines, Iowa, and John A. Hull, of Boone, Iowa, for objecting creditors.

WADE, District Judge. This case comes before the court upon petition for review.

On August 24, 1914, a petition in bankruptcy was filed against the Lockwood Grain Company, and upon adjudication M. McFarlin, claimant herein, was appointed trustee. On October 26, 1914, McFarlin, the trustee, filed a claim in the sum of $17,195, claiming a lien upon certain real estate in the city of Ames, Iowa, under a deed which he claims was executed as a mortgage. It is also claimed that the description in the deed was by mutual mistake incorrect, and claimant asked that the deed be reformed and the lien established.

On October 27, 1914, the referee appointed a committee of creditors to represent the estate in the matter of the claim so filed by the trustee, who, on account of his personal interest, was incapacitated from acting therein. On the same date, October 27, 1914, at a continuance

of the first meeting of the creditors, an order was made by the referee, directing said M. McFarlin, as trustee, to—

"forthwith expose for sale at private sale, in bulk or singly, the elevator properties, and the mill property, belonging to the estate of the above-named bankrupt, more particularly described as follows: The real and personal property at Ames, Gilbert, Ontario, Kelley, Slater, Sheldahl, Polk City, Crocker, Ankeny, Garden City, Shipley, Cambridge, Lee's Switch, Elkhart, Enterprise, Commerce, Urbendale, and Saylor; the flour and feed mill operated by Shannon & Mott Company, located at Des Moines, Iowa—all of the above property being more fully described in the inventory of assets and liabilities filed herein by M. McFarlin, receiver."

The property upon which McFarlin claimed a lien was the real estate located at Ames, Iowa, and included in the foregoing order. The committee of creditors filed objections to the claim filed by McFarlin, upon which a hearing was had before the referee on December 14, 1914. Evidence was taken, and the cause submitted—judgment to await briefs to be filed by counsel. Decision was finally made by the referee April 24, 1915, sustaining the claim of M. McFarlin, and establishing the same as a "prior claim against the estate of the above-named bankrupt in the sum of $17,195."

On January 16, 1915, after the submission of the case to the referee and before the decision, one Parley Sheldon filed a proposal to purchase all of the property of the bankrupt as above described for the sum of $65,000. Thereupon the referee called a special meeting of the creditors on January 26, 1915. The record shows that at this meeting "the trustee (McFarlin) is present in person and by his attorneys." The offer made by Sheldon having been presented, it was accepted by a majority of the creditors in number and amount of claims filed and allowed, and the referee entered an order approving a sale to be made upon the terms proposed, and an order was made that "the said trustee (McFarlin) shall forthwith sell and convey to the said Parley Sheldon all the trustee's right, title, and interest" in all of the property heretofore described.

On March 9, 1915, in compliance with such direction, the trustee (McFarlin) did execute his deed, conveying all of said property, describing it in detail, unto the Central Iowa Grain Company (being a corporation organized by Mr. Sheldon to receive the property), which deed specifies in detail the proceedings leading up to the sale, and which deed includes the following:

"Whereas, the said M. McFarlin, as trustee in bankruptcy of the estate of B. A. Lockwood Grain Company, bankrupt, was duly authorized, after notice to all creditors and lienholders, by an order of Hon. H. H. Whittaker, referee in bankruptcy, dated October 27, 1914, to sell and convey the property hereinafter mentioned, at private sale, in bulk or singly, free and clear of all liens, and the said trustee having under such order sold the said property described in said order to the Central Iowa Grain Company," etc.

This deed was filed for record April 8, 1915. Thereafter, on April 24, 1915, the referee filed his opinion in the case submitted, holding that McFarlin had a valid lien upon the property described in the deed, and that he was entitled to preference; and the opinion further states:

"It is unnecessary to pass upon the question as to whether or not this court has jurisdiction to reform the deed given claimant by bankrupt. The trustee of the estate, pursuant to the will of the creditors, and under order of court, has sold all of the real and personal property in Ames, including that covered by the conveyance, in bulk, free and clear of liens, to the Central Iowa Grain Company, a corporation composed of creditors of this estate, for an amount greatly in excess of claimant's lien thereon. The lien of the claimant would therefore follow the proceeds derived from such sale, and the estate would be bound to protect him."

Exceptions were taken, and upon petition for review it becomes necessary to determine whether or not the findings of the referee should be sustained. In the view I take of this case, it is unnecessary to pass upon the question of the right of McFarlin to a lien upon the property described in the deed.

The exceptions raise the question as to whether, in view of the sale in bulk of all this property, consisting, as aforesaid, of the real estate in some 19 separate towns, corncribs, elevator scales, coalhouses, etc., located in many of these towns, and numerous items of grain and other personal property, for the sum of $65,000, the claim by McFarlin to a lien upon the real property at Ames can now be recognized and enforced against the fund of $65,000 received for all of said property. There was no appraisement of any individual piece of property, so far as appears, and the record in no manner indicates anything as to the value of the property at Ames upon which McFarlin claims a lien. McFarlin was present at the meeting when the order for sale was made. He, as trustee, signed the deed, and made the conveyance of all this property, free from all liens. No objections were made by him at any stage to the sale of said property, or the manner in which it was sold.

As found by the referee, McFarlin had a lien upon a specific parcel of property. This parcel, with some 18 other parcels, and the vast amount of personal property, were sold in bulk for a gross sum. A court of equity has broad powers, and will ignore forms and technical rules, in order that justice may be done; but no way is suggested, and I can conceive of no way, in which, under existing conditions, the McFarlin lien can be established against any portion of the proceeds of this sale. It has been repeatedly held that, where the holder of a lien upon property permits its sale in bulk, together with other property upon which he claims no lien, he is estopped from asserting a lien against any portion of the purchase price.

In re Gerry (D. C.) 112 Fed. 957, is in point. The estate of the bankrupt consisted of 12 pieces of realty, a large amount of machinery, and personal property of various kinds. The whole of said assets were sold in lump for $27,500. The sale was unanimously agreed to at a meeting of the creditors, of which claimant had notice, and to which he made no objection. Subsequently he asked that his claim, which constituted a lien upon two pieces of realty only, be paid out of the gross sum. His request was denied; the court using the following language:

"This sale was unanimously agreed to at a meeting of the creditors, of which meeting the claimant had notice; and as he did not object, either

then or afterwards, he actually or presumably assented to what was done. It seems clear to me, therefore, that even if, under ordinary circumstances, his lien would have been discharged by a referee's sale in case money enough was produced by the two lots to pay the lien, it is impossible, under the facts in hand, to determine that sufficient money was produced by the land that was bound for his claim. No apportionment of the price paid is possible. This condition having been brought about by the decision of the creditors, in which he took part, to sell the real and personal property for a lump sum, it is, I think, evident that his claim for payment out of this sum cannot be allowed."

In Re Klapholz (D. C.) 13 Fed. 1002, the claimant asserted a lien upon certain clothing sold by him to the bankrupt. The assets of the bankrupt, including said clothing, were sold in lump. In denying claimant's right to a preference out of the proceeds, the court used the following language:

"The fund was produced by the sale of all the bankrupt's personal property, including the clothing manufactured by the claimant, clothing manufactured by other persons, and various other articles; and there is no evidence concerning the price for which the suits in question were sold. The claimant had notice of the sale, which was made by the receiver under an order of court, and was afterwards duly confirmed without objection; and he should have asked the court to direct this clothing to be sold separately, in order that the fund thus produced might be earmarked, and the validity of his claim upon it be considered. The court had no knowledge that he was asserting a lien for the manufacture of these goods, and, as they had passed out of his possession into the custody of the receiver, it was his duty to make seasonable claim to priority of payment. Otherwise, he must be held to have taken the risk that the goods might be sold in such manner that the proceeds might be indistinguishably mingled with the proceeds of the other property of the bankrupt. In re Gerry (D. C.) 112 Fed. 957."

In Keyser v. Wessel, 128 Fed. 281, 62 C. C. A. 650, the court says:

"I agree with this conclusion, which accords with two previous decisions in this district. In re Gerry [D. C.] 7 Am. Bankr. Rep. 462, 112 Fed. 957; In re Klapholz [D. C.] 7 Am. Bankr. Rep. 703, 113 Fed. 1002. It is certain that no apportionment of the $3,500 can be made with any degree of accuracy; for, while it is true that only $1,000 was bid for the license separately, and therefore it may be contended with some degree of plausibility that the remaining $2,500 was bid for the stock and fixtures, it may also be contended, and with equal plausibility, that, as only $144.61 was bid for the stock and fixtures separately, the license must have produced the balance of the $3,500. Clearly the two lots as an entirety were more valuable than when offered separately; but the excess of value cannot now be assigned to its proper source or sources. Probably each lot contributed something to the higher price, but it would be a mere guess to attempt to say how much. If the landlord had desired to object to the sale upon the ground that he had not received notice, his time for so doing was, at latest, when the petition for confirmation was presented, for of this, at least, he had knowledge, and he was actually present when the order was made. His acquiescence in the report and confirmation was a clear ratification of the sale in bulk, and a waiver of the failure to give him notice. The action of the referee in rejecting the claim is approved."

In Re McFadgen (D. C.) 156 Fed. 715, it is said:

"If the landlords cannot claim priority out of the proceeds of the sale of the license, it becomes necessary for them to designate a particular fund out of which they claim priority. This they cannot do, for the reason that they permitted the trustee to sell the lease, license, stock, and fixtures together,

and thereby lost their claim to priority of payment out of the fund realized, because it could not be possible for them to claim priority out of any particular fund, when everything was sold in bulk. This point was decided in Keyser v. Wessel, 12 Am. Bankr. Rep. 126, 128 Fed. 281, 62 C. C. A. 650. No objection was made to the sale, nor is there any evidence how much the stock and fixtures brought separate from the license, or how much the lease brought separate from the whole. * * * Under the facts thus stated by the referee and by the court, it seems to me that discussion is unnecessary, in view of the decision by the Court of Appeals of this circuit in Keyser v. Wessel, 128 Fed. 281, 62 C. C. A. 650, 12 Am. Bankr. Rep. 126, from which I am unable to distinguish the present controversy. Upon the authority of that case, therefore, the ruling of the learned referee, declining to sustain the claim of the landlords to priority, must be affirmed."

In Vollmer v. McFadgen, 161 Fed. 914, 88 C. C. A. 605, the court says:

"The sale in gross of these different items was made and confirmed on notice to the landlord and without objection. * * * The gross price for which these items were sold constitutes such a commingling of the three items as brings the case within the ruling in Keyser v. Wessel, 12 Am. Bankr. Rep. 126, 128 Fed. 281, 62 C. C. A. 650, where on a commingling of like items this court held it was impossible 'to determine the proportional value of the particular part bound by the liens to the gross purchase price.'"

See, also, In re Torchia (D. C.) 185 Fed. 578; In re Grainger, 160 Fed. 69, 87 C. C. A. 225.

Counsel for claimant rely upon In re Goldsmith (D. C.) 168 Fed. 779, McKay v. Hamill, 185 Fed. 11, 107 C. C. A. 115, and In re Dunn & Co. (D. C.) 193 Fed. 212. None of these cases are in point. In the first case claimant had a chattel mortgage upon specific articles of personal property which were sold, not in bulk, at a sale with other articles of property, and the difficulty arose because the accounts kept of the sale did not specify the property for which the different amounts were received, and the question involved was whether the evidence was sufficient to properly point out the amounts received for the articles upon which the mortgage lien existed. McKay v. Hamill simply involved a question as to whether or not a sale was free from a lien of a trust deed, and, if so, whether the proceeds of the property was subject to the lien. There was no question as to the identity of the proceeds. In re Dunn & Co. involved claims for priority, based upon rights accruing prior to the time the property passed into the hands of the trustee, and did not involve any question presented in this case.

These cases, however, show how far a court of equity will go in an effort to see that justice and right shall prevail; but they in no manner indicate a plan or principle upon which the lien of the claimant in this case could be established against any portion of the money received for the sale. If there were but two or three separate pieces of property involved, it might be possible to in some manner arrive at the proximate amount which was derived from any one of them; but in this case the bankrupt was an elevator company, having property and doing business in some 19 different towns and cities. Some places it owned the real estate upon which its buildings were located, and did not own the buildings; some places it owned the buildings, and

not the ground. There were elevators, corncribs, coalhouses, wagon scales, dwelling house, chicken house, feedhouse, oilhouse, barn, and numerous other structures, all, together with the real estate, included in the sale. In addition thereto, there were thousands of bushels of wheat, and corn, and oats, and other grain—all sold in bulk for the gross sum of $65,000.

The claimant only asks a lien upon the real estate separate from the buildings at Ames, and how it would be possible to "unscramble" this transaction, so as to even approximate the real interest which McFarlin, under the decision of the referee, had in the property at Ames, is beyond my comprehension. So that, aside from the question of waiver and estoppel based upon the knowledge and acts of McFarlin, it seems to be impossible to grant him any relief.

The decision of the referee is reversed, for the reasons above indicated, and the cause is remanded to him for further proceedings consistent with this opinion.

In re LENTERS.

(District Court, E. D. Pennsylvania. August 2, 1915.)

No. 5242.

1. BANKRUPTCY ⟸396—EXEMPTIONS—STATUTORY PROVISIONS.
A bankrupt's right to exemption must be deduced from the state law, but must be asserted in the manner prescribed by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. ⟸396.]

2. BANKRUPTCY ⟸395—EXEMPTIONS—STATUTORY PROVISIONS—CONSTRUCTION.
The bankruptcy court should administer the exemption law liberally, and should not attempt to defeat an exemption by application of technical rules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. ⟸395.]

3. BANKRUPTCY ⟸400—EXEMPTIONS—STATUTORY PROVISIONS—CONSTRUCTION.
A bankrupt filed his schedules, setting forth a claim for an exemption of $300 in cash under a state statute providing that property to the value of $300 should be exempt. The value of the drug business of the bankrupt was not set out in his schedules. After the filing of the schedules, the business and stock were sold as a going concern for cash and notes. Subsequently the bankrupt filed a petition to amend his schedules by adding the cash and notes as the value of the business, and the petition was allowed. Four days later the bankrupt filed a petition for leave to amend his original claim of exemption, asking that $300 in cash be set apart out of the proceeds of the sale. The state law provided that property to the value of $300 should be exempt, and that the person entitled to an exemption could elect to retain the same out of any bank notes, moneys, stocks, or other indebtedness. *Held*, that the bankrupt was entitled to his exemption of $300 in cash, in view of Bankr. Act, § 7 (Comp. St. 1913, § 9591), which does not require that the bankrupt shall enumerate articles claimed as exempt, and section 47 (section 9631), requiring the trustee to set apart an exemption claimed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⟸400.]

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4. BANKRUPTCY ⊂=399—EXEMPTIONS—ESTOPPEL.

That a petitioning creditor, who discounted the notes of the purchaser of the business and stock of a bankrupt as a going concern, would fail to receive a dividend if an exemption was allowed to the bankrupt, did not justify disallowance of the claim of the bankrupt, who did not lead the petitioning creditor into discounting the notes under the belief that the exemption would not be claimed; the creditor having notice that the exemption was claimed and that the claim was not withdrawn, and in the absence of any fact to the contrary it being assumed that the purchaser will pay the notes at maturity, so that the creditor will receive back the cash advanced on the notes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⊂=399.]

5. BANKRUPTCY ⊂=245—TRUSTEE IN BANKRUPTCY.

Though the Bankruptcy Act imposes on the trustee in bankruptcy the duty of conserving the estate, collecting outstanding claims, and resisting payment of doubtful claims, he occupies a fiduciary capacity, and is to some extent a stakeholder, and he has a duty to perform to the bankrupt as well as to the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=245.]

In Bankruptcy. In the matter of Williams J. Lenters, bankrupt. On a certificate of review of an order of the referee refusing the bankrupt his exemptions. Order reversed, with directions to allow an amendment to the claims for exemption and allow the exemption as claimed.

Charles S. Wood, of Philadelphia, Pa., for bankrupt.
John Blakeley, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. William J. Lenters was declared a bankrupt on October 28, 1914. On December 10, 1914, he filed his schedules, setting forth a claim for an exemption of $300 in cash. The value of the drug business, in which the bankrupt was engaged, had not been set out in his schedules. After the schedules were filed, the business and stock of drugs were sold as a going concern, realizing the sum of $3,550 in cash and notes. On March 18, 1915, the bankrupt filed a petition to amend his schedule B–2 by adding $3,550 as the value of the business, and the same day the referee made an order allowing the amendment. On March 22d, the bankrupt, out of abundance of caution, filed a petition asking leave to amend his original claim of exemption so as to read as follows:

"Wearing apparel to the value of $20.00 and the said pair of cuff links to the value of $5.00, as set forth by him in his said 'Schedule B–5'; and the setting apart out of the proceeds derived from the sale of said drug business the further additional sum of $300 in cash, and that, as so amended and determined, the same be delivered to him forthwith."

On March 29th the referee made an order denying the prayer of the petition and refusing the bankrupt his exemption, and that order is before the court for review.

The referee's action was based upon the ground that the business had been sold by the trustee under an agreement between creditors

by which the purchaser gave notes for the purchase money, which were to be discounted by one of the large creditors, Smith, Kline & French Company; that this was done upon the prospect that by so doing Smith, Kline & French Company would ultimately receive a dividend of 2½ per cent. upon its claim, and if the exemption was allowed there would be no dividend to creditors whatever.

The trustee, who is the sole objector to the allowance of the bankrupt's exemption, bases his objection mainly upon the fact, stated by his counsel, that Smith, Kline & French Company will, if the claim is allowed, receive no dividend upon its claim. The trustee's counsel states in his brief:

"As opposed to the hardship the bankrupt may suffer as the result of his failure to obtain his exemption, Smith, Kline & French Company, for whom counsel for the trustee is likewise personal counsel, will be a sufferer, should this exemption be granted."

[1] The exemption is claimed under section 2 of the act of assembly of Pennsylvania of April 9, 1849 (P. L. 533), providing that property to the value of $300 shall be exempt from levy and sale, and section 1 of the act of April 8, 1859 (P. L. 425), providing that every person entitled to the exemption provided for in the act of April 9, 1849, may elect to retain the said exemption or any part thereof out of any bank notes, moneys, stocks, judgments, or other indebtedness to such person.

"That a bankrupt's right to exemption must be deduced from the state law is unquestionable; but it is no less true that, where the right exists, it is to be asserted in the manner which the Bankruptcy Act itself prescribes." Lipman v. Stein, 14 Am. Bankr. Rep. 30, 134 Fed. 235, 67 C. C. A. 17; Burke v. Guarantee Title & Trust Co., 14 Am. Bankr. Rep. 31, 134 Fed. 562, 67 C. C. A. 486.

[2] The spirit in which exemption laws should be administered in bankruptcy is well expressed in the language of Judge Hook, sitting in the Circuit Court of Appeals for the Eighth Circuit, in the case of Smith v. Thompson, 32 Am. Bankr. Rep. 165, 213 Fed. 335, 129 C. C. A. 637, as follows:

"In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity especially should not attempt to defeat the exemption by niceties in practice; it should be helpful to those whose condition requires them to invoke it. The exemption in question here was not of described articles, but was generally of personal property up to a maximum value out of a larger mass. The substance under the statute was the value, not the particular character of the items."

[3] It is the duty of the trustee, under section 47 of the Bankruptcy Act, to set apart the exemption claimed. It is asserted by the trustee that he could not set apart the claim in cash, because no cash was included within the assets contained in the original schedules. It is undisputed, however, that at the time the petition was filed for leave to amend the claim there was sufficient cash in his hands derived from the sale of the bankrupt's business. Four days prior to the application to amend the claim for exemption, the bankrupt had asked for and

obtained leave to amend the schedules by adding the sum of $3,550 as the value of the business which had been sold. When the bankrupt was permitted to amend his schedules, presumably on notice to the trustee and creditors, and without objection by them, his existing claim for exemption necessarily related to the amended schedule.

In the case of In re O'Hara (D. C.) 162 Fed. 325, it was held that it was not material that the bankrupt was given 10 days extra by the referee within which to file his schedules; the grace accorded him extending to everything which was so covered including his claim for exemption. The bankrupt here moved to amend, in order that he might specifically designate the fund out of which he claimed $300 in cash. The exemption allowed under the Bankruptcy Act is a personal right of the bankrupt, and should not be defeated by the application of technical rules in compliance with the provisions of the state statuté, nor with the forms in bankruptcy. The original claim was for $300 in cash. If cash to that amount had been among the assets, it would have been the duty of the trustee at once to set it aside for the bankrupt.

Section 7 of the Bankruptcy Act does not require that the bankrupt shall enumerate articles claimed as exempt, but only that the claim for such exemption as he may be entitled to shall appear in the schedules which he is required to file. A strict adherence to form is not necessary in order to obtain a substantial right of this nature in a court of bankruptcy. Judge Dallas, in referring to the forms in bankruptcy, well stated the attitude of the courts in Burke v. Guarantee Title & Trust Co., supra:

"They are 'forms,' and nothing more. As was said by the Supreme Court (General Order 38, 39 Fed. xiv, 32 C. C. A. xxxvii), they are to be 'observed and used with such alterations as may be necessary to suit the circumstances of any particular case'; and, under the circumstances of this case, we decline to hold that the failure of the bankrupt to precisely observe one of them was fatal to his claim, because we could not do so without subordinating substance to form, and refusing a legal right, merely on account of a defect in procedure, which has caused no injury to any one, and which, if requisite, might be cured by amendment."

In Lipman v. Stein, supra, where all the assets of the bankrupt estate were sold before the claim was made, and the time allowed for making it had expired, rendering it impossible to appropriate specific property to its liquidation, it was held that the bankrupt's right to the allowance was not thereby extinguished, and that she should be allowed $300 in cash out of the proceeds of the receiver's sale. That the substance of the bankrupt's right, and not the form in which it is presented, is controlling, is evident from an examination of the decisions. See In re Renda (D. C.) 17 Am. Bankr. Rep. 521, 149 Fed. 614; In re Ansley Brothers (D. C.) 18 Am. Bankr. Rep. 457, 153 Fed. 983; In re Luby (D. C.) 18 Am. Bankr. Rep. 801, 155 Fed. 659; In re Dunlap Co., 21 Am. Bankr. Rep. 731, 167 Fed. 433, 93 C. C. A. 69; In re Zack (D. C.) 28 Am. Bankr. Rep. 138, 196 Fed. 909; In re Kelly (D. C.) 28 Am. Bankr. Rep. 730, 199 Fed. 984.

What then was the substance of the bankrupt's right? The law entitled him to cash or property to the value of $300. The assets

which came into the hands of the trustee exceeded in value that amount, though at the time the claim was filed they were not scheduled. The failure to schedule was due merely to inadvertence, and it is not claimed by anybody that it was through a desire on the part of the bankrupt to conceal or to withhold information. Upon the sale of these assets, the original claim for exemption having been objected to by the trustee, the bankrupt without objection added to his schedules the value received for the omitted item. To hold that the bankrupt cannot now have his exemption, because it was claimed in cash and the schedules exhibited no cash at that time, is subordinating substance to technical form. Whether the bankrupt had received property to the value of $300 out of his assets, or now receives $300 in cash, is not shown in the present case to result in any difference in the value of what is received, and, following the equitable doctrine above laid down, the bankrupt's right to exemption should not be defeated, unless some one is injured thereby through some act or omission upon his part.

[4] It is asserted by the trustee, and the referee held, that the fact that the petitioning creditor, who discounted the notes of the purchaser, would fail to receive a dividend, was sufficient ground for not allowing the claim of the bankrupt. Nothing in this record convinces me that the petitioning creditor was led into discounting the notes through reliance upon any act or omission of the bankrupt which can now be held to estop him from asserting his rights as against this creditor. The creditor had notice that exemption was claimed and that the claim was not withdrawn. If he relied upon the technical objection to the claim that it called for cash, when no cash was in existence, I fail to see that he was justified in assuming that the bankrupt was thereby debarred from asserting his claim to payment out of any fund. Moreover, there is nothing in the facts of the case to show that Smith, Kline & French Company will lose anything which it would not have lost if it had not undertaken to discount the notes and the sale had been allowed to go for cash. In the absence of any fact found to the contrary, it must be assumed that the makers of the notes will pay at maturity, and that Smith, Kline & French Company will receive back whatever cash has been advanced by it. Its only disadvantage, then, would be in the disappointment of a hope which it had in common with other creditors that the bankrupt's exemption would not be allowed, and that out of the $300 left in the hands of the trustee all creditors would receive a dividend upon their claims. That it indulged in this hope was based upon its own conclusion as to the law, and not upon any act or omission of the bankrupt. Smith, Kline & French Company, however, is not appearing against the bankrupt upon the petition for review, but its case is presented by the trustee through his counsel.

[5] The position of the trustee should be borne in mind. He has a duty to the bankrupt as well as to the creditor. His attitude in the present case has not been to see that the exemption was set apart, or that the substance of the bankrupt's rights was obtained, but to obstruct and defeat a right asserted by the bankrupt in order to prevent

supposed hardship to a particular creditor. While the Bankruptcy Act imposes upon the trustee the duty of conserving the estate, collecting outstanding claims, and resisting payment of doubtful claims, he stands in a fiduciary capacity, and is to some extent a stakeholder. Bosworth v. Terminal Railroad Association, 80 Fed. 969, 26 C. C. A. 279. In the conflict between his duty to the bankrupt and that to the creditors, he has apparently subordinated the claim of the bankrupt to that of the creditor, who is a private client of the counsel appearing at the argument for the trustee. The situation is at best a delicate one, in the double fiduciary and professional relations involved.

Passing to the merits of the case, I think the learned referee has overlooked the substance of the bankrupt's rights in adhering to technical form; that, while the allowance of an amendment is said to be a matter of grace, the allowance of a claim for exemption is a matter of substantial right, and if, by refusing to allow the amendment, the bankrupt is denied a right which the courts should be astute to recognize and allow, he has gone beyond matters of grace, upon which discretion may be properly exercised, and denied the bankrupt a substantial right, which has not been expressly waived by him, and which he should not be estopped from asserting by reason of any conduct disclosed in this record.

The order of the referee will be reversed, with directions to allow the amendment to the claim for exemption and to allow the exemption as claimed.

CUSHMAN & DENISON MFG. CO. v. GRAMMES et al.

(District Court, E. D. Pennsylvania. August 16, 1915.)

No. 1081.

1. TRADE-MARKS AND TRADE-NAMES ⊂=98—INFRINGEMENT—REFERENCE TO MASTER—FINDINGS AND FORM OF REPORT.

Where, after an interlocutory decree in a suit for unfair trade and an infringement of a trade-mark, adjudging the facts on both issues in plaintiff's favor, defendant's petition to have the decree modified on the issue of plaintiff's property rights in the trade-mark is sent to the master, with the question of what sum plaintiff should recover, he should find the facts bearing on the petition, unless he finds plaintiff joins in the prayer thereof, and make an interlocutory report thereon, or also find separately what plaintiff would be entitled to on the basis of unfair trade alone and on the basis of both unfair trade and infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊂=98.]

2. TRADE-MARKS AND TRADE-NAMES ⊂=98—MASTER—ACCOUNTING FOR PROFITS—DETERMINATION.

Even if the question before the master be only what plaintiff is entitled to recover for unfair trade, it is for him in the first instance to determine whether an accounting for profits by defendant properly enters into the inquiry.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊂=98.]

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3. TRADE-MARKS AND TRADE-NAMES ⊜98—MASTER—ACCOUNTING—STATING ACCOUNT—CONTEMPT.

Under rule of practice 63 (198 Fed. xxxvii), providing that all parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor, a party's account is on the basis of a cash statement of moneys received and disbursed, so that defendants are not in contempt for not complying with the master's order to include in their account the names and addresses of their customers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊜98.]

In Equity. Injunction by the Cushman & Denison Manufacturing Company against Henry A. Grammes and others. Sur interlocutory report of master certifying questions. Cause recommitted to master, with instructions.

Oswald M. Milligan, of Philadelphia, Pa., and Gantz & Tucker, of New York City, for plaintiff.

Fenton & Blount, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. This case presents unusual features. Some of them relate to questions which have been already passed upon and should be regarded as eliminated, except so far as they may be still included among those which may be raised on exceptions to the master's report when it comes to be filed. Others of them may be regarded as still in the case to be determined. A short outline statement of certain record facts may serve to separate the ins from the outs, and enable one to state the governing principles applicable to each.

The plaintiff filed its bill of complaint August 12, 1913, averring both a common-law and a statutory proprietary right in a trade-mark known as the "Gem," and charging both unfair trade and an infringement of its proprietary exclusive privilege, and praying for an injunction and the awarding of damages and profits. On October 6, 1913, a preliminary injunction issued. The cause then proceeded to trial, and defendants, through their counsel, admitted both the trespass and the infringement. Thereupon the cause further proceeded to the entry of a decree adjudicating these facts, and thus far the rights of the parties by making permanent the injunction and referring the cause to have found whether an account of profits should be taken. This was on January 22, 1914. An accounting was found to be called for. A reference then followed to have determined "what sum" the plaintiff should recover. Subsequently there came to the defendants information of facts which were in lethal conflict with the claims of right set up by the bill of complaint. This information was that the claim of a common-law trade-mark had been adjudicated against the plaintiff, and registration of the trade-mark, upon which its statutory right depended, had been denied it. These new aspects of the case were presented to the court in the form of an application to have the decree of January 22, 1914, vacated. This relief was denied by the court. The grievance was re-presented in the form of a motion to open the decree which had first been made. This motion was like-

wise dismissed. The appeal for relief was then renewed under the guise of a petition to have the existing decree modified. No definite action was taken upon this by the court beyond sending it to the master by the order of July 3, 1914.

Recurring now to the proceedings before the master, we have this record: The defendants presented evidence of the facts upon which the prayer of their petition was based. They also presented what they characterize as an account of their dealings in the device to which the dispute between the parties relates. This was not acceptable to the plaintiff as the account to which it claims to be entitled. The master upheld the views of the plaintiff, and by his order indicated that the defendants, in addition to the purely accounting features of the statement, should incorporate in it a list of the names (with addresses) of the customers to whom the clips had been sold, as well as details of production cost, and the facts relating to the credits claimed in the account. The defendants have not complied with this order, and the question of being in contempt has arisen.

[1-3] It will be observed that the undisposed-of petition leaves in the case, undisturbed by any prayer for relief, the finding of unfair competition. The part of the finding which the court is asked to modify is the part of the decree which is based upon the proprietary right. This prelude brings us to a formulation of the principles by which the action of the court should be guided and controlled. This further first calls for an analysis of the situation to which these principles are applicable. Every one has the right to pursue his business or calling free from unlawful interference by others. To him also belongs the right to the possession and use of his property. Each is a right, but the latter only can be properly said to be a right of property. If the former is interfered with by the unfair competition, which is here charged, the wrong is a tort, redress for which is afforded through legal forms by an action for damages and through chancery forms by the added remedy of a restraining order. The basis of the complaint is the tortious conduct of the defendant, and of the remedy compensation for the damage done, as well as protection against further damage. If the owner is deprived of his property, he may establish his right and have the property restored to him, together with the profits, which are also his, received therefrom, for which the defendant must account. To the owner, it is true, belongs the further right to an undisturbed possession and use of that which is his, so that a deprivation of the right of property may involve a tortious act, and there is also at times included in the term "damages" the punitive or vindicatory, as well as the compensatory, thought. None the less there is the indicated essential difference in the two things.

Viewing the present case in the light of this distinction, it is clear that the court cannot proceed to a final award without first finding whether defendant has been guilty simply of the tortious act, or the appropriation of property, or of both. This was done by the decree of January 22, 1914. The decree, it is true, is interlocutory; but as long as it stands it disposes of everything involved in it. We entertain no doubt of the power of control which the court has over such

decrees. This is implied in their very nature. If authority for the existence of such power is required, it may be found in Perkins v. Fourniquet, 47 U. S. 206, 12 L. Ed. 406. This is, however, far from being all. The exercise of power, merely because it is possessed, is the height of unwisdom. The doctrine of stare decisis, where the decision has been made in the very case under consideration, has a value far beyond that of the presumption of correctness. The ruling is much more than merely persuasive, even when the reasoning of the judges by whom it was rendered is such as to bring instant convincement of mind. It is a decision of the questions involved which should not be disturbed by any other than a tribunal having appellate duties. We have the authority of one of the greatest of jurists and statesmen for the truth that bad laws may be borne, but the "jus aut vadum aut incertum" presents a situation which is intolerable.

The decree of January 22, 1914, has not only the original sanction of its first entry, but the double confirmation of two refusals—one to vacate, the other to open, it. If this were all the record shows, it surely would stand as made. The decree of July 3, 1914, and the opinion of Judge McPherson accompanying it, however, implies its at least partial suspension, and forbids us to treat it as a closed chapter of the controversy. As the question of the property rights of the plaintiff is still in the case, this in consequence affects the duty imposed upon the master to report "what sum, if any, plaintiff is entitled to recover." The controversy has already been unduly prolonged, and the litigation, so far as conducted in this court, should be brought to a final decree. The order of July 3d contemplated a report from the master which would enable the court to make a final decree. It further expresses the will of the court to retain control of the questions otherwise determined by the decree of January 22d. This decree is none the less in force. It, coupled with the order of July 3d, imposes a triple duty upon the master. This would involve a finding of the sum to be found under the decree as made. It would also involve a separate finding of such sum, based upon the unfair competition by itself, in the event of the proprietary property feature being eliminated. Finally, it would call for a report of the facts averred in the petition upon which the order of July 3d was based, so that the court might modify or refuse to change the decree of January 22d.

The order in which these several duties were to be discharged is not indicated in the order. It would therefore be within the province of the master, if so requested by the parties, or if in his judgment such a disposition of the cause was called for, to report first upon the facts of the petition by an interlocutory report, and thus clear the case of the necessity of a finding of more than one sum. The final decree could, of course, be expedited by the parties agreeing upon and joining in a request for a modification of the decree by limiting the sum to be found to the amount which the plaintiff is entitled to recover for unfair competition only. To this, we understand from the report of the master, the plaintiff has agreed. If such is the case, the finding may be accordingly limited. This should enable the master to proceed with what is pending before him. It does not, however, dis-

pose of the special question which he has certified to the court. We do not deem it proper, in advance of the report of the master and of argument upon exceptions, which may be filed to his report, to give expression to the views of the court on the question of whether the amount of defendants' profits affords any aid in the admeasurement of plaintiff's damages, or whether plaintiff is entitled to an accounting for such profits further than to make these observations. If the property right is still in the case, we do not understand plaintiff's right to an accounting to be denied. If the finding is restricted to the sum to which plaintiff is entitled because of unfair trade only, the master can determine whether an accounting for profits properly enters into the inquiry.

When the right of a plaintiff to an accounting is found, rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii) gives ample authority to require the defendant to file such account, and sufficiently designates its form and what it shall contain. In form it must be a debtor and creditor statement. The rule indicates that it shall be on the basis of a cash statement of moneys received and disbursed. The analogue of an account stated by a sales agent or other fiduciary will afford a guide to what is required. If the account is accepted by the plaintiff, the profits have been ascertained, and this inquiry is at an end. If the statement is not acceptable, the case of a hearing upon exceptions to the account of any trustee supplies the required guide. The account, as stated by the defendants, is one thing. The evidence from which the master finds the facts upon which to base an account stated by him is another thing. Care should be taken to keep the distinction clear. The first should be a financial statement in cash account form simply. It should not be a list of possible witnesses, nor a statement of evidence, by which the items of the account may be vouched. The parties may call witnesses or offer evidence bearing upon accounting facts. Subpœnas may issue and include the usual duces tecum clauses. The production of books and papers may be compelled. Rules 62 and 63 and the ordinary rules which pertain to such matters apply. If a defendant objects to account, or a witness is asked to testify, or to produce books or papers, and objection is made, the question raised should be passed upon by the master. If the order of the master is met by a refusal to comply, the refusal may be certified to the court, or the opposite party may ask the master to find the facts and to state an account against the defendants from all the evidence before him.

In making such orders, care should, of course, always be taken to preserve to each party all his rights. Under the guise of requiring an account, or eliciting facts through testimony and evidence, neither party should be required to disclose the course of his dealings, so that a rival or competitor may injure him or gain an unfair advantage. The test is always: Is the requirement relevant to the decision of the cause? Almost everything in such cases must in the first instance be left to the discretion of the trial judge, or of the master acting in that capacity. Bringing these abstractions to the concrete, we decline to adjudge the defendants to be in contempt because of what this record

discloses, and are of opinion that the order requiring the defendants *in their accounting* to give the names and addresses of their customers should be revoked. The basis of the expressed willingness of the defendants to give the information does not warrant a contempt finding. The cause is recommitted to the master, with instructions to proceed in accordance with this opinion. For his guidance we recapitulate the points of instruction:

1. Let the master definitely find whether plaintiff agrees to join with defendants in the prayer to have the decree of January 22, 1914, so modified as to limit the finding against the defendants to one of unfair competition only, and to withdraw all claim to infringement of trade-mark property, and to further agree that the determination of the "sum, if any, which plaintiff is entitled to recover from the defendants" be likewise limited.

2. If the inquiry is so limited by agreement, the master may then determine "the sum, if any, to which plaintiff is entitled," and questions which may incidentally arise, including the one of whether, in the case as so limited, the defendants should be called upon to disclose the amount of moneys received by them. If the plaintiff has not so agreed, or does not do so, then the master, if the parties so request and stipulate, or if in his judgment such interlocutory report will expedite the decision of the cause, may report a finding of all the facts bearing upon the petition referred to him by the order of July 3, 1914, or the master may proceed to determine all the questions now before him, and report, in addition to the findings above indicated, findings of the sum, if any, to which plaintiff is entitled on the basis of a finding of unfair trade alone, and also on the basis of a finding of both unfair trade and infringement of trade-mark property being in the case, these amounts to be separately stated, respectively.

This order is made with a view to having the case in shape for final decree on exceptions, if any are taken, to the master's report.

In re J. F. PIERSON, JR., & CO.

(District Court, S. D. New York. July 24, 1915.)

1. BANKRUPTCY ⟸140—BROKERS—RIGHTS OF CUSTOMERS.
Where a bankrupt stockbroker did not have in his possession free and clear stock equal to the claims of all customers for whom he had purchased stock, none of the customers could reclaim any part of the stock on hand, or any part of the equity in such loans as had among their collateral the remaining stock, though, where he had in his possession stock free and clear sufficient to satisfy all the customers, it would be presumed that he had purchased it to keep good his obligations to the customers, who could reclaim the stock.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

2. BANKRUPTCY ⟸140—BROKERS—RIGHTS OF CUSTOMERS.
A customer of a bankrupt stockbroker, who showed that his account had a credit balance when the petition in bankruptcy was filed, but who could not trace his stock by certificate number into a loan secured by stock as collateral, had no superior equity, and could not reclaim any stock.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

3. BANKRUPTCY ⟸326—BROKERS—RIGHTS OF CUSTOMERS.
A customer of a bankrupt stockbroker, who could not trace stock purchased for him, and pledged for loans, was entitled to a set-off equal to the value of the stock when converted; and where the customer, having the burden to show the date of the conversion, did not show it as of any given date before date of bankruptcy, the value of the stock could be fixed as of that date.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. ⟸326.]

4. BANKRUPTCY ⟸140—BROKERS—RIGHTS OF CUSTOMERS.
A customer of a bankrupt stockbroker, who was credited with the proceeds of stock as of the date of bankruptcy in a sum sufficient to wipe out his debt, and which gave him stock free and clear, came within the preferred class, and could reclaim the stock; and where the equity of the loan was not enough, the deficiency must be borne by other customers, holding their stocks on a margin.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. ⟸140.]

5. BANKRUPTCY ⟸474—PROCEEDINGS TO RECLAIM PROPERTY—COSTS.
A customer of a bankrupt stockbroker, who found his stock in loans, while entitled to a credit balance, is not liable to pay any part of the disbursements in reclamation proceedings, and should have a docket fee; and since the bankrupt should have withdrawn the stock from the collateral, and so placed it as to enable the customer to get it without expense, the expenses arising from his failure to do so must be borne by the general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⟸474.]

6. BANKRUPTCY ⟸476—PROCEEDINGS TO RECLAIM PROPERTY—COSTS.
Customers of a bankrupt stockbroker, carrying stocks on a margin, are not entitled to any docket fee in reclamation proceedings, for they gave the broker the right to pledge them as collateral with banks.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 898, 899; Dec. Dig. ⟸476.]

7. BANKRUPTCY ⊂=474—PROCEEDINGS TO RECLAIM PROPERTY—COSTS.
Customers of a bankrupt stockbroker, who seek to reclaim stock, but who fail altogether, should not bear any costs of an omnibus customers' reclamation proceeding, wherein other customers obtained relief.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. ⊂=474.]

In Bankruptcy. In the matter of the bankruptcy of J. F. Pierson, Jr., & Co. Omnibus customers' reclamation proceeding. Order advised.

William M. Parke, of New York City, for receiver.
Joseph J. Jacobs, of New York City, for Charles Greenberg.
Bayard L. Peck, of New York City, for Walter J. Quinn.
James Gillin, of New York City, for Howard S. Gott.
John C. Rowe, of New York City, for Charles McClair.
Irving L. Ernst, of New York City, for Patrick J. Ruddy, Joseph J. Ives, Pauline A. Buchholz, and Jared T. Kirtland.
Taylor, Jackson & Brophy, of New York City, for Morris Ritter.
Frank L. Boynton, of New York City, for Horace C. Stringfield.
William F. Unger, of New York City, for Laurence J. Levy, Hela Van Thyn, and Jules Vrieslander.

LEARNED HAND, District Judge. [1] Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, held that, when a broker had enough stocks in his box to meet all his obligations, it would be presumed that he had purchased them to keep good those obligations. Just what there was "revolutionary" in that doctrine I confess is not apparent to me, except that it reversed the rule theretofore obtaining for a short time in this circuit. Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806, did not affect or modify this ruling in the least, but it did hold that the same rule did not apply to the replenishing of bank accounts. Re Leavitt & Grant, 215 Fed. 899, 132 C. C. A. 238. Re Hollins & Co., 219 Fed. 544, — C. C. A. —, held that the presumption did not apply, although the broker had enough shares of stock to meet all his obligations, if those shares were partly in loans, partly lent to a customer who had gone "short," and partly in his box. I do not think that anything turned upon the fact that part of the shares had been lent to another customer, instead of being pledged with a bank, because, when so lent, the broker gets in return a chose in action binding the customer to secure for him a corresponding number of shares. There is no indication in Re Hollins, supra, that the decision would have been different, had the shares of stock in the loans and in the box equaled the number required to fulfill the obligations to the customers. On the contrary, the whole discussion turns upon the number of shares which the brokers had free and clear and in their possession. I think the master was right in holding that this case limits Gorman v. Littlefield, supra, to cases where there is enough to go around "in the box." However, I wish to add that the language in Re Leavitt & Grant, supra, that Gorman v. Littlefield, supra, applied to securities "in the

box" was not intended so to limit that case, and was quite unnecessary to the decision.

The claimants urge that the doctrine of Re Hollins, supra, is wholly inconsistent with any logical application of the doctrine of Gorman v. Littlefield, supra. They say that, if the presumption exists, it is one of fact, arising from the probability that a broker has done what is honest, and that the Supreme Court put the doctrine upon that very ground. If, they add, the stock was intended to become the customers' as soon as the broker bought it, obviously no subsequent pledge can affect their rights in it as between him and them. If, they conclude, it should be urged that his subsequent pledge be thought to be evidence of his prior intent, when he bought it, to buy it for himself, not them, the answer is that his subsequent pledge was not inconsistent with an intent to buy for them, for he had the right to pledge customers' shares which they held on margin, at least for the amount of the margin. Once you assume that purchases of the necessary issues of stock are intended for customers, why, they ask, should you think them any the less so because you afterwards find them exactly where you would expect to find them, were your assumption true?

All such arguments, however, must be addressed only to the Circuit Court of Appeals, and can gain no hearing in this court. It therefore follows that, in all cases where the bankrupts did not have free and clear in their box an amount of stock equal to the claims of all customers, none of the customers may reclaim any part of what they did have on hand, nor any part of the equity in such loans as had among their collateral the remaining shares. This disposes of the claims of Joseph J. Ives, Patrick Ruddy, Pauline A. Buchholz, and Jared T. Kirtland.

[2] Quinn's claim is in the same category. He insists that his case is covered by Re Ennis, Ex parte Bamford, 187 Fed. 720, 109 C. C. A. 468, because his account showed a credit balance when the petition was filed. He would be quite right in his argument if he could trace his stock by certificate number into the loan in question. That was the assumption throughout in Ex parte Bamford, supra, an assumption the exact basis of which is not quite certain to me, but which I understand to rest upon an actual tally of the securities found in the loan. They were identically traced. We must remember, however, that under the rule of Re Hollins, supra, no presumption whatever of ownership arises unless there are enough shares "in the box," or unless the claimant can actually identify his shares by certificate number. Hence the condition is absent which would give Quinn the preference that Bamford got in his case. The decision in Re McIntyre, Ex parte Pippey, 181 Fed. 955, 104 C. C. A. 419, rests upon the same identification of securities as Ex parte Bamford, supra.

McClair's Case falls with Quinn's. McClair has not actually traced his certificate .099 bought on May 27, 1912, into the shares held by the American Exchange National Bank. On the contrary, it was delivered elsewhere. Hence, though he had a credit balance, he does not fulfill the condition realized in Ex parte Bamford, supra, and Ex parte Pippey, supra; he cannot trace or identify his stock.

Levy's Case follows the disposition of Ruddy's and the others first considered, and fails.

The claim of Van Thyn and Vrieslander also falls in the same category as Ruddy, except for the point of waiver. That can make no difference in the result, because it does no more than give to those who can trace their property the right to that property. As there is no property to reach, it cannot create what does not exist.

[3] Gott's claim raises an interesting question. The master has allowed him his National Enameling stock because he has traced the specific certificate. About that stock, therefore, there is no dispute. Yet he has held him indebted to the estate to an extent measured in part by crediting him with the value of his Sloss-Sheffield stock. Now, this stock, under the rule in Re Hollins & Co., supra, cannot be traced, because, although the bankrupts had enough stock to fill their orders, it was all pledged, and the pledge prevents the presumption from arising. If the Sloss-Sheffield stock in the loan is not Gott's, then it must have been converted at some prior time, or it can never have been purchased at all. As Gott is in any event entitled to a set-off equal to the purchase price, if the order was never executed, or to the value of the stock when sold, if later converted, there must be some period of time fixed for its value. The master has taken the value of Sloss-Sheffield stock on July 30, 1914, and allowed him for that. Such a finding can only rest upon the assumption that July 30, 1914, or later was the date of conversion, a pure assumption without evidence. Further, we have it on the authority of Re McIntyre, Ex parte Niven, 174 Fed. 627, 98 C. C. A. 381, that there is no conversion if the broker retains enough shares in the possession of another to meet his obligations.

Apparently, therefore, while the customer has no property in the certificates in the hands of others, the broker has not converted the stock, if there remain enough in such hands subject to his control to answer his obligations. If it appeared that there always was enough stock on hand, then there would never be a conversion, and we should be presented with the strange anomaly that while, under Ex parte Nevin, supra, the broker had never converted the stock, yet under Re Hollins & Co., supra, the customer had no property in any of the stock at hand. Such a situation, if it ever arise, would apparently present the necessity of yielding one doctrine or the other. However, that dilemma is not raised in the case at bar, because it does not appear that the bankrupts always had enough stock on hand, but only that they might have had. Since, under Ex parte Nevin, supra, the burden rests upon the customer to show the date of the conversion and since he has not shown it as of any given date before July 30, 1914, the master did the only thing open to him and took the value as of the date of bankruptcy. I do not forget that consistently, under Ex parte Nevin, supra, no conversion whatever has been shown. Logic would require that Gott should get neither stock nor any allowance for the value of the stock at any time; but there are limits of injustice to which consistency should not drive us, and this is one of them. Some value must be taken quite arbitrarily, and I can see no other which is less arbitrary than that adopted.

It is quite clear that there is no warrant in fact for Gott's suggestion that no purchase was ever made, and therefore the rule does not apply of West v. McLaughlin, 162 Fed. 124, 89 C. C. A. 124.

Greenberg's claim falls with Ruddy's.

[4] Ritter's claim is a little better than the master has allowed. Having traced his stock specifically, he may recover it. However, his other stocks he does not get, and is credited with their proceeds as of July 30, 1914, a credit which is enough to wipe out his debt altogether and give him his Erie stock free and clear. He, therefore, comes under the rule of Ex parte Bamford, supra, and is in a preferred class. If the equity of the loan is not enough, the deficiency must be borne by the other claimants, provided they held their stocks on a margin. If any of them were in Ritter's position, and held stocks free and clear, they will also be in the preferred class.

[5] The last question is of the costs and disbursements. Those customers who, like Ritter, found their property in loans, while they were themselves entitled to a credit balance, ought not to be called on to pay any part of the disbursements, and should have a docket fee. The bankrupt, under Ex parte Bamford, supra, should have withdrawn their shares from the collateral, and put them in his box, where the customer should have been able to get them without expense. The expenses arising from his failure to do this are properly to be borne by his general creditors, who must take his place as he left it.

[6] Those customers who were carrying their stocks on a margin gave the broker thereby the right to pledge them as collateral with banks, and it may fairly be argued that the expense of disentangling the resulting rights they should bear in proportion to their eventual interests. I am clear that they should have no docket fee.

[7] Those claimants who fail altogether should not bear any costs. The proceeding is now remitted to the Special Master to prepare an order in accordance with this opinion. So far as I am aware, that order will follow the report, except in respect of the stock of Ritter and in the matter of disbursements.

SHAFFER v. FEDERAL CEMENT CO.

(District Court, E. D. Pennsylvania. September 2, 1915.)

No. 3638.

1. DEBT, ACTION OF ⊂=15—NATURE AND SCOPE OF REMEDY.

In an action of debt, the issues are, does defendant owe the claimed debt? and does he owe it to plaintiff? and a merger of the issues results in the question, what, if anything, does defendant owe to plaintiff?

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. §§ 30, 37; Dec. Dig. ⊂=15.]

2. ACTION ⊂=13—LEGAL OR EQUITABLE—DEFENSES.

Notwithstanding the practice prevailing in Pennsylvania of administering equity through legal forms permits equitable defenses in actions of

assumpsit, no action at law can be maintained unless the right of action is in plaintiff.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 76–83; Dec. Dig. ⊂⊃13.]

3. ACTION ⊂⊃24—DEFENSES—LEGAL OR EQUITABLE.

Where a claim of debt arises out of the promise sued on, so as to give a right of action to plaintiff, the fact that the claim has been assigned to a third person is no legal defense; but out of such a claim of ownership an equitable defense may arise, and under the Pennsylvania practice defendant may call on claimant to come in and defend or invoke the equitable powers of the court through form of motion or rule to have the case marked to the use of the real owner of the claim, or, if within the terms of the statutes, to have the parties interplead, or file a bill in equity for the purpose, or pay the claim into court, so that an issue may be framed and determined to whom it belongs, or permit the cause to proceed and ask for relief.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 153–155; Dec. Dig ⊂⊃24.]

4. ASSIGNMENTS ⊂⊃131—ACTION—DEFENSES.

Where suit is brought in the name of the legal plaintiff, the averment by defendant of his ignorance of the true ownership of the claim, or his averment of its assignment, unless such as to carry with it the right of action, is no defense.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 220–226; Dec. Dig. ⊂⊃131.]

5. ASSIGNMENTS ⊂⊃121—ACTION BY ASSIGNEE—DEFENSES.

An action by, and in the name of, the assignee of the claim sued on, who is not the proper legal plaintiff, cannot be maintained, though the fact of assignment is admitted, and the absence of the right of action in the assignee is a good defense.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200–205; Dec. Dig. ⊂⊃121.]

6. CORPORATIONS ⊂⊃473—ISSUE OF BONDS—"REGISTERED HOLDER"—"REGISTERED OWNER."

An obligor in bonds in the form of an acknowledgment of an indebtedness to the registered holder, with a further promise to pay the interest to such holder, and the added provision that the bond is transferable on the books of the obligor at its office, and the registered owner only shall be entitled to receive the principal and interest, is not called on to pay interest, except to one in whose name the bond is registered, and who can also otherwise prove himself to be the owner, and the obligor may not refuse to permit a transfer of the registered ownership, and then refuse to pay the interest to the registered holder, in whose name the bonds stand, because of his attempted transfer; "registered holder" and "registered owner" meaning that the person in whose name the bond is registered is the owner, so far as propriety of payment by the obligor, and so far as the right of action to enforce payment, is concerned.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. ⊂⊃473.

For other definitions, see Words and Phrases, Second Series, Registered Holder.]

7. BANKRUPTCY ⊂⊃150—"TITLE" OF BANKRUPT AND TRUSTEE.

Where a registered holder of bonds was adjudged a bankrupt, but the bonds were not included in the schedule of assets, and the trustee disclaimed all title thereto, the registered holder could enforce payment thereof, though the legal effect of an adjudication in bankruptcy is by operation of law to transfer to the trustee the right of ownership and title of the bankrupt to all his property; but the word "title" may be

used as expressive of the thought of having the naked legal title without the beneficial ownership, or of the thought of having both.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 228; Dec. Dig. ⊂⊃150.

For other definitions, see Words and Phrases, First and Second Series, Title.]

8. PLEADING ⊂⊃281—SUPPLEMENTAL AFFIDAVIT OF DEFENSE.

Though a registered holder of bonds is entitled to enforce payment thereof, the obligor, filing affidavit of defense not presenting a valid defense, will be granted leave to file a supplemental affidavit of defense, setting up any new matter arising out of any steps he may take for his protection in the payment of the claim of the holder, provided the affidavit is filed within a specified time.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 844; Dec. Dig. ⊂⊃281.]

At Law. Assumpsit by William B. Shaffer against the Federal Cement Company. On rule for judgment for want of sufficient affidavit of defense. Judgment for plaintiff.

Smith, Paff & Laub, of Easton, Pa., for plaintiff.
Wm. Jay Turner, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] This is in substance an action of debt. In any such actions, one or both of two questions may arise, which in a sense are merged into one. The two questions are: The one, does the defendant owe the claimed debt? The other, does he owe it to the plaintiff? The merger results in the query: What, if anything, does he owe the plaintiff? In all legal actions these questions are distinct and separate, and differ in kind and character.

[2] The practice which prevails in Pennsylvania of administering equity through legal forms permits equitable defenses to be presented in actions of assumpsit. Legal principles are, however, none the less given their full sway and application. No action at law can be maintained unless the right of action is in the plaintiff. The fact that the fruits of the legal victory, if obtained, belong to another, in no wise affects the question of determining who is the legal plaintiff, or the legal principle that the suit must be brought in the name of the legal plaintiff.

[3] Where a claim of debt justly arises out of the promise sued upon, so as to give a right of action to the plaintiff, the fact (although it be a conceded fact) that the claim has been assigned to a third person is no legal defense, and that mere fact presents no defense at all. Out of such a claim of ownership by a third party, however, an equitable defense, or the right of defendant to equitable relief, may arise. Under the Pennsylvania practice he may call upon the claimant to come in and defend, or invoke the equitable powers of the court through the form of a motion or rule to have the case marked to the use of the real owner of the claim, or, if within the terms of the statutes, to have the parties interplead, or may file a bill in equity for the purpose, or may pay the amount of the claim into court, so that an issue may be framed to determine to whom it belongs, or he may

permit the cause to proceed, to have determined the existence or amount of the debt, and then ask for relief through any of the appropriate forms above indicated, or through the exercise of the control which every court has over its execution process.

[4] When, however, suit has been brought in the name of the legal plaintiff, the averment by the defendant of his ignorance of the true ownership of the claim, or his averment even of its assignment (unless such as to carry with it the right of action), is no defense.

[5] On the other hand, an action brought by and in the name of the assignee, even if the fact be admitted, who is not the proper legal plaintiff, cannot be maintained, and the absence of a right of action in the plaintiff is a good defense. Let us apply these principles to the facts of this case as set forth in the statement of claim, and as modified by the averments of the affidavit of defense. The first question to be determined is: In whom is the right of action? If it is not in the plaintiff, that is the end of the case. If it is in him, we go to the next question.

[6] The record facts are these: the defendant company issued a series of bonds, and executed a collateral trust agreement to secure their payment. In and by each of the bonds the defendant promised to pay the amount named within a certain time, and the interest semi-annually on the 1st days of January and July of each year at a given rate per cent. The claim is for this interest, and the action has been brought to recover it. Neither the fact that the interest claimed is due and payable, nor the amount of it, is in dispute. The bond is in the form of an acknowledgment of indebtedness to the "registered holder," with a further promise to pay the interest to "such holder," and the added provision that the "bond is transferable upon the books" of the defendant "at its office in the city of Philadelphia, and the registered owner only shall be entitled to receive the principal and interest," etc. This part of the defense turns upon the latter quoted clause. The bonds in suit were issued to and registered in the name of the plaintiff. The argument is that, although the promise to pay is made to the registered "holder" he is given the right to assign to a registered "owner," and such owner thereafter is alone entitled to receive the interest. In other words, this latter phraseology means that, after a bond has been assigned, the company is not called upon to pay the interest, except to one in whose name the bond is registered, and who can also otherwise prove himself to be the "owner."

The averment of facts to which this meaning of the contract is applied is that defendant is informed that the plaintiff disclaimed ownership in the bonds, and that different persons at different times had asked to have the bonds, or some of them, registered in their names as assignees of the plaintiff (which registration was refused by defendant), and that defendant expects to be able to prove that plaintiff is not the real owner of the bonds. The inferential denial of indebtedness because of these facts is made. This case is no exception to the general rule that every case worth decision always presents a practical question, as well as sometimes a purely legal one. The practical phase is the absence of any averment that any one other than the

plaintiff has ever demanded the interest on these bonds, or that any one has notified or warned the defendant not to pay the plaintiff, or threatened it with the danger of a double payment in case it did so. The statement of facts accompanying the above averments of the affidavit is wholly consistent with the truth of such a situation as this. The bonds, although registered in the name of the plaintiff, in fact belonged to other members of his family, and the effort was made to have them assigned to the real owners. When registration was refused by defendant, the effort was made to sell or pledge them, and to have the proposed change of ownership noted. The position of defendant (except with respect to the feature next to be discussed) resolves itself into this: That it may first refuse to permit a transfer of the registered ownership, and then refuse to pay the interest to the registered holder, in whose names the bonds stand, because of his attempted transfer.

We can find no such meaning in the quoted language of the contract. The phrase was inserted for the benefit, in that it was for the protection, of the defendant in making payment to the registered owner. It is justified in paying him, because he alone can demand payment. This means that no one else has a right of action against the corporation. There is no difference in legal meaning between "'registered holder" and "registered owner." Either expression means that the person in whose name the bond is registered is the owner, so far as the propriety of payment by the corporation and so far as the right of action to enforce payment is concerned. In this aspect of the case the affidavit shows no defense.

[7] This brings us to the other feature of the affidavit, to which reference was above made. There is the positive averment of an adjudication in bankruptcy, with the usual legal consequence that the title to these bonds passed along with the other property of the bankrupt to his trustee. There is, however, the accompanying statement that the bonds were not included in the schedule of assets, and that after inquiry made into the facts the trustee disclaimed all title to the bonds. The facts leave no merit in defendant's position, other than what arises out of the question of whether the legal effect of the adjudication (notwithstanding the disclaimer) was to transfer the title of the registered owner to his trustee in bankruptcy by operation of law. If the title so passed, it follows that the right of action is in the trustee, and not in the plaintiff, and this action cannot be maintained in his name. The converse is equally clear. The distinction is a hornbook one between the ownership of property and the mere holding of title to it, or the power of control over it, or its possession. The distinction is between title to and the property right in a thing. Broadly stated the legal effect of an adjudication in bankruptcy is by operation of law to transfer to his trustee both the right of ownership and the title of the bankrupt to all his property. In the apt language of the act of Congress the trustee is "vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt," with the exception noted. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (Comp. St. 1913, § 9654).

The word "title" has a recognized appropriate use in a double sense. It may be used as expressive of the thought of having the naked legal title, without the beneficial ownership, or of the thought of having both. The distinction is recognized in the act of Congress, and preserved by the provisions which require a conveyance by the trustee to the purchaser of property sold, and which revest title in the bankrupt after composition made, and vesting it in the trustee if the composition be set aside. The difference between a mere holding of title to and the real ownership of property is further recognized in the practice of summary and reclamation proceedings, through which the trustee in the one case asserts and in the other abandons claim to the property which is the subject of the proceedings. When a claim of ownership to property of which the bankrupt is in possession, or to which he holds the naked legal title, is made by a third party, and allowed through appropriate proceedings, the legal result must be that the title is vested in such claimant. Such result may be reached through formal petition, answer, and replication, and the decision of the issue thus raised. It none the less flows from the abandonment by the trustee of all claim to the property. Under the Bankruptcy Law the title which passes to the trustee is the title of the bankrupt to that which belongs to him, not to what belongs to another, and when through any proceedings it is determined that the thing in dispute did not belong to the bankrupt, it is determined that title did not vest in the trustee. The affidavit of defense in the present case admits that such proceedings were had, and thus admits the legal consequence that title did not pass to the trustee. The further legal consequence is that plaintiff is entitled to judgment.

[8] In making absolute the rule for judgment, we wish to protect the defendant as a stakeholder from all danger of double payment. Leave is therefore granted defendant to file a further supplemental affidavit of defense, setting up any new matter which may arise out of any steps defendant may take for its protection in the payment of plaintiff's claim. If such affidavit be filed within five days, the rule may be set down for reargument on the affidavit. If the affidavit be not so filed, the present rule is made absolute. The ruling is based on these propositions. The promise of defendant is to pay the interest to the person in whose name the bond is registered. Such person has a right of action to enforce the promise, and is properly made the legal plaintiff in a suit at law. For the protection of defendant the contract provides that legal demand for payment can be made by no one else. The legal right of action is therefore in such person only, and any suit at law must be in his name. The defendant clearly has no right of concern in the beneficial ownership of the bond beyond being protected against the assertion of the equitable rights of unregistered owners. This right of protection affords no justification for defendant's refusal to keep its promises. There are other recognized methods of securing the relief for which such protection calls. The statement of claim includes a demand for interest on the several sums which make up plaintiff's total claim. This question of the right to recover interest has not been passed upon, because not discussed at the argument.

In entering the judgment above allowed, the plaintiff may enter judgment for the amount of his claim, without interest, or may move for judgment for the amount of his claim, with interest, and the question will then be decided.

HUDGENS et al. v. BAUGH.

(District Court, W. D. South Carolina. September 15, 1915.)

JUDGMENT ⊂=446—ENFORCEMENT—RIGHT TO ENJOIN.

While enforcement of a judgment may be enjoined, where the unsuccessful party has been prevented from fully presenting his case by the deception of his opponent, a judgment on a note given for the price of a horse, which proved worthless, will not, where plaintiff, who was assignee of the note, was unconnected with the fraud, be enjoined on account of newly discovered evidence that defendant's agent fraudulently conspired with the sellers; the fraud not affecting the judgment, and the defense being one which could have been presented at trial, which did not occur until a number of years after the sale and execution of the note.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 845–848; Dec. Dig. ⊂=446.]

In Equity. Bill by Arthur L. Hudgens and others against William S. Baugh. Bill dismissed.

Richey & Richey, of Laurens, S. C., and Haynsworth & Haynsworth, of Greenville, S. C., for complainants.

Dial & Todd, of Laurens, S. C., and Cothran, Dean & Cothran, of Greenville, S. C., for defendant.

JOHNSON, District Judge. In December, 1911, the defendant in this bill, William S. Baugh, brought an action at law in the Circuit Court of this district against the complainants in this bill, as defendants, upon three several promissory notes, each for the sum of $1,066.66, dated February 13, 1907, and payable, respectively, October 1, 1908, October 1, 1909, and October 1, 1910, with interest at 6 per cent. from maturity and 10 per cent. attorney's fees; each note subject to a credit of $266.66 as of February 8, 1907. The defendants in that action answered the complaint and made defense, alleging a breach of warranty in the sale of a German Coach stallion for which the notes were given.

The action came on to be tried by Judge H. A. M. Smith and a jury at October, 1913, term, and resulted in a directed verdict in favor of the plaintiff for $3,789.56. Upon the trial it appeared that the two notes maturing October 1, 1909, and October 1, 1910, were transferred to William S. Baugh before maturity, for value, but that the note maturing October 1, 1908, was transferred to him after maturity. The defendants made no contest as to the two notes transferred before maturity, but contested the other. The verdict as to it was directed upon the ground that the sale was made under a special warranty, which required a return of the horse, and this was never tendered.

In October, 1914, nearly a year after the rendition of the judgment, a motion was made before Judge Smith for a new trial upon after-discovered evidence; the after-discovered evidence being that at the time of the purchase of the stallion, which was the consideration for the notes set up in the complaint, the defendants did not know that one D. H. Counts, who acted for them in the purchase, was at the same time the agent and acted for the vendor, and was interested in making the representations on behalf of the vendor and procuring the sale; that D. H. Counts had deceived the defendants into the belief that he (Counts) had faith in the enterprise and had joined in the venture, and he would be stimulated to make the business a success, and to make sure of the deception resorted to the trick of giving his check as one of the purchasers for $200, which was paid to the vendor, who thereupon paid it back to Counts; that this was a fraud under the principles decided in Hickman v. Sawyer, 216 Fed. 281, 132 C. C. A. 425, and that as to the third note sued upon, which was not proven to have been transferred to the plaintiff for value before maturity, this defense of fraudulent conspiracy could be interposed; that it was unknown to the defendants at the time of the previous trial, and only now were they able to set it up, and therefore upon this after-discovered evidence they are entitled to a new trial upon this note.

On the 13th of November, 1914, Judge Smith filed his order refusing the motion, holding that the moving parties had not shown due diligence, that their motion depended upon the declarations of a witness who was examined at the trial, and that it referred to an issue which was not made upon the trial. His concluding words were:

"If the verdict and judgment has been procured by fraud through the collusion of the plaintiff and the witness Counts in preventing the interposition of the fraud of the vendor and Counts as a defense in this cause, so that it is an issue not determined upon the trial had, then it may be that the defendants would be entitled to an injunction on the equity side of the court against the enforcement of the judgment."

Thereafter the defendants were inactive until the 20th day of July, 1915, when this bill was filed. The defendants in the action at law now bring this bill against the plaintiff in that action to enjoin the enforcement of the execution issued upon the aforesaid judgment. It is important to notice the exact ground for this bill. The plain intimation in Judge Smith's order, which is unquestionably the law, is that if the verdict and judgment has been procured by fraud through the collusion of William S. Baugh and the witness Counts in preventing the interposition of the fraud of Couch & Son and Counts as a defense, the defendants could maintain this bill to enjoin the enforcement of the execution. The collusion must have been between the plaintiff, Baugh, and the witness Counts, not between Couch & Son and Counts.

The bill makes no reference to any fraud or collusion between Baugh and Counts, but refers only to that between Couch & Son and Counts. It appears that Baugh came into the case long after the negotiations for a sale in February, 1907, and there is not a word in the bill connecting him with the alleged fraud of Couch and Counts. The defendant W. S. Baugh now moves for an order dismissing the bill for

want of equity, and that is the matter presently to be decided. I think that the controversy is governed by the case of United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93. There it is held:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side, these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, § 499; Pearce v. Olney, 20 Conn. 544; Wierich v. De Zoya [2 Gilman] (7 Ill.) 385; Kent v. Ricards, 3 Md. Ch. 392; Smith v. Lowry, 1 Johns. Ch. (N. Y.) 320; De Louis et al. v. Meek et al., 2 G. Greene (Iowa) 55 [50 Am. Dec. 491].

"In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

Also:

"We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, in the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

To the same effect is United States v. Beebe, 180 U. S. 348, 21 Sup. Ct. 371, 45 L. Ed. 563; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; Marshall v. Holmes, 141 U. S. 596, 12 Sup. Ct. 62, 35 L. Ed. 870; Graham v. R. Co. (C. C.) 14 Fed. 753; Kimberly v. Arms et ux. (C. C.) 40 Fed. 548; Hilton v. Guyott (C. C.) 42 Fed. 252; Young v. Sigler (C. C.) 48 Fed. 183; Daniels v. Benedict (C. C.) 50 Fed. 353; Smith v. Worthington, 53 Fed. 981, 4 C. C. A. 130; Tomkins v. Drennen, 56 Fed. 694, 6 C. C. A. 83; Graver v. Faurot, 76 Fed. 259, 22 C. C. A. 156; Ritchie v. McMullen, 79 Fed. 522, 25 C. C. A. 50; Miller v. Perris (C. C.) 85 Fed. 693; Reed v. Stanly (C. C.) 89 Fed. 433; Jahn v. Lumber Co. (C. C.) 157 Fed. 416; Jackson v. Wilkerson, 160 Fed. 623, 87 C. C. A. 525; United States v. Aakervik (D. C.) 180 Fed. 143; Stead v. Curtis, 191 Fed. 529, 112 C. C. A. 463; Buchler v. Black (D. C.) 213 Fed. 881; Nelson v. Meehan, 155 Fed. 6, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374; Bailey v. Willeford (C. C.) 126 Fed. 806.

The horse was purchased in February, 1907. His worthlessness was known that season. The action at law on the notes for the purchase money was not begun until December, 1911. The case was not brought

to trial until October, 1913. Motion for a new trial on the ground of after-discovered evidence was made and refused a year later. More than eight years after the original transaction, this court is asked to exercise its equity powers, which are great, to enjoin the collection of a portion of the judgment. In the long time that elapsed between the transaction and the time suit was brought, and before trial was had, the complainants had ample opportunity to ascertain all the facts in the case and to set up all their defenses.

The ground of this bill is an alleged fraud between the payees of the note and a stranger, a matter which might have been set up as a defense in the action at law, as it was a matter which affected the validity of the original transaction, and not the judgment which resulted from that trial. It is not alleged nor suggested that the defendant in this action, the plaintiff in the action at law, practiced any fraud on the complainants, whereby they were prevented from making a full defense.

It is therefore ordered, adjudged, and decreed that the bill be dismissed, with costs.

KALISTHENIC EXHIBITION CO., Inc., v. EMMONS, Collector of Customs.

(District Court, D. Maine. August 25, 1915.)

No. 739.

1. CUSTOMS DUTIES ⟸22—PROHIBITION OF IMPORTATION—STATUTES—"FILM OR OTHER PICTORIAL REPRESENTATION OF A PRIZE FIGHT."

Negatives of a prize fight in a foreign country are within Act July 31, 1912, c. 263, 37 Stat. 240 (Comp. St. 1913, § 10416), making it unlawful for any person to bring into the United States from abroad any film or other pictorial representation of any prize fight.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 18; Dec. Dig. ⟸22.]

2. CUSTOMS DUTIES ⟸22—PROHIBITION OF IMPORTATION—FILMS OF PRIZE FIGHTS—PUBLIC EXHIBITION.

One seeking to bring into the country negatives of a prize fight in a foreign country, for exhibition before clubs, societies, associations, and athletic clubs and their guests for gain, seeks to import the same in violation of Act July 31, 1912 (Comp. St. 1913, § 10416), prohibiting the importation of any film of any prize fight designed to be used, or which may be used, for purposes of public exhibition; there being no limitation as to the number of the guests of the clubs, societies, and associations, and the exhibition being public.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 18; Dec. Dig. ⟸22.]

In Equity. Suit by the Kalisthenic Exhibition Company against Willis T. Emmons, Collector of Customs for the Port of Portland. Bill dismissed.

Loucks & Alexander, of Schenectady, N. Y., Tyler, Corneau & Eames and Wm. H. Garland, all of Boston, Mass., and Woodman & Whitehouse, of Portland, Me., for complainant.

John F. A. Merrill, U. S. Dist. Atty., and Arthur Chapman, Asst. U. S. Dist. Atty., both of Portland, Me., for defendant.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

HALE, District Judge. The plaintiff alleges that on April 5, 1915, a pugilistic contest took place in Havana, Cuba, between Jack Johnson and Jesse Willard, for the title of heavy-weight champion of the world; through the use of photographic cameras, certain negative impressions have been taken of the contest; the owner of the negatives has transferred to the plaintiff his rights in the negative films, subject to reservation that no positives made from said negatives should ever be used for the purpose of public exhibition. Plaintiff has sought to make entry of these negatives with the defendant, as collector of the port of Portland, and has tendered the same, along with the duty thereon, for entry in the customhouse; but the defendant has peremptorily refused to allow the plaintiff to bring the negative films into the United States. The plaintiff says that its rights of private exhibition are worth at least $100,000, which are decreasing at the rate of $25,000 per month from the date of the filing of the bill; that the damages to be sustained by it, in the event of the action being unsuccessful, are difficult to prove; that they are so large that the defendant is financially unable to respond to the damages; and that its rights are constantly decreasing with the lapse of time. The plaintiff prays for a temporary and permanent injunction against the defendant, enjoining him from interfering with the plaintiff in entering through the customhouse at Portland the negative film in question, on payment of the duties prescribed by law. A hearing has been had before me upon the application for a temporary injunction. The temporary injunction was denied.

The action is now heard on bill, answer, and proofs. The manager of the company testifies that it is his intention to exhibit the positives, made from the film in question, "before clubs, societies, associations, and athletic clubs, and their guests"; that the value for such exhibitions would be at least $100,000; that such value would be decreased over 50 or 60 per cent. in three months from now, and 75 per cent. in six months from now, when the contest would be forgotten. He says the company is ready to furnish a bond, if the film be admitted to entry, that only such exhibitions shall be given as he has described.

[1] A statute of the United States, passed July 31, 1912, incorporated in the United States Compiled Statutes of 1913 in section 10416, is as follows:

> "It shall be unlawful for any person to deposit, or cause to be deposited, in the United States mails for mailing or delivery, or to deposit, or cause to be deposited, with any express company or other common carrier for carriage, or to send or carry from one state or territory of the United States or the District of Columbia * * * or to bring, or to cause to be brought, into the United States from abroad, any *film* or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used, or may be used, for purposes of public exhibition.

The plaintiff says that its film is not within the inhibition of this statute; that the negative itself is physically incapable of being used, and is not designed to be used, for purposes of exhibition, but that, in order that the pugilistic contest impressed on the negative be exhibited, it would be necessary to print from the negative a positive film; that there is no attempt to import any such positives into the

United States; that there is nothing in the statute to prevent the printing of positives from this negative in question, for the purposes of exhibitions to clubs, associations, societies, athletic clubs, and their guests. The plaintiff is willing to give a bond that the positive shall be used only for such exhibitions; and it calls them *private* exhibitions.

I have no hesitation in finding that the film in question is "a film or other pictorial representation of a prize fight," and is within the inhibition of the statute.

[2] The plaintiff says further that, even though a negative film may be within the meaning of the statute, the pictorial representation in this case is not such as "is designed to be used, or may be used, for the purposes of public exhibition"; that the use which the plaintiff seeks is for private exhibitions before clubs, societies, associations, athletic clubs, and their guests; that an exhibition, in order to be public, must be before an indiscriminate audience; that any representation before a select audience is private, within the meaning of the act; and that an exhibition before clubs, societies, associations, athletic clubs, and their guests should be held to be private, and not public.

The statute makes it unlawful for any person to bring into the United States from abroad any film or other pictorial representation of any prize fight "which is designed to be used, or may be used, for purposes of public exhibition." The avowed purpose of the plaintiff is to show its pictures of this prize fight to thousands of people during the next few months for gain. It expects to receive $100,000 for such exhibitions. Its purpose is to show the picture, not only to clubs, societies, associations, and athletic clubs, but to their guests. The selection of guests is left entirely to the clubs, societies, associations, and athletic clubs giving the various exhibitions; no control remaining with the plaintiff as to the designation of the guests, or with reference to limiting their number. With such a purpose, it is clear that the pictorial representation *may be* used for the purposes of public exhibition. In Commonwealth v. Mack, 187 Mass. 441, 73 N. E. 534, the Massachusetts court held that an exhibition may be found to be public, although the building where the show is to be given is leased to a club, and each applicant for a ticket is required to sign a request to become a member of the club. It was held that, even though club machinery was used, the clear purpose was to obtain publicity, and to evade the law. In the case at bar, no pretense is made that persons must become members of the club in order to see the show; no protection is given that the various clubs, societies, associations, and athletic clubs will not have thousands of people as guests, and give an exhibition substantially public. In fact, unless large masses of people are present at the proposed exhibitions, the plaintiff will not be able to get the gain which it avowedly seeks. The act is clearly within the general intention of the present laws against prize fights. It is for the protection of public morals. It is for the purpose of preventing the immoral influence of spectacular representations of prize fights before large numbers of people. It is the duty of the court to carry out the clear intention of the Congress, and not permit it to be "eluded by mere construction." Oates v. National Bank, 100 U. S. 239, 244, 25 L. Ed. 580. In the case before me, the clear intention of the plaintiff

is to show pictures of the prize fight in question to masses of people in this country, and to get gain by its venture. This is precisely what Congress did not intend to allow. Calling an exhibition "private" does not make it so. An exhibition cannot be said to be private, or "characterized by freedom from observation," if such masses of people are to be invited to see it as intended by the plaintiff. The cases brought to the attention of the court by the learned counsel for the plaintiff are not of great assistance in passing upon this statute. The leading case cited is Kene v. Wheatley, 14 Fed. Cas. 180, the "American Cousin" Case, in which Judge Cadwalader, a District Judge in the Pennsylvania Circuit, had before him a question arising under copyright law. The court discusses, among other things, whether a circulation may be private when made to a few ascertained persons only.

In the case before me, it is not pretended that the picture of the prize fight is intended to be presented only to a few ascertained people; it is to be presented to "clubs, societies, associations, athletic clubs, and their guests." No limitation is made as to the number of their guests. There is no question of a "select few placed under conditions." The number of guests may be large; in fact, it must be large, in order to meet the expectations of the plaintiff of getting gain from its venture. I think the plaintiff's venture is clearly against the spirit and meaning of the statute.

The bill is dismissed, with costs for the defendant.

COOK v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(District Court, E. D. Wisconsin. July 15, 1913.)

1. RAILROADS ⟸348—INJURIES TO PERSON ON TRACK—NEGLIGENCE—EVIDENCE.

Where, in an action for the death of a pedestrian struck by cars blocking a street, there was evidence of unnecessary blocking of the street for an unreasonable time, of the habit of travelers in passing around cars blocking the street, of the absence of any objection by the railroad company to the use of its right of way to get around the blocked portion of the street, and the testimony was conflicting on the issue of signals by the engineer on moving the train at the time of the accident, a verdict of negligence of the company in operating its train will not be disturbed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. ⟸348.]

2. RAILROADS ⟸350—INJURIES TO TRAVELER ON TRACK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a pedestrian, killed by cars at a street crossing while he attempted to cross the track, was guilty of contributory negligence, *held* under the evidence for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⟸350.]

At Law. Action by Alex Cook, executor, against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Verdict for plaintiff, motion for new trial overruled, and judgment entered on verdict.

Judgment affirmed, 226 Fed. 1023, — C. C. A. —.

D. W. McNamara, of Montello, Wis., for plaintiff.
W. A. Hayes, of Milwaukee, Wis., for defendant.

GEIGER, District Judge. This action, tried before the late Judge Quarles, seeks to recover damages for negligently causing the death of the plaintiff's testate. The jury returned a verdict for the plaintiff, and a motion for a new trial was pending at the time of Judge Quarles' death. The matter has now come before the court upon motion by the defendant for a new trial, and by the plaintiff for judgment upon the verdict.

Judge Quarles, in his charge to the jury, stated the case, doubtless as the evidence disclosed it to him, as follows:

"The two leading principal streets of the village of Montello, running north and south, giving access to and egress from that village, were so situated that they might be blocked by the cars of the defendant standing on that portion of the track. Now under the law the defendant company had the right to block those streets with its cars for a reasonable length of time, when it became necessary. The grade of the track at this point was such that when the train crew was switching at the west end, some 1,000 feet or more west of the depot, it was very easy and convenient to kick the car down and let it run by gravity, unattended by anybody, until it lost its momentum and stopped, and this had been the habit of the company, at least to some extent, sending those cars down without any brakeman to stop them at a particular place, and frequently those cars would stop where they would block one or more of those streets; and it appears that while the streets were so blocked for a long period of time, and during the entire operation of this railway by the defendant, the people of that locality who had occasion to pass back and forth on those streets, whenever the streets were blocked, were in the habit of passing around or going through, getting through the best way they could, and that this custom had been in existence so long that the defendant was presumed to know of its existence. It is charged in this complaint that the railroad company abused this statutory right, and allowed its cars to block this street when it was not necessary, and for an unreasonable length of time. Now, looking at it in a broad view, it would almost seem that the people there had acquiesced in that habit of the company—they brought no action, apparently, against the company—and that the company, on the other hand, had acquiesced in the right of the people to go around and get through as best they could, because the evidence does not show that the company ever made any objection to that custom. So that this is the situation when the curtain rises on this drama. On the 12th day of May this freight train came into the village, and the train crew proceeded to do their work, went up to the west end, and they kicked a car down, and a short time after they sent down in the same way four additional gondola cars that were empty, so that there were five cars shunted down, which were left to run and stopped whenever the momentum ceased; and in this instance it appears these five cars stopped where they blocked these two streets, shown to be the only public and practicable means of access or of egress to or from the village, and while these cars were standing, blocking both these streets, this old gentlemen came along, stood five or six minutes waiting for the train to come and take the cars out of the way, and then he attempted to cross the track, having received a signal from the man Rohrbeck by a nod of the head, which he might or might not have understood, and while attempting to cross he was thrown down by the car and killed."

That the case was permitted to go to the jury with a grave doubt in the judge's mind is shown by this remark appearing in the record:

"Any verdict that the jury may render will be under the control of the court, and while I feel pretty strongly on this question of contributory neg-

ligence, I am inclined to think I ought to let the case go to the jury, and then this question can be reargued, if necessary, and such action taken, in view of the conclusion of the jury, as seems best; whereas, if I take it away from the jury entirely, that is the end of the whole matter, and of course there is no chance to revive it. I think I will let the case go to the jury."

[1] My examination of the testimony satisfies me that it was ample to sustain a finding by the jury that the defendant was negligent. The testimony respecting the unnecessary blocking of the street for an unreasonable length of time, the habit of travelers in passing around the cars thus blocking the street, the absence of any testimony showing objection on the part of the company to the use of its right of way and track for the purpose of getting around the blocked portion of the street, the conflict of testimony respecting the giving of signals by the engineer upon the movement of the train at the time the injury was occasioned—these elements were all disclosed in the testimony, either sufficiently clearly or capable of being found upon a conflict, that the finding of the jury should not be disturbed.

[2] The question of contributory negligence seems to have been regarded as crucial in the case, and naturally its consideration at this time, by the writer hereof, cannot be aided by the advantages which might otherwise arise from having seen or heard the witnesses who testified upon certain matters respecting which there was a conflict. This issue was submitted to the jury in this language:

"Would a man of ordinary care and prudence have undertaken to cross over the track and around a standing car, if placed in the same situation, under the same circumstances, having the same bodily informity, being of the age and crippled as he was? If Mr. Ritchie did nothing but what such a man of ordinary care, intelligence, and prudence would have done under the same circumstances, then he was not guilty of contributory negligence. This, gentlemen, is perhaps the crucial point in this case, and it merits your careful attention. In considering this question, it must be remembered that Mr. Ritchie was 65 or 66 years of age; that he had lost one foot, so that his ability to handle himself was more or less impaired, and it is a correct proposition that greater vigilance was required on the part of Ritchie to keep out of danger and insure his personal safety, by reason of this bodily infirmity. It appears also that he was incumbered by a basket, which he carried on one arm, and a cane. It appears that there was no path around the cars where he attempted to cross, and the ground near the track on the north side thereof was more or less uneven and rough. The presence of the standing cars was notice that the balance of the train might be expected at any time to couple onto these cars. The evidence shows that the old gentleman was quite familiar with this place, the habits and customs of the people, and also the manner of doing business by this railroad company. So that he was presumed to know that these five cars had been set out there for the purpose of being coupled onto and constitute a part of the train when it went away, and that that coupling was liable to take place at any time."

The court also instructed the jury that, if the deceased was under the influence of liquor at the time he was killed to such an extent as to benumb his faculties, such fact would justify a finding of contributory negligence proximately causing the injury, and that there was testimony indicating that one Rohrbeck, by a nod of his head, had suggested to deceased that he might go around the car; that the authority of Rohrbeck to speak for the company does not appear to have been known by

deceased, although he may have known that on former occasions Rohrbeck acted as guard at the crossing at the request of the trainmen. These facts are stated by the court to bear not upon the legal authority of Rohrbeck so much as upon the general questions of the care used by the deceased; and the court also instructed the jury respecting the duty of the deceased to use the care which the law requires of one when about to cross a railway track, and called their attention particularly to certain evidence which the defendant claimed showed negligence on the part of the deceased in crossing the track at a point so near the cars that any starting thereof would inevitably injure him.

The testimony, particularly that respecting the custom of blocking the crossing and of passing around the cars, the knowledge of the train crews thereof, the act of Rohrbeck on the particular day in question in giving directions (apparently on the strength of what the train crew had on other occasions requested him to do) to other travelers, the condition of the ground at and near the point where deceased was struck, the speed of the train, the failure to give a signal, the impossibility of seeing the train because of obstructions, the length of the time which the crossing had been blocked, the specific direction which Rohrbeck had given to the deceased, made a case, it seems to me, proper to be submitted to the jury; and the physical condition of the deceased, both as respects his bodily infirmity and his alleged intoxicated condition, did not demand, in connection with the other circumstances, a finding of contributory negligence as a matter of law. The evidence did not justify the inference conclusively that the deceased was intoxicated, nor do I think the fact of his bodily infirmity placed him in a position where he was bound to wait indefinitely for the removal of the cars, whereas one sound in health would have been at liberty to do just what he did. It would seem that the court gave instructions to the jury upon that phase of the matter, and also with respect to the claim made that the deceased passed too close behind the car, which were as favorable as the defendant could ask.

The testimony shows a sharp conflict upon many matters from which the inferences respecting contributory negligence are to be drawn; and it is my judgment that the ultimate question was properly left to the jury, and that its finding should not be disturbed. I therefore conclude that the motion for a new trial should be overruled, and that judgment should be entered on the verdict.

UNITED STATES v. DAHL et al.

(District Court, W. D. Washington, N. D. July 1, 1915.)

No. 2976.

1. CONSPIRACY ⟸43—CRIMINAL OFFENSES—INDICTMENT—REQUISITES.
An indictment charging a conspiracy under Pen. Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1092 (Comp. St. 1913, § 10201), for a violation of Chinese Exclusion Act May 6, 1882, c. 126, § 11, 22 Stat. 58, as amended by Act July 5, 1884, c. 220, 23 Stat. 117 (Comp. St. 1913, § 4298), which alleges that defendants conspired and agreed together and together with divers "other persons to the grand jurors unknown," is good as against an objection that the conspiracy could not be entered into unless it included persons who were excluded by the act.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

2. CONSPIRACY ⟸43—CRIMINAL OFFENSES—INDICTMENT—REQUISITES.
An indictment charging a general conspiracy to bring into the country Chinese aliens not lawfully entitled to enter the United States need not set forth the names of the persons who were brought into the United States.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

3. CONSPIRACY ⟸43—CRIMINAL CONSPIRACY—INDICTMENT—SUFFICIENCY.
An indictment charging a conspiracy to violate a law of the United States need not set out the means by which the conspiracy is to be carried out, nor that the means were a part of the agreement or confederation, nor what part each conspirator should play, nor the character of the acts to be performed to effectuate the purpose, for it is the conspiracy to do the unlawful act that is the gravamen of the offense.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

4. CONSPIRACY ⟸43—CRIMINAL CONSPIRACY—INDICTMENT—REQUISITES.
An indictment charging a conspiracy under Pen. Code, § 37, for a violation of Chinese Exclusion Act 1882, § 11, as amended by Act July 5, 1884, need not charge a violation of the Exclusion Act with the same particularity necessary to charge a crime under the act, and an indictment alleging that defendants conspired and agreed together, and together with divers other persons to the grand jurors unknown, to violate the act, and then charging overt acts committed in furtherance of the conspiracy, is sufficient.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

Harry J. Dahl and another were convicted of a conspiracy. Motion in arrest of judgment denied.

Clay Allen, U. S. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash.

E. C. MacDonald, of Seattle, Wash., and Gordon & Easterday, of Tacoma, Wash., for defendant Dahl.

NETERER, District Judge. The indictment in this case charges a conspiracy, under section 37 of the Penal Code, for a violation of section 11 of the Chinese Exclusion Act of 1882, as amended. After

formal parts, count 1 alleges, "did unlawfully, willfully, knowingly, feloniously, wickedly, and maliciously conspire, combine, confederate, and agree together, and together with divers other persons to the grand jurors unknown," and then charges overt acts committed in furtherance of the conspiracy. Each of the counts in the indictment contains similar language, followed by the charge of overt acts. A formal demurrer was tendered by defendant Dahl, but was not argued. The case was tried, the jury returned a verdict of guilty, and a motion in arrest of judgment is made by defendant Dahl.

[1] The sufficiency of the indictment is now vigorously attacked, and it is contended that the indictment does not charge a conspiracy to commit an offense against the United States, nor set forth with sufficient particularity the elements of the conspiracy, and that the overt acts set out are not overt acts in furtherance of any conspiracy; that the defendants who are charged with conspiring are not Chinese who are excluded by the act; and that the conspiracy to violate the act could not be entered into unless it included persons who were excluded by the act, as they necessarily must be parties to consummating the unlawful confederation. I think this part of the objection can be answered by reference to the indictment where it says, "together with divers other persons to the grand jurors unknown."

[2] The further objection that the names of the persons who were to be brought into the United States were not given in the indictment, I think, is answered by reference to the indictment, where it is alleged, in substance, that the conspiracy was a general conspiracy to bring in Chinese aliens not lawfully entitled to enter the United States. Williamson v. U. S., 207 U. S. 425–447, 28 Sup. Ct. 163, 52 L. Ed. 278.

[3, 4] An indictment must be free from ambiguity, uncertainty, and repugnance, and clearly state every ingredient of the offense charged. It is not necessary, however, to set out the means by which a conspiracy is to be carried out; nor that they are a part of the agreement or confederation; nor what part each conspirator is to play; nor the character of the acts to be performed to effectuate the purpose. It is the conspiracy to do the unlawful thing that is the gravamen of the offense.

[5] The offense charged is not of itself a crime under the Exclusion Act; hence the acts need not be charged with the same particularity. Reason suggests that in a charge of conspiracy to commit a crime, while the particular crime must be alleged, it need not be set out with the same particularity in an indictment as a charge for the crime itself. 5 Ruling Case Law, 1083. This conclusion finds support in the recent decision of the Supreme Court, in which it held that a conspiracy to commit a crime under section 37 of the Criminal Code may be prosecuted, even though the time for prosecution of the crime itself has expired, if limitation under the conspiracy section has not elapsed. Justice Pitney, in U. S. v. William Rabinowich, 238 U. S. 85, 35 Sup. Ct. 682, 683, 59 L. Ed. ——, uses this language:

"It is apparent from a reading of section 37, Crim. Code (section 5540 Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the

object of the conspiracy. Callan v. Wilson, 127 U. S. 540, 555 [8 Sup. Ct. 1301, 32 L. Ed. 223]; Clune v. United States, 159 U. S. 590, 595 [16 Sup. Ct. 125, 40 L. Ed. 269]; Williamson v. United States, 207 U. S. 425, 447 [28 Sup. Ct. 163, 52 L. Ed. 278]; United States v. Stevenson (No. 2) 215 U. S. 200, 203 [30 Sup. Ct. 37, 54 L. Ed. 157]. And see Burton v. United States, 202 U. S. 344, 377 [26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362]; Morgan v. Devine (No. 685) 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. —, decided this day. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. Williamson v. United States, supra. And it is punishable as conspiracy, though the intended crime be accomplished. Heike v. United States, 227 U. S. 131, 144 [33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128]."

In the same case the court says:

"* * * A conspiracy to commit an offense made criminal by the Bankruptcy Act is not of itself an offense 'arising under' that act, within the meaning of section 29d, and hence the prosecution is not limited by that section."

This was a prosecution under a charge of conspiracy to violate section 29d of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 554 [Comp. St. 1913, § 9613]), in which the indictment must be returned within a year. The indictment was not returned until after the expiration of a year, and the court concluded that, the conspiracy being the gist of the action, the limitation to apply was not under the bankruptcy provision which it was conspired to violate, but the limitation which applied to section 37, supra.

Section 11 of the act of 1882, as amended by the act of 1884, denounces the bringing into the United States of Chinese. Section 13 of the same act excepts from the general provisions diplomatic and other officers of the Chinese government, with their servants, and other exceptions appear by the act. The act of 1888 (Act Sept. 13, 1888, c. 1015, 25 Stat. 476) designates certain ports for admission of Chinese, and rule 1 of the regulations of the Department of Labor, governing the admission of Chinese, contains a further provision relating to the entry of Chinese into the United States through Canada, requiring an examination at Vancouver for entry at Sumas, the place charged for operation, and other places named. The allegations in the indictment, I think, bring the indictment within the rule of pleading, to fully advise the defendants of every fact which the government is required to set out. An indictment charging the unlawful bringing into the country of Chinese aliens manifestly would be insufficient unless it set out the facts with the particularity contended for by the defendant, and such contention is supported uniformly by authority. It is in this respect that the indictment differs from the authorities which have been presented by the defense, and which brings this indictment within the holding of the Court of Appeals of this Circuit in Wong Din v. U. S., 135 Fed. 702, 68 C. C. A. 340.

The motion is denied.

WAGNER v. WILSON.

(District Court, E. D. New York. July 15, 1915.)

1. COPYRIGHTS ⊂=79—INFRINGEMENT—ACTIONS—JURISDICTION.
An action for infringement of a copyright, under Act March 4, 1909, c. 320, 35 Stat. 1084, may, under section 35 thereof (Comp. St. 1913, § 9556) be maintained in the District Court of the district where there is infringement by the principal or his agent.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 67; Dec. Dig. ⊂=79.]

2. COPYRIGHTS ⊂=79—ACTIONS FOR INFRINGEMENT—SERVICE OF PROCESS.
In an action for infringement of copyright, under Act March 4, 1909, brought in the District Court of the district where there is infringement by the principal or his agent, service of summons on the agent is sufficient; but service of summons on defendant in another district in the same state must be set aside.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 67; Dec. Dig. ⊂=79.]

At Law. Action by Daniel C. Wagner against William W. Wilson. Service of summons set aside.

Rufus Lewis Perry, of Brooklyn, N. Y., for plaintiff.
Edmund Fletcher Driggs, of Brooklyn, N. Y., for defendant.

CHATFIELD, District Judge. [1, 2] The court has jurisdiction over an action for infringement of copyright (35 Stat. 1075), and by section 35 this action can be maintained in a district where there is infringement by the principal or his agent. Service on the agent is sufficient.

Whether the present action can be maintained is not to be decided upon the present motion. Motion to dismiss as to jurisdiction over the alleged cause of action is denied.

This is not a "local" suit, and hence the service did not give jurisdiction over the person of the defendant. Even in a patent case, the plaintiff cannot have process served in another district in the same state (Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1100] § 48 [Comp. St. 1913, § 1030]), but must make service of the alleged agent. Service of summons will be set aside.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

VAGASZKI v. CONSOLIDATION COAL CO., Inc.

(Circuit Court of Appeals, Second Circuit. August 16, 1915.)

No. 280.

1. EVIDENCE ⟸29, 43—JUDICIAL NOTICE—STATUTES AND JUDICIAL OPINIONS OF STATES.

The courts of the United States take judicial notice of the statutes and judicial opinions of any state, without plea or proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43–46, 48, 62–65; Dec. Dig. ⟸29, 43.

Judicial notice of public laws and regulations, see note to Smith v. City of Shakopee, 44 C. C. A. 4.]

2. COURTS ⟸366—AUTHORITY OF DECISIONS OF STATE COURT—STATUTES—CONSTRUCTION.

An action in a federal District Court of New York for the death of a miner in a coal mine located in Pennsylvania is governed by the Bituminous Mining Act of Pennsylvania (Act May 15, 1893 [P. L. 52]), reenacted as construed by the courts of Pennsylvania, to the effect that a mineowner is not liable for the negligence of a mine foreman or his assistants committed in the discharge of duties imposed by the act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⟸366.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

3. MASTER AND SERVANT ⟸270—DEATH OF SERVANT—EVIDENCE—ADMISSIBILITY.

In an action for the death of a miner in Pennsylvania by rock falling on him, testimony of a conversation, two weeks before the accident, between a witness and the assistant mine foreman, in which the witness asked the official for crossbars, was remote, and properly stricken out as too remote.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. ⟸270.]

4. MASTER AND SERVANT ⟸278—DEATH OF SERVANT—EVIDENCE—ADMISSIBILITY.

The testimony of a witness that about two weeks before the accident he had asked the assistant superintendent of the mine for crossbars did not, under the decisions of the Supreme Court of Pennsylvania construing the act, show that the mine foreman had been in default.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⟸278.]

5. MASTER AND SERVANT ⟸220—DEATH OF SERVANT—ASSUMPTION OF RISK.

A bituminous coal miner, who continues at work after noncompliance with his request for crossbars and a buddy, assumed the risk of injury by falling rock, in view of Bituminous Mining Acts of Pennsylvania of 1893 and 1911, making it the duty of the miner to quit work on failure to furnish the crossbars and buddy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 625–637, 641, 644–647; Dec. Dig. ⟸220.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

6. DEPOSITIONS ⟸90—ADMISSIBILITY—STATUTORY PROVISIONS.

A deposition taken by a party, under Rev. St. § 863 (Comp. St. 1913, § 1472), providing that the testimony of any witness may be taken by

deposition de bene esse when he lives at a greater distance than 100 miles from the place of trial, may not be introduced in evidence, in view of section 865 (Comp. St. 1913, § 1474), providing that, unless it appears that the witness is dead, or has gone to a greater distance than 100 miles from the place of trial, the deposition shall not be used, when the witness was present and available, though not called by the party.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 248–255, 258–260; Dec. Dig. ⟸90.

Use of deposition when deponent is present, see note to Texas & P. Ry. Co. v. Watson, 50 C. C. A. 232.]

7. APPEAL AND ERROR ⟸1029—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

A judgment will not be reversed for errors committed against a defeated party not entitled to succeed in any event.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. ⟸1029.]

8. APPEAL AND ERROR ⟸1050—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where, in an action for the death of a miner by falling rock, competent evidence showed that decedent assumed the risk, error in admitting in evidence a deposition did not justify reversal of a judgment for defendant, introducing the deposition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⟸1050.]

9. MASTER AND SERVANT ⟸211—INJURY TO SERVANT—ASSUMPTION OF RISK.

A miner in a bituminous coal mine in Pennsylvania asked for crossbars and a buddy on Saturday night, and was told, "All right." The crossbars and a buddy were not furnished, and the miner began work on Monday morning, and was killed by rock falling on him. A former miner had quit work because not furnished with crossbars and a buddy, and he testified that crossbars were needed because of a rotten roof. The assistant foreman told the miner on Saturday afternoon that he must either make the piece of rock safe or take it down, and that the rock which he found down on Monday was the rock which he advised the miner to remove or make safe. The miner was a man of mature age and of extended experience as a miner. *Held* that, under the Bituminous Mining Acts of Pennsylvania of 1893 and 1911, he assumed the risk of danger as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557; Dec. Dig. ⟸211.]

10. TRIAL ⟸40—RECEPTION OF EVIDENCE—MANNER OF INTRODUCING DEPOSITIONS.

Where a deposition is admissible, it is proper for the court to permit one counsel for the party introducing the deposition to stand at the bar and read the questions, and the other counsel to sit in the witness chair and read the answers.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 99; Dec. Dig. ⟸40.]

Coxe, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on writ of error to review a judgment upon a verdict for defendant in the District Court of the United States for the Southern District of New York.

L. B. Treadwell, of New York City (L. B. Treadwell, Roger Foster, and R. W. Darling, all of New York City, of counsel), for plaintiff in error.

Davies, Auerbach & Cornell, of New York City (Charles H. Tuttle, of New York City, Charles F. Uhl, Jr., of Somerset, Pa., and Martin A. Schenck, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action was brought to recover damages in the sum of $30,000 for the death, on August 25, 1913, of George Vagaszki. At the time of his death he was 29 years of age, and was employed as a miner in a bituminous coal mine belonging to the defendant, and located at Jenner, in Somerset county, state of Pennsylvania. His death occurred while he was at work in mine No. 119, butt heading No. 8, second right, and was caused by a mass of rock which became detached from the roof of the heading, which struck and crushed him. There was no one with him at the time, and no one witnessed what occurred. The action is brought by the widow. The Constitution of the state of Pennsylvania provides that in case of death from injuries the cause of action shall survive, and that no act of the General Assembly shall limit the amount to be recovered in such cases. An act passed in that state in 1855, still in force, provides that the persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased, and that the sum recovered shall go to them in the proportion they would take his or her personal estate in the case of intestacy, and that without liability to creditors; the law of Pennsylvania on the subject being similar in import and character to the law of New York in that regard.

The action is brought by the widow of the deceased for the benefit of herself and a son of the age of six years. The theory of the action is that it was the duty of the defendant to keep the heading in the mine in which the deceased was at work in a safe and secure condition, and to properly inspect the same, and to support the roof with sufficient timbers or other suitable means; that instead of performing its duty it negligently permitted the place to be and remain in an unsafe, dangerous, and insecure condition, although its condition might have been discovered and ascertained by a proper inspection thereof; and it is averred that there was no negligence or want of care on the part of the deceased contributing to his death. The case was submitted to the jury, and a verdict was returned in favor of the defendant.

[1, 2] The courts of the United States take judicial notice of the statutes and judicial opinions of any state in the Union without plea or proof. See Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94. This case is governed by the Bituminous Mining Act of Pennsylvania, passed in 1893 and re-enacted in 1911, with some minor changes. The act places the management of the inner workings of a bituminous coal mine in the hands of a certified mine foreman, whose qualifications are determined by the state. Neither he nor the assist-

ants whom he appoints are agents of the mining company; and the company is not responsible for their acts, unless it has notice that an emergency of danger has arisen demanding immediate action, and that these officials are not discharging their duties with regard thereto. The mining company is also responsible if it has failed to comply with the orders of the mine foreman. The following provisions of the act are important in determining the question involved in this case:

Article 3, section 1:

"It shall be the duty of every superintendent, on behalf and at the expense of the operator, to keep on hand at each mine at all times a sufficient quantity of all materials and supplies required to preserve the health and safety of the employés, as ordered by the mine foreman and required by this act. If for any reason the superintendent cannot procure the necessary materials or supplies as aforesaid, he shall at once notify the mine foreman, whose duty it shall be to withdraw the men from the mine or portion of mine, until such materials or supplies are received. The superintendent shall, at least once every week, read, examine carefully, and countersign all reports entered in the mine record book by the mine foreman, and if he finds on such examination that the law is being violated in any particular, he shall order the mine foreman to stop said violation forthwith, and shall see that his order is complied with."

Section 2:

"The superintendent shall not obstruct the mine foreman or other officials in the fulfillment of any of their duties as required by this act, but he shall direct that the mine foreman and all the other employés under him comply with the law in all its provisions, especially when his attention is called by the inspector to any violation of the law. At any mine where a superintendent is not employed, the duties that are herein prescribed for the superintendent shall devolve upon the mine foreman, in addition to his regular duties."

Article 4, section 1, provides that:

"The mine foreman shall have full charge of all the inside workings and of the persons employed therein, in order that all the provisions of this act so far as they relate to his duties shall be complied with, and the regulations prescribed for each class of workmen under his charge carried out in the strictest manner possible."

The section also gives the mine foreman authority to appoint assistants when the workings are so extensive that he is unable personally to carry out the requirements of the act.

Article 4, section 6, provides that:

"The mine foreman shall direct and see that every working place is properly secured by props or timbers, and shall see that no person is directed or permitted to work in an unsafe place, unless it be for the purpose of making it safe. He shall also see that the workmen are provided with sufficient props, cap-pieces, and timbers of suitable size."

Section 7 provides:

"Every workman in need of props, cap-pieces, and timbers shall notify the mine foreman or the assistant mine foreman (or any other person delegated by the mine foreman) of the fact, at least one day in advance, giving the number, size, and length of props, cap-pieces, and timbers required. In case of emergency, the timber may be ordered immediately upon the discovery of danger. If for any reason the necessary timbers cannot be supplied when required, the mine foreman or assistant mine foreman shall instruct the workmen to vacate the place until the timber needed is supplied."

Section 9:

"The mine foreman shall direct and see that as the miners advance in their excavation all dangerous and doubtful pieces of coal, slate, and rock overhead are taken down or at once carefully secured against falling on the workmen. Any workman who neglects to carry out, or disobeys, the instructions of the mine foreman or his assistant in regard to securing his working place, shall be suspended or discharged by the mine foreman."

Section 10:

"The mine foreman shall give prompt attention to the removal of all dangers reported to him by his assistants, the fire boss, or by any other person working in the mine, and in case it is impracticable to remove the danger at once, he shall notify every person whose safety is menaced thereby to remain away from the portion where the dangerous conditions exist. * * * Instructions shall be given the men by the mine foreman, assistant mine foreman, or fire boss, or other authorized person, as to when, where, and how timber shall be placed so as to avoid accidents from falls, and also, in a general way, how to mine coal with safety to themselves and others."

Article 25.—Special Rules.

Duties of Miners.

"Rule 1. The miner shall examine his working place before beginning work, and take down all dangerous slate, or otherwise make it safe by properly timbering it, before commencing to mine or load coal. * * * Should he at any time find his place becoming dangerous from gas or roof or from any unusual condition that may arise, he shall at once cease working and inform the mine foreman or the assistant mine foreman of said danger, but before leaving his place he shall put some plain warning across the entrance thereto to warn others against entering into danger. * * * He shall order all props, cap-pieces, and all other timbers necessary, at least one day in advance of needing them, as provided for in the rules of the mine. If he fails to receive said timbers, and finds his place unsafe, he shall vacate it until the necessary timbers are supplied. * * * The miner shall remain during working hours in the working place assigned to him by the mine foreman or the assistant mine foreman, and he shall not leave his working place for another working place without the permission of the mine foreman, assistant mine foreman, or fire boss, and he shall not wander about the hauling roads or enter abandoned or idle workings."

General rules:

"Rule 7. All employés shall notify the mine foreman or the assistant mine foreman of the unsafe condition of any working place, * * * when said conditions are known to them."

Act June 9, 1911 (P. L. 756).

As this court is bound by the construction given to this act by the courts of Pennsylvania, we call attention to the decisions of the Supreme Court of that state for the purpose of showing that the mine foreman is the representative of the state and not of the mine-owner, and that the latter, as already indicated, is not liable for injuries which result from the former's neglect of his statutory duties.

In Durkin v. Kingston Coal Company, 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801 (1895) the court declared that:

"Under the operation of this statute the mine foreman represents the commonwealth."

And the court decided that the mineowner is not liable for an injury arising from the negligence of the foreman. The court said that a

mine foreman who neglected to perform his duty under the act is liable for injuries sustained by a miner resulting from his neglect.

In Golden v. Mt. Jessup Coal Company, Limited, 225 Pa. 164, 73 Atl. 1103 (1909), it was held that the foreman was the state's representative and that:

"An employer cannot be held liable for the mistakes or incompetency of the state's representative."

In Wolcutt v. Erie Coal & Coke Company, 226 Pa. 204, 75 Atl. 197 (1910), the court declared:

"We have uniformly held that a mine foreman is a fellow servant of the other employés engaged in the mine, and in none of our cases has it been suggested that he is a representative or agent of the owners. Being a fellow servant of the other laborers in the mine, the owner is not liable for injuries resulting to them by neglect of the foreman to perform his statutory duties. It may therefore be admitted that if Mitchell was a duly certified mine foreman, and was engaged only as such in this mine at the time the plaintiff was injured, and the plaintiff's injuries resulted from the foreman's negligence, the defendant company would not be liable."

It was declared that the duty of the mine foreman is to see that the interior of the mine is kept in a proper and safe condition, and that in that position he is supreme, and that the superintendent—

"who is the representative of the owner, cannot interfere with him in the discharge of his duties. While his powers are extensive and ample in regulating and controlling the internal operations of the mine so as to protect those employed therein, yet he is in no sense the agent or representative of the owner of the mine."

In Dempsey v. Buck Run Coal Company, 227 Pa. 571, 76 Atl. 745 (1910) it was held that a mineowner is not responsible for injuries to a workman due to negligence of the foreman in the discharge of his duties under the law.

In Reeder v. Lehigh Valley Coal Company, 231 Pa. 563, 575, 80 Atl. 1121, 1125 (1911) the court said:

"It has been held in a long line of cases that the mine owner is not liable for the negligent acts of a mine foreman committed in the discharge of duties imposed upon him by law and in and about those workings over which he exercises supervision. From Lehigh Valley Coal Co. v. Jones, 86 Pa. 432, and Durkin v. Kingston Coal Co., 171 Pa. 193 [33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801], to Golden v. Mt. Jessup Coal Co., 225 Pa. 164 [73 Atl. 1103], this rule has remained unbroken. It may therefore be said to be settled law."

[3, 4] It is assigned as error in the case at bar that the court struck out certain testimony concerning a conversation alleged to have taken place two weeks before the accident between plaintiff's witness, John Zipay, and the assistant mine foreman and the assistant superintendent, in which Zipay asked these officials for crossbars. But the record shows that the court granted the motion "to strike out the portion of the testimony of Zipay, which says he asked Joe Willis (the assistant mine foreman) for crossbars." It nowhere appears that the court struck out that part of Zipay's testimony in which he declared that he made a like request of Browning, the assistant superintendent. Browning represented the defendant. Willis, the assistant mine foreman, did not. Proof as to notices other than such as were con-

nected in time and place should have gone out. We think the alleged request made by Zipay on the assistant mine foreman was remote, and properly stricken out. But if we are mistaken, and the testimony had not been stricken out, and had been accepted as true, notwithstanding the fact that the witness was contradicted by both the assistant mine foreman and the assistant superintendent, it could not have helped the plaintiff's case, under the decisions of the Supreme Court of Pennsylvania, construing the Mining Act. In Peters v. Vesta Coal Co., 243 Pa. 241, 90 Atl. 65 (1914), the plaintiff, as here, not only asked the mine foreman for timbers and did not get them, and then asked the superintendent, but in that case he went further, and told the superintendent that he "had asked everybody for longer posts, and they never sent me in any, and the place is too dangerous," and the superintendent replied: "Go in, I will send you now good ones." The Supreme Court of Pennsylvania said:

"After considering all the proofs, we are of opinion that the evidence relied upon is too vague, indefinite, and lacking in detail to justify a finding that the superintendent should have understood that the mine foreman was in default and that an emergency existed which required the immediate delivery of the posts."

In that case the accident did not occur on the same day that the request was made but on the day after. So in the case at bar the accident was on the next working day after the request.

[5] It is also alleged as error that the court struck out and excluded testimony on behalf of plaintiff concerning conversations between the deceased and Willis, the assistant mine foreman, in the presence of the witness Zipay, in which the deceased asked for crossbars and a buddy a week before the accident. We do not see, in the view we take of this case, how the striking out of this testimony has prejudiced the plaintiff's case. If this request for crossbars and a buddy was made, it evidently was not complied with, and plaintiff continued at work. Mining Act, rule 1, made it the duty of the deceased to quit the work. By not doing so he assumed the risk.

[6] It is further assigned as error that the court erred in permitting the defendant, over the objection and exception of the plaintiff, to read in evidence the deposition of one Joseph Hajduk taken by commission on behalf of the plaintiff. It appears that counsel for plaintiff examined a witness by commission months before trial, and did not call the witness at the trial, and that thereupon the counsel for defendant proposed to read the deposition. When this was proposed, it was admitted that the witness was present and available; but it was insisted that, as the plaintiff did not see fit to place him on the stand, defendant had a right to read the deposition. The deposition was taken pursuant to section 863 of the Revised Statutes of the United States (Comp. St. 1913, § 1472), which provides that the testimony of any witness may be taken in any civil cause by deposition de bene esse, when the witness lives at a greater distance than 100 miles from the place of trial, upon reasonable notice by the party or his attorney proposing to take such deposition. Section 865 of the Statutes (Comp. St. 1913, § 1474) also provides that:

"Unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than 100 miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."

This provision is found in Judiciary Act Sept. 24, 1789, c. 20, § 30, 1 Stat. 90 and has been in force ever since. It is urged that this statutory limitation on the use of depositions is intended to protect the opposite party, and that the party who takes a deposition stands in no position to utilize a restriction which the opposite party does not insist upon. The rule as laid down by Weeks in his Law of Depositions, § 466, is as follows:

"It is held by a large preponderance of authorities that, where one of the parties to a cause obtains a commission to examine witnesses, the other party has a right to call for the deposition and make use of it at the trial. And many cases hold that generally a deposition taken by one party may be used in evidence by the other, if the former fails or refuses to read it himself. And it is held that if one party takes a deposition, and declines to read it, the adverse party may read it, although the witness would have been incompetent, if offered by him."

The author, however, makes no reference to the act of Congress, and it does not appear that he had it in mind in laying down the rule above quoted. Professor Wigmore, in his excellent work on Evidence (volume 2, § 1416, pp. 1786, 1787), in discussing the use of depositions, although making no reference in this connection to the act of Congress, states his opinion as follows:

"It [the deposition] is offered as the substantive testimony of that witness, whose testimony has not as yet been heard. There is, therefore, no reason why one party rather than the other should be allowed to resort to a deposition without showing the deponent unavailable in person; and this the nontaker, as well as the taker, must do before using it."

And he cites in support of his view Gordon v. Little, 8 Serg. & R. (Pa.) 532, 548, 11 Am. Dec. 632 (1822); Sexton v. Brock, 15 Ark. 345, 349 (1854). Elliot v. Schultz, 10 Humph. (29 Tenn.) 234, 236 (1848), also supports the same doctrine.

In Whitford v. Clark County, 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500 (1886) the court held it error to read a deposition the witness being in the court at the time. But in that case the party who read the deposition was the party who took it.

In Yeaton v. Fry, 5 Cranch, 335, 3 L. Ed. 117 (1809) the court had before it a somewhat analogous question. The act of Congress requires that one proposing to take a deposition shall give notice to the opposite party. The deposition was taken by the defendant without notice to the plaintiff. At the trial the plaintiff used the deposition over the defendant's objection. Chief Justice Marshall, speaking for the court, said:

"The defendant is not at liberty to except to his own depositions, because he does not produce proof of his having given notice to the plaintiff."

In Smith v. State, 145 Wis. 612, 130 N. W. 461, a deposition taken on behalf of an accused person was placed on file in the court. It

was held that, whether offered by him or not, it might be used by his adversary at the trial. The court said that:

"If an accused person sees fit to cause a deposition to be taken in his behalf and made a part of the court files existing at the time of the trial, he thereby waives his constitutional right to meet the witness face to face, so far as otherwise his adversary would be precluded from using such deposition whether offered by him or not."

The case at bar is not analogous with that decided in Wisconsin. The constitutional provision which the Wisconsin court held an accused person could waive simply provided that such person "shall enjoy the right * * * to meet the witnesses face to face." But the act of Congress involved here does not simply give an adverse party the right to demand that a witness be placed on the stand, if within the court's jurisdiction and available. It positively prohibits the use of the deposition unless it appears to the court that the witness is dead, or gone out of the United States, or to a greater distance than 100 miles from the place where the court is sitting, etc. In the face of this positive prohibition, it is not within the power of the court to allow a deposition to be used which the act says shall not be used, and such power cannot be given by the consent of this defendant. The deposition clearly should not have been read.

[7-9] It does not, however, necessarily follow that because of this error the case must be reversed and a new trial ordered. There can be no reversal for errors committed against one who it is apparent is not entitled to succeed in his action in any event. It appears from the testimony of the plaintiff's witness Zipay that the latter and one Vasilovich, his buddy, had worked in the same heading, butt No. 8, in which the deceased came to his death; that they worked there for about 10 months, and stopped work there August 11th or 14th, about two weeks prior to the accident; that Zipay, because of the condition of the roof, asked for crossbars 12 feet long and 10 inches thick, so that they might be put on the props and hold up the roof; that he was not furnished with the crossbars he asked for, but with some others, which he tried to use, and could not, because they were too short. He was asked what he and his buddy did when they found they could not use the crossbars and that no others were furnished, and he answered, "Left and quit." This was in strict accord with what the Mining Act, rule 1, required of them. Then the deceased went to work in the heading which Zipay and his buddy had vacated, and on Saturday night, according to Zipay, asked for crossbars 12 feet long and 10 inches thick and a buddy, and was told, "All right." Zipay, when asked why the deceased needed the crossbars, answered: "Rotten roof." He was recalled in rebuttal and asked:

"Mr. Zipay, in your opinion as a practical miner in a mine, could a man working alone have taken down with safety to himself a piece of rock five or six inches thick, six to nine feet square?"

He answered:

"No, one man cannot; there must be a helper. I have worked in mines about five years."

The rock described was the one which fell and killed the deceased.

The assistant foreman, called by defendant, after stating that he visited the deceased in butt No. 8 on Saturday afternoon about 3 p. m. (the deceased was found dead on the following Monday), testified as follows:

"I will describe the condition of eighth butt heading on Saturday afternoon preceding the Monday of this accident. You want me to explain the place, etc. Well, I went in there at 3 o'clock, as nearly as I can remember, and looked around his place, and picked up a pick, as is our custom of doing, and sounded the roof, and found a piece of rock that did not sound very good; he had it in pretty fair shape; he had a prop right in the center of the road, and on both sides; and this prop in the center of the road, in order for him to extend his track, would have to be taken out; so I told him that he would either have to make that piece of rock safe or take it down, and he said that he would; he said that he would probably come in early Monday morning, and he would attend to it."

He also testified that the rock which he found down on Monday morning, and which it is admitted was the rock which killed deceased, was the rock which he on Saturday advised the deceased to remove or make safe. This testimony shows, without the aid of that contained in the improperly admitted deposition, that the deceased knew of the dangerous condition of the place in which he was at work, that it was unsafe on Saturday night, that no crossbars or buddy had been sent him between Saturday night and the time when he resumed his work without either, and yet he resumed his work and apparently undertook to take down the dangerous rock that caused his death. He was a man of mature age and of extended experience as a miner. He had knowledge and appreciation of his danger, and knew that under the Mining Act he was required to quit the work and vacate the place. There is but one conclusion to be drawn from this statement of facts, and that is that he assumed the risk. In this condition of the record, we are not justified in sending the case back for a new trial because of the error in the admission of the deposition.

[10] The conclusion we have reached makes it unnecessary to consider the fourth assignment of error, which is that the court erred in permitting the defendant, against the plaintiff's objection and exception, to read the deposition to the jury through two counsel for defendant, one standing at the bar reading the questions and the other sitting in the witness chair reading the answers. When it was proposed to do this, counsel for plaintiff objected, saying:

"I object to any dramatic exhibition of that character; this is a court of justice; it is not a playhouse, and it is imitating this man, who is an employé of the defendant."

The court overruled the objection, and declared no one was being imitated. We take occasion to say that, if the circumstances had justified the reading of the deposition, no exception could be taken to the manner in which it was read. It was a perfectly proper way in which to read it. Indeed, it is a much more satisfactory way than to have one person read the whole, because it enables the jury easily to differentiate between question and answer.

There is no evidence in the record that the defendant ever failed to comply with the orders of the mine foreman or of his assistants; and there is no evidence that the defendant ever had notice that an "emer-

gency of danger" had arisen which demanded immediate action by it as provided in the Mining Act of the state of Pennsylvania. The alleged conversation of Zipay with the assistant mine foreman under the Pennsylvania decisions is not notice to the defendant. Such evidence as there is to show notice is the testimony of the witness Zipay as to the alleged conversation of the deceased with the assistant superintendent, in which he simply asked for the crossbars and a buddy. That testimony is denied. But, assuming it to be true, the conversation as reported is insufficient under the Pennsylvania decisions, as we have seen, to inform the assistant superintendent that the mine foreman was in default and that an emergency existed which required immediate action.

Judgment affirmed.

COXE, Circuit Judge. I dissent upon the ground that it cannot be said, as matter of law, that the conceded error in admitting the Hajduk deposition was not prejudical to the plaintiff.

The negligence of Vagaszki and of the defendant are questions of fact and should be submitted to a jury upon competent evidence.

What effect the reading by the defendant of testimony taken on behalf of the plaintiff may have had upon the jury we do not know. That it influenced the jury unfavorably to the plaintiff may reasonably be inferred.

The plaintiff is entitled to a new trial.

BULL v. CAMPBELL.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1915.)

No. 4367.

1. QUIETING TITLE ⊂=10—QUESTIONING TITLE OF COMMON GRANTOR.
   Where both plaintiff and defendant in a suit to quiet title deraigned title from a common grantor, neither party could question such grantor's title.
   [Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36–42; Dec. Dig. ⊂=10.]

2. PUBLIC LANDS ⊂=114—GRANT TO RAILROAD—VESTING OF TITLE.
   Where Congress granted public lands to a railroad in præsenti, and such road conveyed the lands before execution of its patent, upon execution the patent related back to the date of the grant, and the railroad's conveyance gave title to the grantee.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314–322; Dec. Dig. ⊂=114.
   Grants of railroad rights of way in public lands, see note to Taggart v. Great Northern Ry. Co., 129 C. C. A. 362.]

3. ESTOPPEL ⊂=35—TITLE BY ESTOPPEL.
   Under Rev. Codes Dak. 1877 (Civ. Code) § 633, providing that where a person purports by proper instrument to grant property in fee simple, and subsequently acquires any title or claim thereto, the same passes by operation of law to the grantee or his successor, where a railroad was granted public lands by Congress, and, previous to the issuance to it of the patent thereto, conveyed away such lands, upon issuance of the

patent the road's title thereunder passed by operation of law to its grantee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 84; Dec. Dig. ⊂=35.]

4. JUDGMENT ⊂=490—COLLATERAL ATTACK—ORDER OF SERVICE.

Where the Pennsylvania grantee of the mortgagor of lands in the territory of Dakota was sued to foreclose his equity, a decree of foreclosure being entered, in the mortgagee's subsequent suit against him to quiet title to the lands, he could not collaterally attack the decree by claiming that the order of the Dakota court permitting service against him by publication as a nonresident was invalid, as based on an affidavit insufficient under the statute of the territory in force in 1880, providing that, where the person on whom service of summons is to be made cannot after due diligence be found within the territory, and that fact appears by affidavit to the satisfaction of the court, it may order service by publication, since any error in the court's action could only be corrected by appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 926-928; Dec. Dig. ⊂=490.]

5. MORTGAGES ⊂=427—FORECLOSURE—FAILURE TO JOIN MORTGAGORS AS GRANTEES.

In suit to foreclose a mortgage, plaintiff's failure to join as parties defendant subsequent grantees of the mortgagor did not deprive the court of jurisdiction.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1269, 1272-1287; Dec. Dig. ⊂=427.]

6. MORTGAGES ⊂=497—FORCLOSURE—FAILURE TO JOIN MORTGAGOR'S GRANTEE —EFFECT.

Where, in suit to foreclose a mortgage, the plaintiff fails to join as party defendant the mortgagor's grantee, a decree of foreclosure will not extinguish such grantee's right of redemption.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471-1473; Dec. Dig. ⊂=497.]

7. MORTGAGES ⊂=497—FORECLOSURE—CONCLUSIVENESS—FINDING—COLLATERAL ATTACK.

In a mortgagee's suit to quiet title derived from a decree of foreclosure, a finding in such decree that the indebtedness secured by the mortgage was due to the plaintiff could not be attacked.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471-1473; Dec. Dig. ⊂=497.]

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action by Hugh Campbell, Jr., against Joseph W. Bull. Decree for plaintiff, and defendant appeals. Affirmed.

The appellee, hereinafter called the plaintiff, filed his bill in the District Court against the appellant, referred to hereafter as the defendant, to determine adverse claims and to quiet his title to a quantity of land in the state of North Dakota. The defendant, asserting title in himself, filed a counterclaim, asking for the same relief against the plaintiff.

The plaintiff claims to be the owner of the lands described in the complaint, deraigning title from one Christopher Stuart Patterson, under whom the defendant also claims title in his counterclaim. The plaintiff deraigns title by reason of a mortgage executed by Patterson and wife on the 2d day of October, 1879, to secure the payment of an indebtedness of $5,000. On August 2, 1880, the plaintiff, being the owner of the indebtedness secured by the mortgage, instituted an action in the district court of Burleigh county, Dakota territory, in which district the lands were situated, for the purpose of fore-

closing the mortgage. The defendants Patterson, in that case, were duly served with process within the territorial jurisdiction of the court, but made no defense, whereupon a decree by default was entered on November 24, 1880. Under this decree a sale of the premises was had, and the plaintiff became the purchaser thereof. This sale was duly confirmed by the court. After these proceedings had been had, it was ascertained by the plaintiff that before the institution of that suit Patterson and wife, the mortgagors, had coveyed these lands to one J. Warren Coulston; but, that fact having been overlooked, Coulston was not made a party defendant in the foreclosure proceedings. Thereupon, on the 9th day of February, 1885, another action of foreclosure was instituted in the district court of the Sixth judicial district of the territory of Dakota against the said Coulston as the sole defendant. Coulston being a nonresident of the territory, and the sheriff having made the return on the summons that he could not be found in the territory, after using due diligence, an affidavit was presented to the judge of the court, which affidavit is as follows:

"Territory of Dakota, County of Burleigh.

"John E. Carland, being duly sworn, on oath says that he is the attorney for the plaintiff in this action; that the said defendant J. Warren Coulston cannot after due diligence be found within this territory; that a summons was duly issued against said defendant and placed in the hands of the sheriff of said county for service, but was returned by said sheriff with his indorsement thereon that said defendant could not be found, which summons, so indorsed, is hereto annexed; that said defendant is a proper party to this action, which relates to real property in this territory; that a cause of action exists against the said defendant in favor of the said plaintiff, as will appear by the complaint of the said plaintiff, a copy of which is hereto annexed; that the affiant is informed and believes that the said defendant, J. Warren Coulston, resides at Philadelphia, in the state of Pennsylvania; that the subject of this action is real property in this territory, and said defendant claims an equity of redemption therein, and the relief demanded is a foreclosure of said equity.

"John E. Carland."

Upon presentation of this affidavit, which was duly verified, the judge of said court, on February 9, 1885, made the following order in that cause:

"It satisfactorily appearing to the judge of said court, by the annexed affidavit of John E. Carland, that the defendant, J. Warren Coulston, cannot after due diligence be found within this territory, and it in like manner appearing that a cause of action exists against the said defendant in favor of the said plaintiff, Hugh Campbell, Jr., and that said defendant is a necessary party in said action, as set forth in his complaint, a copy of which is hereto annexed, and that the subject of the action is real property in this territory, and said defendant claims an equity of redemption therein, and the relief demanded is a foreclosure of said equity, and it further appearing that the place of residence of the said defendant, J. Warren Coulston, is at Philadelphia, in the state of Pennsylvania: On motion of John E. Carland, attorney for the said plaintiff, ordered, that service be made upon said defendant by the publication of a summons in the form of the copy of same hereto annexed, in the Bismarck Weekly Tribune, a newspaper printed and published in Bismarck, Dakota, the same being most likely to give notice to said defendant, once a week for six successive weeks; and it is further ordered and directed that a copy of the summons and complaint be forthwith deposited in the post office, in a registered letter, directed to the said defendant, the person to be served, at Philadelphia, Pennsylvania, his place of residence, and postage paid.

"Dated February 9, 1885. William H. Francis, Judge."

Due notice was given by publication as required by the order of the court, and also a copy of the summons and complaint sent through the mail, in a registered letter, to the defendant, addressed at Philadelphia, Pa., his place of residence, postage prepaid. In addition to that a copy of the summons and complaint was also served on the defendant at Philadelphia by a disinterested person, over the age of 18 years, and a return of the service made under oath by that person. This last service was made on the 27th day of April, 1885.

On the 8th day of July, 1885, the cause came on for hearing, and proof of the service of process having been presented to the court, a decree was rendered by the court reciting that the said defendant, J. Warren Coulston, had been duly served with process in said action, but having filed no pleading therein, and made no appearance in any manner, either in person or by attorney, was in default of answer, and thereupon the court, having heard the evidence, found the facts necessary to render a decree ordering a sale of the premises by the sheriff of the county, and upon such sale that the defendant's equity of redemption be barred and foreclosed from all equity of redemption and any claim to said mortgaged premises, and every part and parcel thereof, after the delivery of the sheriff's deed. A sale was had, and the plaintiff became the purchaser at that sale for the mortgage debt, and, no redemption having been made from the sheriff's sale, it was approved by the court, and the sheriff directed to execute a deed of conveyance to the plaintiff, which was done.

Immediately after the delivery of the sheriff's deed to him, the plaintiff entered into possession of the lands, and has held them ever since openly and adversely to the title of any other person from that date to the time this suit was instituted, which was on May 15, 1911. The lands were wild, open, and uninclosed, and situated in a thinly settled district of said county; and he has paid the taxes thereon annually ever since, and ever since the year 1891 has leased and rented said lands for grazing, pasturage, and the making of hay thereon to tenants, who have accounted to him for the value of such use and occupation of said lands. He inclosed all of said lands by a substantial fence showing his occupation; and during all the time he was in such possession neither the mortgagor, Patterson, nor Coulston, nor any one claiming under them, or either of them, has ever been in possession of said lands, nor in any wise disturbed, disputed, or protested against plaintiff's possession.

On August 15, 1906, the defendant obtained and caused to be filed for record and recorded in the office of the register of deeds for Burleigh county, N. D., where said lands are situated, a quitclaim deed to these lands from J. Warren Coulston to him, the defendant. The consideration named in the instrument is "the sum of one dollar and other valuable consideration," and it bore date August 10, 1906. At the time of the sale by the sheriff under the foreclosure decree in the action against Coulston, had in the territorial court, the value of the lands did not exceed the sum of $5,433.26; but since then, more than 25 years having elapsed, these lands have greatly increased and appreciated in value, and are now worth at lease $50,000, and he has paid out in taxes on said lands during that time the sum of $3,000.

For the purpose of obtaining possession of these lands, the defendant, on April 23, 1910, purchased from a tenant of plaintiff some lands adjoining the lands belonging to the plaintiff, and then pretended to make a lease to one Hubbard, and induced him to commit trespasses upon plaintiff's lands; and the defendant also caused Hubbard, who claimed to be his lessee, to cut the fence which inclosed plaintiff's land and drive some live stock belonging to him thereon, and after the plaintiff had caused Hubbard to leave and repaired the fence, he at various times thereafter again cut the fence and trespassed upon the lands.

The prayer of the bill is the usual one, that the defendant be required to set forth his adverse interest, demand, right, title, and interest, or estate, in and to the premises, in order that they may be justly adjudicated, and that upon a hearing they be declared null and void as against the plaintiff, that the plaintiff's title to the lands be confirmed and quieted against the defendant and all claiming under him, and that he be enjoined and restrained from asserting any claim, right, or title adverse to the plaintiff.

The defendant filed an answer in which he denies plaintiff's right upon several grounds: First, that at the time Patterson executed the mortgage no patent had been issued by the United States to the Northern Pacific Railway Company, under whom he claimed title; second, that the decree against Coulston showed on its face that the court which rendered it was without jurisdiction, because no sufficient affidavit for publication was made showing diligence to serve the defendant within the territory.

He also denied that the plaintiff was in possession, but alleged that the land was open and unoccupied prairie land, used by no one; that the inclosure was not made until May, 1907. He admits that he obtained a conveyance of said lands by proper deed from Coulston; that it was for a valuable consideration, and therefore he is now the lawful owner thereof; that at the time he bought these lands from Coulston none of the land was inclosed nor occupied by any one, except a small tract which was used as a pasture by an adjoining neighbor. He admits that he purchased the east half of section 28, which adjoins some of the lands in controversy, but that he bought it in good faith; that he leased that land to Hubbard; that, the fence between the lands claimed by plaintiff and those which defendant had leased to Hubbard being down, Hubbard's cattle went upon them, but that it was not done for any fraudulent purpose; that he gave permission to Hubbard to put his horses in section 27 of the lands claimed by plaintiff, and had 10 acres of that land broken up and sowed in wheat.

He also filed a counterclaim, in which he claimed to be the owner of these lands by virtue of his purchase from Coulston, and asked for affirmative relief. He also claimed that he is willing and ready to pay all sums of money that were liens on the lands on the 10th day of August, 1906, or are now such liens, by reason of the Patterson mortgage, and he offers to pay all legal taxes that were assessed and levied against said land and paid by the plaintiff, but subject to an accounting and credit on said lands of any and all moneys that have been received by the plaintiff as rents and profits of said lands.

These lands were granted to the Northern Pacific Railway Company by an act of Congress approved July 2, 1864 (13 Stat. 365, c. 217), but the patents were not issued by the government to the railway company until 1895, some time after the lands had been conveyed by the railway company to Patterson's grantor, Stuart, and after Stuart conveyed them to Patterson, and after Patterson executed the mortgage under which plaintiff now claims title, and also after Patterson conveyed them to Coulston. The defendant also claims that the plaintiff was not the owner of the mortgage at the time of the foreclosure proceedings hereinbefore stated.

There was considerable evidence, which it is unnecessary to set out, in view of the conclusions reached by the court, as the main grounds upon which the defendant relies for a reversal of the decree, which was rendered in favor of the plaintiff, are questions of law, which are decisive of this case.

Burt F. Lum, of Minneapolis, Minn., for appellant.

S. E. Ellsworth, of Jamestown, N. D., and Allen C. Orrick, of St. Louis, Mo., for appellee.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge (after stating the facts as above). The defendant relies for a reversal, upon two grounds: (1) That the mortgage executed by Christopher Stuart Patterson to Robert Campbell, as whose assignee of the mortgage plaintiff claims, was absolutely void, as at the time the railway company conveyed these lands to Stuart, and the subsequent conveyances from Stuart to Patterson and the mortgage by Patterson to Robert Campbell, it had not received a patent from the government for these lands, although they had been granted to and selected by the railway company long before. (2) That the foreclosure proceedings which resulted in the decrees under which the plaintiff claims to have become the purchaser are absolutely void—the first, against Patterson, because Coulston was not made a party defendant; and the second, against Coulston, because he had not been properly served with process to give the court, which rendered the decree, jurisdiction to render it.

[1] As to the first proposition, a complete answer is that both parties claim title to the land from a common grantor Patterson. This being the case it is not competent for either party to question the title of the grantor. When both parties assert title from a common grantor, and no other source, neither can deny that such common grantor had a valid title when he executed his conveyance. Robertson v. Pickrell, 109 U. S. 608, 615, 3 Sup. Ct. 407, 27 L. Ed. 1049.

[2] But, aside from that, the title of the Northern Pacific Railway Company to the lands granted by the act of Congress of July 2, 1864, was in præsenti, and upon execution of the patent it related back to the date of the grant. That was expressly determined in St. Paul & P. R. R. Co. v. Northern Pacific Ry. Co., 139 U. S. 1, 11 Sup. Ct. 389, 35 L. Ed. 77.

[3] In addition to that the laws of the territory of Dakota, at the time these conveyances were made, provided:

"Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes, by operation of law, to the grantee, or his successors." Rev. Codes Dakota 1877 (Civil Code) § 633.

Was the decree of foreclosure under which plaintiff claims title absolutely void, so as to subject it to collateral attack? There were two separate decrees of foreclosure, under both of which plaintiff claims title to the lands in controversy, having become the purchaser of them at both sales. The first action was against the mortgagor, Patterson, and his wife only. Both of these defendants were served with process in the territory of Dakota and a proper decree of foreclosure rendered. After the sale and purchase by the plaintiff under this decree it was discovered that Patterson had conveyed these lands, after the execution of the mortgage, but prior to the institution of the first foreclosure suit, to one J. Warren Coulston, under whom defendant claims title by purchase. Coulston not having been made a party to the foreclosure proceedings, an action to foreclose his equity of redemption was instituted by the plaintiff as mortgagee, and also as the purchaser of the lands under the former decree. A decree of foreclosure was rendered in that case, and upon a sale of the lands under the last decree they were purchased by the plaintiff.

[4] It is claimed that, Coulston being a nonresident of the territory of Dakota, residing in the city of Philadelphia, state of Pennsylvania, the order of the judge of the district court of Burleigh county, in which the cause was pending, was a nullity, because the affidavit upon which the order was made did not comply with the terms of the statutes of the territory authorizing an order for constructive service. The statutes of the territory of Dakota then in force on that subject, were as follows:

"Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the territory, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this territory, such court or judge may grant an order that the service be made by the publication of a summons in either

of the following cases: * * * (4) Where the subject of the action is real or personal property in this territory, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein. (5) * * * When publication is ordered, personal service of a copy of the summons and complaint, out of the territory, is equivalent to publication and deposit in the post office. The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may, in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected. * * *" Rev. Codes Dakota 1877 (Code of Civil Proc.) § 104.

It is claimed that the affidavit, which has been set out in the statement of facts, was void because it failed to state what diligence had been used to obtain service on Coulston within the territory, and that he was not to be found in the territory. It may be conceded that, upon an appeal from a decree rendered upon such an affidavit, it would be declared insufficient to warrant an order of the court for substituted service, a question not before us, and therefore not determined; but it would not follow that a decree based upon such an affidavit and order would make the decree absolutely void, so that it could be attacked in a collateral proceeding. No authority has been called to our attention in the very elaborate brief of counsel for defendant, nor in the oral argument, to any decision of the Supreme Court of the territory of Dakota, or the state of North Dakota, where such a judgment or decree has been declared void when collaterally attacked, nor have we been able to find any such authority. The court which acted on the affidavit held it sufficient, and if it erred the error could only be corrected by appeal. The decree cannot be attacked collaterally. Applegate v. Mining Co., 117 U. S. 255, 6 Sup. Ct. 742, 29 L. Ed. 892; Pennoyer v. Neff, 95 U. S. 714, 721, 24 L. Ed. 565.

In the last-cited case this identical question was before the court under a statute of Oregon, which is practically the same as that of the territory of Dakota, and where the affidavit upon which the order for substituted service was made was almost identical with that in this case. The court there said:

"There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that, inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally." (The words in italics are in the opinion itself.)

The same conclusion was reached in Marx v. Ebner, 180 U. S. 314, 319, 21 Sup. Ct. 376, 45 L. Ed. 547, where the affidavit was almost identical with the one in this case, and the language of the statute practically the same. It was there held:

"We think, where the affidavit shows that the defendant is a nonresident of the district and that personal service cannot be made upon him, and the marshal, or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question. It is not to be expected that positive proof that the defendant cannot be found within the state or district will always be attainable. Facts must appear from which it will be a just and reasonable inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a nonresident of the state, and there is an affidavit that personal service cannot be made upon him within its borders, and there is a certificate of the marshal such as appears in this case."

To the same effect are Cohen v. Portland Lodge, 152 Fed. 357, 81 C. C. A. 483; Bower v. Stein, 177 Fed. 673, 101 C. C. A. 299.

[5, 6] The original decree in the Patterson case is also attacked upon the ground that Coulston, his grantee, was not made a party thereto. But the failure to make subsequent grantees parties, especially when they are not in possession, would not deprive the court of jurisdiction. The only effect of such an omission would be that the right of redemption of the grantee remains in existence.

[7] It is also claimed that the plaintiff, Hugh Campbell, Jr., was not the owner of the mortgage; but the finding of the court, as recited in the decree, that the indebtedness secured by the Patterson mortgage was due to the plaintiff in that action, is conclusive in a collateral proceeding. No authorities need be cited on that proposition.

Other contentions have been made and carefully examined, but they are too frivolous to require notice. The conclusions reached make it unnecessary to determine the question of plaintiff's title by prescription, and the alleged laches of the defendant and his grantor. Upon the whole bill the defendant has failed to show any equities which can appeal to the conscience of a court of equity. His grantor had actual notice of the pendency of the foreclosure proceedings. He made no defense. For over 20 years he took no steps to have the decree reviewed, as could have been done under the statutes of the territory of Dakota. He paid no taxes on the lands, and, as appears from the deed to the defendant in this case, he purchased it for a nominal consideration, laboring, no doubt, under the impression that the decree could be set aside upon payment of the mortgage debt; the lands, in the meantime, having increased tenfold in value.

The decree of the District Court was right, and is affirmed.

EVERETT, CLARKE & BENEDICT v. ALPHA PORTLAND CEMENT CO.

In re ALPHA PORTLAND CEMENT CO.

(Circuit Court of Appeals, Second Circuit. July 22, 1915.)

No. 228.

1. ATTORNEY AND CLIENT ⟸171—ATTORNEY'S LIEN—ORIGIN.
An attorney's general or retaining lien upon the papers of his client has its origin in the inherent power of courts over the relations of attorney and client, and has been long recognized and protected.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 383; Dec. Dig. ⟸171.]

2. ATTORNEY AND CLIENT ⟸171—ATTORNEY'S LIEN—NEW YORK LAW.
The retaining lien of an attorney upon his client's papers in his possession to secure his charges is recognized in New York.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 383; Dec. Dig. ⟸171.]

3. ATTORNEY AND CLIENT ⟸171—ATTORNEY'S LIEN—PAPERS AND JUDGMENT.
The retaining lien of an attorney upon the papers of his client in his possession to secure his charge, and his lien on a judgment recovered by him, are different in their nature, and rules applicable to the one are not necessarily applicable to the other; the lien on a judgment not being recognized at common law unless declared by statute, while that on papers is, since the common law only recognizes liens when acquired by possession.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 383; Dec. Dig. ⟸171.]

4. ATTORNEY AND CLIENT ⟸171—ATTORNEY'S LIEN—LIEN ON JUDGMENT—EQUITY.
Apart from statute, courts of equity recognized an attorney's lien on the judgment secured by him, as courts of common law did not, since possession is not essential to an equitable lien.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 383; Dec. Dig. ⟸171.]

5. ATTORNEY AND CLIENT ⟸181—ATTORNEY'S LIEN—LIEN ON JUDGMENT—EXTENT.
An attorney's special or charging lien on a judgment recovered by him for his client never exceeds costs and fees due him in the particular suit.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 394–398; Dec. Dig. ⟸181.]

6. ATTORNEY AND CLIENT ⟸181—ATTORNEY'S LIEN—LIEN ON PAPERS—EXTENT.
An attorney's general or retaining lien on his client's papers in his possession is not limited to services rendered in the particular suit in which the papers were received, but includes any general balance due for services.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 394–398; Dec. Dig. ⟸181.]

7. ATTORNEY AND CLIENT ⟸171—ATTORNEY'S LIEN—LIEN ON JUDGMENT—ENFORCEMENT.
An attorney may actively enforce his special lien on a judgment recovered by him.
[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 383; Dec. Dig. ⟸171.]

8. ATTORNEY AND CLIENT ⟸171—ATTORNEY'S LIEN—LIEN ON PAPERS—ENFORCEMENT.

An attorney's general lien on his client's papers in his possession is merely passive and retaining, and may not be actively enforced.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 383; Dec. Dig. ⟸171.]

9. ATTORNEY AND CLIENT ⟸182—ATTORNEY'S LIEN—LIEN ON PAPERS.

A company obtained insurance against loss in personal injury actions by its employés, the insured agreeing to place in the control of the insurer any action brought against it, and empowering the insurer to designate attorneys to appear on the insured's behalf in such actions without interference from it. Upon injury to an employé of the insured, who sued, the defense was taken over by the insurer, which placed its attorneys in charge thereof, and later, during the pendency of the action, the insurer was dissolved by a state court, and its affairs taken over by the state insurance commissioner. The insurer's attorneys agreed with the insured that they should continue to defend the pending suit, but at the expense of the insurance commissioner, upon the insured's desiring to substitute its own personal attorney for those of the insurer. *Held*, that such attorneys could not assert a lien upon the insured's papers relating to the suit in their possession for disbursements and services, since the attorneys' client was the insurance company, not the insured.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399–406; Dec. Dig. ⟸182.]

10. ATTORNEY AND CLIENT ⟸182—ATTORNEY'S LIEN—LIEN ON PAPERS—POWER OF COURT.

A court has power to order an attorney to deliver up a client's papers, upon the client's giving security in a sum sufficient to answer the attorney's demands.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399–406; Dec. Dig. ⟸182.]

11. ATTORNEY AND CLIENT ⟸75—CLIENT'S RIGHT TO CHANGE ATTORNEY.

A client has a right to change his attorney at any stage of a suit, and without assigning a reason; and the court may grant an order of substitution, imposing upon the client such terms as the circumstances justify to protect a discarded attorney, who appears free from blame.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–119; Dec. Dig. ⟸75.]

12. ATTORNEY AND CLIENT ⟸75—CLIENT'S PAPERS—POWER OF COURT TO ORDER SURRENDER.

Where a client, pending suit, seeks an order substituting a new attorney of record, the power of the court to order the discarded attorney to surrender the client's papers, upon security being given to cover his legitimate charges, rests upon the relationship of client and attorney, and the mere fact of possession of the client's papers by the attorney does not gives the court jurisdiction to make such an order.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 110–119; Dec. Dig. ⟸75.]

13. ATTORNEY AND CLIENT ⟸63—RELATIONSHIP—ESTABLISHMENT—LIEN.

Where attorneys were originally retained by an indemnity company, and on its behalf undertook the defense in a personal injury suit against an employer, but upon dissolution of such indemnity company by a state court they agreed with the defendant employer to continue to conduct the defense, although at the expense of the state insurance commissioner, the relationship of attorney and client was established between them and the defendant; but, as they had no lien on defendant's papers up to

that time, none was thereafter created, as the expenses were to be borne by the insurance commissioner.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 85, 87; Dec. Dig. ⟸63.]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on writ of error to review an order of the District Court of the United States for the Southern District of New York.

Everett, Clarke & Benedict, of New York City (Herman S. Hertwig and George M. Clarke, both of New York City, of counsel), for plaintiffs in error.

Louis H. Porter, of New York City (Louis H. Porter and F. Carroll Taylor, both of New York City, of counsel), for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The question presented to the court in this case involves the validity of an order allowing the substitution of attorneys and the turning over of papers upon which the attorneys claim a lien; the substitution of the attorneys and the surrender of the papers being conditioned on the giving of security for the payment of any final judgment which the displaced attorneys might obtain against the defendant in an independent action.

The Employers' Indemnity Company of Philadelphia, in 1912, insured the defendant for a period named in the contract on account of accidents to defendant's employés; the liability on account of an accident to any one person being limited to $5,000. The defendant was entitled to recover this amount only after it had paid out the amount in money, after trial of issue, in satisfaction of the final judgment against it. In consideration of this insurance the defendant paid the premium and agreed to place in the control of the Employers' Indemnity Company any action brought against it for the injuries covered by the policy, and empowered the Indemnity Company to designate attorneys to appear on behalf of the defendant in such actions without interference from the defendant. The Indemnity Company undertook to defend such actions at its own cost in the name and on behalf of the assured. While this policy was in effect the action in which the order complained of was made, Corsi v. Alpha Portland Cement Company, was commenced, and pursuant to the terms of the policy the defense of the action was intrusted to the Indemnity Company, and the latter retained the plaintiffs to appear and defend on behalf of the defendant. The same course was pursued in the case of certain other actions brought by various other injured employés against the defendant.

After certain of the actions had been concluded, but while the Corsi action was still pending, the Indemnity Company was dissolved by order of the Pennsylvania courts in May, 1914, and its affairs were placed in the hands of the Pennsylvania state superintendent of insurance for liquidation. Upon receipt of this notice the defendant re-

quested the plaintiffs to consent to the substitution of Mr. Louis H. Porter as its attorney in the Corsi action and the delivery to him of the papers, pleadings, and exhibits in their possession relating to the defense of the action. Plaintiffs agreed to consent to this upon receiving payment of their claim for services and disbursements in the action, amounting to $130.50, and to surrender the papers, pleadings, and exhibits on satisfaction of their alleged lien thereon for the unpaid balance of their claim for services rendered and disbursements made in the various matters in which they had represented the defendant, amounting to $1,092.26. The conditions named by the plaintiffs were rejected by the defendant, on the ground that plaintiffs under the circumstances had no lien or claim enforceable against the defendant. A motion was thereupon made by the defendant to determine the question. The District Court held that:

"Whether or not defendant is indebted to Messrs. Everett, Clarke & Benedict for professional services in connection with this and other litigations, and, if so, in what amount, are questions which will have to be settled in an independent action."

Accordingly the order under review was made, substituting Mr. Porter as attorney for the defendant, and directing plaintiffs to deliver to him the papers, pleadings, and exhibits, on condition that the defendant first file an undertaking to secure the payment of the amount claimed by plaintiffs in the event that either or both of their contentions should be established either in independent proceedings or on appeal from the order.

The defendant claims that no liability to the plaintiffs on their part exists; that all the services performed by the plaintiffs were rendered solely in the interest of the Employers' Indemnity Company, and not for the defendant, whose interests from the beginning of the litigation were represented by Mr. Louis H. Porter as their personal counsel. In support of this view of the matter attention is called to a letter written by the plaintiffs to the defendant on May 19, 1914, in which they announced the dissolution of the Employers' Indemnity Company by the action of the Pennsylvania court, and that the insurance commissioner of Pennsylvania had taken charge with powers of a receiver, to liquidate the business and protect the creditors. The letter continued:

"In respect to all unsettled claims, which arose prior to the reinsurance date, the assured, being liable in the first instance, must see to the protection of their own interests by continuing the litigation, compromising, appealing, etc., as they may consider most expedient. In this connection, we, who have heretofore represented the Employers' Indemnity Company, have been authorized by the commissioner to confer with the assured and offer such aid as may be advisable to protect the rights of all creditors and to reduce the ultimate liability of the company. Our charges for this service will be paid by the commissioner. We shall be pleased to confer with you as to pending cases."

To that Mr. Porter replied on behalf of defendant as follows:

"I have consulted with my clients with regard to the case of Corsi against the Alpha Portland Cement Company and they accept my recommendation that you continue in charge of this case as heretofore, my understanding being that your charges will be borne by the insurance department of Pennsyl-

vania, and that I will co-operate with you in the defense of the case as in the other cases that we have heretofore had."

Thereupon plaintiffs replied as follows:

"I acknowledge the receipt of your letter of May 27th, referring to the above case. and stating that your clients have accepted your recommendation that we shall continue in charge of the case as heretofore, it being understood that our charges are to be borne by the insurance department of Pennsylvania, and that you will co-operate in the defense of the case as heretofore. This is entirely satisfactory."

This correspondence makes plain what the original understanding of the parties was, and that the plaintiffs' fees and disbursements were to be paid by the Indemnity Company. Moreover, the policy issued to the defendant by the Indemnity Company expressly stated that the latter would be "liable for the costs of court and of the company's attorneys and agents in defending or effecting the settlement of any suit or claim covered by this policy." The plaintiffs were employed by the Employers' Indemnity Company, and they had full knowledge of the provision referred to, which was inserted in all the policies issued by the company.

The plaintiffs nevertheless assert that they have a lien on the papers, pleadings, and exhibits in the action for the general balance due to them for services and disbursements "in matters in which they represented the Alpha Portland Cement Company" and that they are entitled to have that lien satisfied before being compelled to surrender the papers. In the argument in this court they admitted that they have no personal claim upon defendant for their fees and disbursements, and that the only personal liability which existed was against the Indemnity Company. They contended merely that the personal liability of the Indemnity Company for unpaid fees and disbursements is secured by their attorney's lien on the papers in their possession and that the defendant, as well as the Indemnity Company, is bound to respect that lien, and to satisfy it before it can lawfully require the surrender of the papers. The argument is that, when the defendant empowered the Indemnity Company to retain attorneys to appear in these actions and to defend them, it is to be assumed that they knew that the law gave to attorneys so designated a lien on the papers to secure payment of their fees and disbursements; that therefore its agreement that the Indemnity Company might designate the attorneys necessarily carried with it an understanding that it thereby assented to the legal consequences of such designation, namely, the accrual of a lien which in an emergency, would be enforceable against it; that defendant is in precisely the position of A., who permits B. to pledge A.'s property with C. to secure the personal claim of C. against B.

[1] An attorney's general or retaining lien is a common-law lien, which has its origin in the inherent power of courts over the relations between attorneys and their clients. The power which the courts have summarily to enforce the performance by the attorney of his duties toward his client enables the court to protect the rights of the attorney as against the client. This lien is one which the courts have long recognized and protected. Almost 200 years ago, in a case before

Lord Chancellor Talbot, Ex parte Bush, 7 Viner's Abr. 74 (1734), it was held that:

"The attorney hath a lien upon the papers in the same manner against assignees as against the bankrupt, and though it does not arise by any express contract or agreement, yet it is as effectual, being an implied contract by law."

And in a case before Lord Mansfield in 1779, Wilkins v. Carmichael, 1 Doug. 101, 104, counsel, who was seeking to establish a lien in favor of a captain against a ship for his wages, likened it to the case of attorneys, who could not be compelled to deliver up a client's papers until their charges were paid, and was stopped by Lord Mansfield, who said:

"The practice, in that respect, was not very ancient, but that it was established on general principles of justice, and that courts both of law and equity have now carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he had been employed for him, till the bill is paid."

And in a recent case, In re Morris, 1 K. B. 473 (1907), Lord Chief Justice Alverstone said:

"Prima facie a solicitor has a lien for his charges upon the papers of his client."

[2] In McPherson v. Cox, 96 U. S. 404, 417, 24 L. Ed. 746 (1877), the Supreme Court, in a case which came up from the District of Columbia, declared that an attorney has a lien by law, apart from any express agreement, on the papers of his client in his hands, for all that is due him as an attorney. And the courts of the local jurisdiction also recognize the attorney's retaining lien. Matter of Dunn, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536 (1912).

The courts have held that the fact that an attorney is not retained by the nominal party whom he represents, but by the real party in interest, acting under the authority of the nominal party, does not deprive the attorney of his charging lien on the judgment, even though the real party is alone under personal obligation to remunerate him. In McGregor v. Comstock, 28 N. Y. 237 (1863), the New York Court of Appeals held that an attorney who obtained a judgment had a lien upon it for his costs, and that his lien was not defeated by the fact that he was retained by the real party in interest, and not by the nominal defendant. In that case the judgment debtors had paid the judgment to the nominal defendant. It was held that the payment by the plaintiffs was in fraud of the rights of the attorney. The court said:

"The fact that the defendant's attorney was not retained by the defendant in the suit, but by the real party in interest, cannot defeat the lien of the attorney upon the judgment. The acquiescence of the nominal defendant in the conduct of the suit by the attorney, for the benefit of the party in interest, would preclude him from insisting that the lien did not exist, and the opposite party in the action has no right to question it."

In Hilton Bridge Co. v. N. Y. C. & H. R. R. R. Co., 84 Hun, 225, 32 N. Y. Supp. 514 (1895), the New York Central Railroad employed the Moffett, Hodgkins & Clarke Company to procure a right of way

for the railroad, the consideration for these services being fixed by agreement. In this work the Moffett Company employed attorneys to procure a clear title. The attorneys did so, but retained the muniments of title in their hands by virtue of their lien. The General Term held that this lien was good, not only against the Moffett, Hodgkins & Clarke Company, which had employed the attorneys, but also against the railroad company. This case was reversed in the Court of Appeals in 145 N. Y. 390, 40 N. E. 86, but on the ground that the lawyers, because of their lien, were not necessary parties to the particular suit. The Court of Appeals said, however:

"They [the lawyers] have procured the right of way to a very large extent, and have in their possession contracts, title deeds, and other papers relating to the business, upon which they claim, and, so far as appears from the record, they have a lien for their professional services."

This court, in a case heard by Judges Wallace and Shipman, Tuttle v. Claflin, 88 Fed. 122, 31 C. C. A. 419 (1898), held that an attorney had a right to enforce his lien on funds recovered under the following circumstances: An assignee for the benefit of creditors, who was engaged in prosecuting a suit for infringement of a patent belonging to the estate, contracted with a third person, who was suing the same party for infringement on another patent, to unite their interests for their mutual benefit, and authorized such third party to carry on or settle a litigation at his own expense, and divide the net amount recovered equally between them, and the latter employed the solicitor and counsel who was asserting the lien. The party who made this agreement with the third party did not employ the counsel, took no part in the litigation, paid and proposed to pay nothing, and yet the court recognized the attorney as having against him an equitable lien on the fund recovered.

[3-8] But it by no means follows that because an attorney has, as against a nominal party who did not retain him, a special or charging lien on a judgment, he therefore must also have as against such a party a special or retaining lien on the papers in the suit. The two liens are different in their nature, and the rules applicable to the one are not necessarily applicable to the other. An attorney's lien on a judgment is not recognized at common law unless declared by statute, but the lien on the papers is. The reason for that distinction is that the common law only recognized liens acquired by possession. Courts of equity, however, recognized the lien on the judgment; possession not being essential to an equitable lien. Again, a special or charging lien on a judgment never extends beyond the costs and fees due the attorney in the suit in which the judgment is recovered, while a general or retaining lien on the papers is not limited to the services rendered in the particular matter in which the papers were received, but includes a general balance due him for services rendered in other suits. And again, an attorney may take active steps to enforce his lien on a judgment, but the lien on the papers is a mere passive lien, without any right to actively enforce it. It is a mere right to retain.

[9] The general lien which an attorney has upon his client's papers is commensurate with the client's right and title to them. The

plaintiff's client was the Indemnity Company, and their lien on the papers is commensurate with the right of the Indemnity Company to the papers. This is the principle laid down in Jones on Liens, § 146, and we think it sound. It has been held in England that if a client takes to his attorney, for his opinion, title deeds which the client has received from another person for inspection pending negotiations for a sale of property or other business transaction, the attorney cannot, upon a claim of lien, retain the papers as against the person to whom they belong. Hollis v. Claridge, 4 Taunt. 807 (1813). In answer to the suggestion that the attorney had a lien on the papers until he was paid, Gibbs, J., replied, "But it is Basson who alone is bound to pay him." Basson was the one who took the deeds to the attorney. In that case Gibbs, J., said:

"Suppose one having a diamond offers it for sale to another for £100, and gives it to him to examine, and he takes it to a jeweler, who weighs and values it. He refuses to purchase, and, being asked for it again, he says the jeweler must first be paid for the valuation. As between the jeweler and purchaser, the jeweler must first be paid for the valuation; as between the jeweler and purchaser, the jeweler has a lien; but, as against the lender, he has no right to retain the jewel."

Chambre, J., in announcing that he was of the same opinion, declared that it would be "extremely mischievous if it were otherwise."

In the case at bar the papers were intrusted by defendant to the Indemnity Company, to be used by it in defending an action in the result of which it was interested. The Indemnity Company had no right to use the papers for any other purpose, or to pledge them to secure a debt due from it alone, and in respect to which the defendant was not in any way concerned. If the Indemnity Company failed to defend the suit, or the papers were not needed in the defense of the suit, and the defendant had need of them to defend the suit, or to use in some other suit, there can be no question but that it could recover the possession of them as against the Indemnity Company. The defendant's rights are not less as against the plaintiffs, whose rights are only commensurate with those of its client. No retaining lien on the papers can therefore be asserted as against the defendant.

[10, 11] That a court has power to order an attorney to deliver up a client's papers upon the client's giving security in a sum sufficient to answer the attorney's demands is too well established to be called in question. Neither can it be questioned that a client has a right to change his attorney at any stage in the proceeding and without assigning a reason, and may make application to the court to have a new attorney of record substituted, and the court may grant an order of substitution imposing such terms as may be justified under the circumstances to protect the rights of the attorney if he be free from blame. The Supreme Court of the United States in Re Paschal, 10 Wall. 483, 19 L. Ed. 992 (1870) held that a party has a general right to change his attorney, and that a rule for that purpose would be granted, leaving to the attorney the advantage of any lien he might have on papers or moneys in his hands as security for his fees and disbursements. And such, too, is the doctrine of the local jurisdiction. The New York Court of Appeals in the Matter of Dunn, supra,

recognizes the doctrine that the courts will not enforce a substitution of attorneys, where the first attorney is without fault, unless the amount due the attorney for his services and expenditures is either paid or secured.

Lord Romilly, who no doubt, as Master of the Rolls, was very conversant with the practice in such matters, declared in Re Bevan, 33 Beavan, 439 (1864):

"The course I adopt in all these cases is this: Where a sum is claimed by a solicitor to be due him, and some delay occurs in the taxation, imputable to the fault of no one, I order the papers to be delivered over on the amount being secured, and on an undertaking to produce them as required in the course of the taxation."

And in Re Galland, L. R. 31 Ch. Div. 303 (1885), Chitty, J., after citing Lord Romilly's statement, declared:

"It seems to me that it has been treated by the profession as the rule of the court."

And in the same case Lindley, J., referring to the right of the court to order a solicitor to deliver up papers on payment into court of sufficient to secure him, said:

"There is evidently jurisdiction to do it in some cases."

[12] But the power of the court to order in a summary proceeding the surrender of the papers upon security being given rests upon the relationship of attorney and client. The fact that these papers are in the hands of attorneys does not in itself give the court jurisdiction summarily to make the order. Moreover, the order assumes the relationship in that it provides that there may be a substitution of attorneys. See In the Matter of Niagara, Lockport & Ontario Power Co., 203 N. Y. 493, 97 N. E. 33, 38 L. R. A. (N. S.) 207, Ann. Cas. 1913B, 234 (1911).

[13] While these plaintiffs were originally retained by the Indemnity Company, their letter of May 19, 1914, suggesting that they continue to act in the case, and the acceptance of their offer in the letter of Mr. Porter of May 27th, established the relationship. But if they had no lien on the papers prior to that time, they obtained none thereafter, because of the express agreement that their subsequent services were to be paid by the insurance commissioner of Pennsylvania.

The order made by the court below assumed that the lien which these plaintiffs claimed was based on an indebtedness due from the defendant, and it declared that whether such indebtedness existed, and, if so, what amount, should be settled in an independent action, and that the security should be for payment of any final judgment which might be obtained by the plaintiffs. It appears, however, in this court, that the plaintiffs disclaim the existence of any indebtedness whatever to them from the defendant, and the lien they assert is simply a retaining lien, resting on an indebtedness due from the Indemnity Company and upon the relation of that company with the defendant. As the facts disclosed in this record show that no such lien on the papers as the plaintiffs claim can exist against the defendant, even if it might subsequently be shown that an indebtedness for professional

services exists as against the Indemnity Company, we think the order should be modified, and that the substitution of attorneys should be granted, and the plaintiffs directed to turn over the papers as prayed, and that no security be required to be given.

It is so ordered.

CHICAGO & A. R. CO. v. UNITED STATES & MEXICAN TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1915.)

No. 4340.

(Syllabus by the Court.)

1. RAILROADS ⊜209—MORTGAGES—INCOME—PRIORITY.

Where the mortgaged property of a railroad company is placed in the hands of a receiver before the commencement of a suit to foreclose the mortgage and a subsequent suit for that purpose is commenced, the proceedings do not impound the income for the benefit of the mortgage bondholders, until either a demand has been made of the receivers to surrender the income and the administration of the property which has been refused, or an intervention has been made in the earlier suit, or an application for an order to impound the income for the benefit of the bondholders has been made to the court, or the receivership has been extended to the later suit, or receivers have been appointed therein.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 692–695; Dec. Dig. ⊜209.]

2. RAILROADS ⊜173, 197—MORTGAGES—FORECLOSURE.

A mortgagee of the property and income of an operating railroad company impliedly agrees that the current expenses of the ordinary operation of the railroad for wages, supplies, materials, and like necessities of operation, for six months before the impounding of the income for its benefit, may be first paid out of the gross income of operation before that net income arises which the mortgagee's lien holds fast.

A court of equity, administering railroad property in a foreclosure suit, may prefer claims for such current expenses to the claims of bondholders in payment out of the surplus income of the railroad property to the claims of mortgage bondholders secured by a prior mortgage.

If the current income of the property has been diverted from the payment of claims for such current expenses to claims not of this preferential class, leaving claims for such current expenses unpaid, the court may, from the proceeds of the corpus of the mortgaged property, restore and apply to the payment of the unpaid claims for such current expenses the amount so diverted.

But if there has been no diversion there can be no restoration, and the amount that may be so restored and applied may not exceed the amount so diverted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 581–587, 662; Dec. Dig. ⊜173, 197.]

3. RECEIVERS ⊜158—RAILROADS—PRIORITY OF CLAIMS—BALANCES.

Conceding, but not admitting, that it is the duty of a railroad company, connecting with a mortgagor railroad company, to receive and transport freight billed over its line by the mortgagor company, that fact does not render its claims for balances of repairs of cars, loss and damage claims, or overcharges arising from the discharge of that duty, entitled to preference in payment out of the income or out of the corpus of the

mortgagor's property over the claims of bondholders secured by a prior mortgage.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301–306; Dec. Dig. ⟸158.]

4. RECEIVERS ⟸158—RAILROADS—PRIORITY OF CLAIMS—"TRAFFIC BALANCES."
"Traffic balances" are the balances of moneys collected in payment for the transportation of passengers and freight. Claims for balances for car repairs, loss and damage, and overcharges are not traffic balances.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301–306; Dec. Dig. ⟸158.]

5. RECEIVERS ⟸47—ORDERS—CONSTRUCTION.
An order made in the appointment of receivers, or in the consolidation of causes, which authorizes, but does not direct or order, receivers to pay certain classes of claims, does not adjudge that claims within those classes, which the receivers did not pay under the order, are entitled to preference in payment, either out of the income or out of the corpus of the property, over the claims of bondholders secured by a prior mortgage.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 72; Dec. Dig. ⟸47.]

6. RECEIVERS ⟸158 — RAILROADS — RIGHT OF MORTGAGEE — PRIORITY OF CLAIMS.
The claims of bondholders, secured by the lien of a recorded mortgage on the property, the after-acquired property, and the income of a railroad company, to payment out of the proceeds of the mortgaged property, are, in the absence of special circumstances, such as a surplus, or a diversion of income, prior in right and superior in equity to the claims of subsequent creditors of the mortgagor company for unpaid current expenses, although, when the mortgage was made and recorded, the railroad was not built, and the mortgage disclosed the fact that it was made to raise the money to build it.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301–306; Dec. Dig. ⟸158.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the United States & Mexican Trust Company and others against the Kansas City, Orient & Mexico Railway Company and others, in which the Chicago & Alton Railroad Company intervened. From a judgment denying the intervener relief, it appeals. Affirmed.

William C. Scarritt, Elliott H. Jones, Charles M. Miller, Paul Pinkerton, and Edward L. Scarritt, all of Kansas City, Mo., for appellant.

Samuel Untermyer, of New York City, and Samuel W. Moore, of Kansas City, Mo., for appellees.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

SANBORN, Circuit Judge. The complaint of the appellant in this case is that the court below refused to order $1,074.14, balances due it from the Kansas City, Orient & Mexico Railway Company for car repairs, loss and damage claims on shipments of freight, and overcharges, paid out of the corpus of the latter's property in preference to the claims of bondholders secured by a prior mortgage thereon. The

mortgage was made on February 1, 1901, and it created a lien upon the property, the after-acquired property, and the income of the Orient Company to secure the payment of the bonds issued thereunder. The repairs and overcharges were made, and the loss and damage claims were incurred, between January 9, 1910, and March 7, 1912, when a creditors' bill was filed against the Orient Company, and receivers were appointed by the court below, who took possession of its property and proceeded to operate its railroad. Afterwards, on August 7, 1912, the trustee named in the mortgage filed a bill to foreclose it, and on December 24, 1912, the two suits were consolidated, the receivership was extended over the foreclosure suit, and the income of the railway company was first impounded for the benefit of the bondholders secured by the mortgage.

[1] Where the mortgaged property of a railroad company is placed in the hands of a receiver before the commencement of a suit to foreclose the mortgage, and a subsequent suit for that purpose is commenced, the proceedings do not impound the income for the benefit of the mortgage bondholders until either a demand has been made of the receivers to surrender the income and the administration of the property, which has been refused, or an intervention has been made in the earlier suit, or an application for an order to impound the income for the benefit of the bondholders has been made to the court, or the receivership has been extended to the later suit, or receivers have been appointed therein. Gilman v. Telegraph Co., 91 U. S. 603, 617, 23 L. Ed. 405; Galveston R. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. Ed. 199; Freedman's Saving Co. v. Shepherd, 127 U. S. 494, 502, 8 Sup. Ct. 1250, 32 L. Ed. 163; United States Trust Co. v. Wabash Railway, 150 U. S. 287, 305–309, 14 Sup. Ct. 86, 37 L. Ed. 1085; Agra & Masterman's Bank v. Barry, 3 Irish Reports, Equity, 443, 450; Howell v. Ripley, 10 Paige (N. Y.) 43, 48; American Loan & Trust Co. v. Central Vermont R. Co. (C. C.) 86 Fed. 390, 392; American Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144; Teal v. Walker, 111 U. S. 242, 249, 250, 4 Sup. Ct. 420, 28 L. Ed. 415; Atlantic Trust Co. v. Dana, 128 Fed. 209, 219, 62 C. C. A. 657, 667; Hook v. Bosworth, 64 Fed. 443, 448, 12 C. C. A. 208.

On January 6, 1914, the Chicago & Alton Railroad Company intervened in the consolidated cause, set forth its claim, and prayed its payment in preference to the payment of the claims of the bondholders. On February 2, 1914, a decree of foreclosure of the mortgage and of sale of the mortgaged premises to pay the bonds, aggregating $24,538,000, which were thereby adjudged to be secured by the mortgage by a first lien from February 1, 1904, on the property, the after-acquired property, and the income of the railroad company, was rendered and on July 6, 1914, the mortgaged property was sold for $6,001,000 to the Kansas City, Mexico & Orient Railroad Company. There was no diversion of the income of the railway company from the payment of the current expenses of the ordinary operation of the railroad for wages, materials, supplies, and like necessities of operation to the payment of claims of an inferior class, such as for interest on a bonded debt, for borrowed money, and for unnecessary improvements of the

mortgaged property, and the only question was whether or not the claim of the intervener was entitled in equity to a preference over the claims of the bondholders in payment out of the proceeds of the body of the property. The court below was of the opinion that $1,074.-14 of it was not so entitled, and the intervener has appealed to this court to reverse that decision.

The first impression which the facts in this case make upon the mind is that the ruling of the court was right. The railway company made and recorded a trust deed of its property, its after-acquired property, and its income on February 2, 1901, whereby it fastened a first lien thereon to secure the payment of the bonds issued thereunder. Thereafter the intervener, in the face of the prior mortgage, extended credit to the Orient Railway Company for the balances of car repairs, loss and damage claims, and overcharges for which it makes its claim. The lien of the mortgage was of record, and the intervener had legal notice of it. After that mortgage was made and recorded the Orient Company had no power by any contract or promise it could make to give any of its other debts a lien on its property superior to that of the mortgage bondholders, and it never made or tried to make any such agreement or promise. When these balances for car repairs, loss and damage claims, and overcharges are analyzed and thoughtfully considered, they amount to nothing more than simple debts of the Orient Company for labor done and for money advanced by the intervener for the mortgagor company subsequent to and with notice of the prior lien of the mortgage. So it seems that the intervener has no right at law or in equity by virtue of any promise or agreement of the Orient Company, or of the bondholders, to payment in preference to the latter out of the proceeds of the mortgaged property.

[2] It is true that a mortgagee of the property and income of an operating railroad company impliedly agrees that the current expenses of the ordinary operation of the railroad for wages, supplies, materials, and such necessities of operation for six months before the impounding of the income for its benefit may be first paid out of the gross income of operation, before that net income arises which the mortgagee's lien holds fast, and that a court of equity administering railroad property in a foreclosure suit may prefer unpaid claims for such current expenses incurred within six months before the impounding of the income to the claims of bondholders secured by a prior mortgage in its distribution of the surplus income of the property, and that if income has been diverted from the payment of such current expenses, leaving some of them unpaid, to the payment of other debts of the mortgagor not in this preferential class, the court may restore from the proceeds of the corpus of the property the amount thus diverted and apply it to the payment of such current expenses. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion. Conceding, without admitting, that the consideration of the claim of the intervener is a part of the current expenses of the ordinary operation of the railroad for necessities of operation, such as wages and supplies, so that

it might be preferred in payment out of surplus income, or out of moneys taken from the proceeds of the corpus of the property and restored to the place of moneys diverted from the payment of current expenses, yet there is no such surplus income in this case, and there was no such diversion, therefore there can be no restoration, and no payment of this claim out of the proceeds of the sale of the property. It is only when current income has been diverted from the payment of current expenses of the ordinary operation of the railroad for wages, supplies, and such necessities of operation, leaving a part of such current expenses unpaid, and applied to the payment of interest on bonds, or of claims for construction, or for unnecessary betterments and the like, which inure to the benefit of the bondholders, that claims for such current expenses may be paid out of the proceeds of the body of the property. Gregg v. Metropolitan Trust Co., 197 U. S. 183, 190, 25 Sup. Ct. 415, 49 L. Ed. 717; Carbon Fuel Co. v. Chicago, C. & L. R. Co., 202 Fed. 172, 174, 120 C. C. A. 460; Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 131, 132, 148, 149, 44 C. C. A. 389, 52 L. R. A. 481; Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co., 154 Fed. 629, 632, 83 C. C. A. 403.

[3] Notwithstanding the facts, and the established principles and rules of equity adverted to, counsel for the intervener insist that its claim should be preferred in payment out of the proceeds of the sale of the body of the mortgaged property. They contend that it should be so preferred in payment because the intervener was a common carrier, and a connecting carrier with the mortgagor company, and was in duty bound under the law to accept and carry shipments of freight billed over its road by the mortgagor, and they cite in support of this contention the act of Congress which imposes on the initial carrier liability to the holder of a bill of lading or receipt for an interstate shipment for any loss or damage to the property shipped caused by it, or by any common carrier to which the property is delivered—34 Stat. 584, 595, c. 3591, § 7, U. S. Comp. Stat. 1913, § 8592, p. 3875 (11)—and the fact that it is unlawful for a common carrier engaged in interstate commerce to overcharge a shipper. They cite no act of Congress, however, and no decision of any court, that a mortgagor railway company, which, as a common carrier, or a common carrier which, as a connecting carrier therewith, or both together, may, by failing to pay their debts to each other, or by overcharging shippers, or by any other wrongful act, deprive bondholders of the mortgagor company of their prior lien, or impose upon them penalties for the wrongdoing of the carriers. Conceding, but not admitting, that it is the duty of connecting carriers engaged in interstate commerce to receive and carry freight billed over their lines by other railroad companies, it does not follow that the discharge of that duty, or the failure to discharge it, deprives bondholders secured by a prior mortgage of their lien, or makes any debt or obligation of the mortgagor company arising out of the discharge or out of the failure to discharge that duty superior in equity to the lien of the bondholders. As the assumption of the duties and the conduct of the business of a common carrier, and the continuance of that assumption and the discharge of that duty, are not compulsory

upon any corporation, but constitute a voluntary undertaking, a corporation which enters into or continues that undertaking in the face of a mortgage on a connecting line does not thereby render its claims against the mortgagor company arising therefrom superior in equity to those of the bondholders secured by a prior mortgage upon its property.

The second contention of counsel for the intervener is that its claim is entitled to preference in payment out of the corpus of the mortgaged property, because it is founded on services rendered by it which were "absolutely necessary to the business of the railway to keep the road a going concern from day to day, so that the company's property would be preserved, and its public duty discharged." It is a complete answer to this contention that the Supreme Court has decided, and that decision still stands without reversal or modification, that even a claim of such a nature accruing within six months prior to the receivership may not be preferred in payment out of the corpus of the mortgaged property to the claim of the bondholders secured thereon in the absence of that diversion of income which is lacking in this case. Gregg v. Metropolitan Trust Co., 197 U. S. 183, 190, 25 Sup. Ct. 415, 49 L. Ed. 717.

Moreover, there are two grounds—(1) the diversion of income; and (2) the necessity or business policy of immediate payment—on which claims for current expenses for necessities of operation have been paid out of the corpus of the property. Miltenberger v. Logansport Railway Co., 106 U. S. 286, 308, 311, 1 Sup. Ct. 140, 27 L. Ed. 117; Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 457, 6 Sup. Ct. 809, 29 L. Ed. 963. But the decisions of the Supreme Court in the cases in which such claims were allowed on the second ground were rendered more than 15 years ago, before the series of decisions found in Kneeland v. American Loan & Trust Co., 136 U. S. 89, 98, 10 Sup. Ct. 950, 34 L. Ed. 379, Morgan's Co. v. Texas Central Railway, 137 U. S. 171, 196, 198, 11 Sup. Ct. 61, 34 L. Ed. 625, Thompson v. Valley Railroad Co., 132 U. S. 68, 71, 73, 10 Sup. Ct. 29, 33 L. Ed. 256, Thomas v. Western Car Co., 149 U. S. 95, 110, 13 Sup. Ct. 824, 37 L. Ed. 663, Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257, 296, 20 Sup. Ct. 347, 44 L. Ed. 458, Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 315, 20 Sup. Ct. 363, 44 L. Ed. 475, and Gregg v. Metropolitan Trust Co., 197 U. S. 183, 190, 25 Sup. Ct. 415, 49 L. Ed. 717, which so narrowly limit and clearly define preferential claims, were rendered, and the earlier cases were largely controlled by the element of estoppel. A thoughtful consideration of those cases and others which have followed them, and of the opinions in the later cases in the Supreme Court which have been cited, convinces that if claims of the nature of those allowed as preferential in the Miltenberger and Union Trust Company Cases were now presented, under objection of bondholders under no estoppel, to the Supreme Court, they would be denied preference over the claims of the bondholders in payment out of the corpus of the mortgaged property.

Again, if a claim for the current expenses of the necessities of the

operation of a railroad is payable in preference to the claims of secured bondholders out of the corpus of the property in any case in the absence of diversion of the income from such expenses, it is only when such preferential payment is necessary to keep the railroad a going concern, or when its preferential payment is necessary to prevent a loss at least equal to the amount of the payment. Gregg v. Metropolitan Trust Co., 197 U. S. 186, 187, 25 Sup. Ct. 415, 49 L. Ed. 717; Moore v. Donahoo, 217 Fed. 177, 181–183, 133 C. C. A. 171; Taylor v. Delaware & E. R. Co., 213 Fed. 622, 624, 130 C. C. A. 214. The evidence in this case goes no farther than the testimony of one witness that it was not necessary for the mortgagor company, or the receivers, to ship freight on the railroads of other companies, but that they could take it on junction settlement, instead of on interstate account, although they generally have such interline accounts with connecting carriers as that out of which the intervener's claim for the balances arose, and that if these claims for balances were unpaid, and the connecting carriers refused to carry their freight, this would disrupt their freight, and be a serious detriment to their business. This evidence falls far short of proof that the preferential payment of the intervener's claim was either necessary to keep the Orient Company's railroad a going concern, or to prevent a loss as great as the amount of its payment, and it is therefore not entitled to preference in payment on that ground.

[4, 5] Three hundred and seven dollars and twenty-four cents of the intervener's claim accrued between September 1, 1911, and March 7, 1912, when the receivers were appointed under the administration bill, and in the order appointing them the court authorized them to pay out of any income or revenue coming to their hands debts contracted by the Orient Company after September 1, 1911, for services of employés in the operation of the railroad, for necessary materials and supplies and for traffic balances. Counsel suggest that this order adjudged the intervener's claim for these $307.24 entitled to preference in payment over the claims of the bondholders. There are many reasons against the adoption of this suggestion. In the first place, traffic balances are the balances of money collected in payment for the transportation of passengers and freight. The balances for car repairs, loss and damage claims, and overcharges are not traffic balances. In the second place, the order of March 7, 1912, was made in the absence of notice to the trustee or the bondholders under the mortgage, and before it or they became parties to the proceedings. That order, therefore, could not be an adjudication of their rights as against the intervener to prior payment under the lien of their mortgage. Not only this, but the order does not direct or command the payment of the claims mentioned. It merely authorizes the receivers to pay such of them as in their good judgment they deem it desirable to pay, and they deemed it inadvisable to pay the claim of the intervener. That preliminary order of appointment of the receivers was, therefore, no adjudication of the right to the preference in payment of any of the parties in interest in the question now under consideration. An order made in the appointment of receivers, or in the con-

solidation of causes, which authorizes, but does not direct or order, receivers to pay certain classes of claims, does not adjudge that claims within these classes which the receivers did not pay under the order are entitled to preference in payment, either out of the income or out of the corpus of the property over the claims of bondholders secured by the prior mortgage.

[6] Finally, counsel for the intervener argue that it is entitled to a preference over the bondholders because they bought their bonds with notice, disclosed in the face of the trust deed itself, that their bonds were issued and the trust deed was made to raise money to build the railroad, that the railroad was not completed, and that its construction had only been commenced. This contention, however, is put at rest by the opinions and decisions of the Supreme Court in Dunham v. Railway Co., 1 Wall. 254, 266, 267, 17 L. Ed. 584, Galveston Railroad v. Cowdrey, 11 Wall. 459, 481, 20 L. Ed. 199, Thompson v. Valley R. R. Co., 132 U. S. 68, 73, 74, 10 Sup. Ct. 29, 33 L. Ed. 256, Porter v. Pittsburgh, Bessemer Steel Co., 120 U. S. 649, 670, 671, 7 Sup. Ct. 1206, 30 L. Ed. 830, Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296, 298, 299, 300, 10 Sup. Ct. 546, 33 L. Ed. 905. The claims of bondholders secured by the lien of a recorded mortgage on the property, the after-acquired property, and the income of a railroad company, to payment out of the proceeds of the mortgaged property are, in the absence of special circumstances, such as a surplus, or a diversion of income, prior in right and superior in equity to the claims of subsequent creditors of the mortgagor company for unpaid current expenses, although when the mortgage was made and recorded the railroad was not built, and the mortgage disclosed the fact that it was made to raise the money to build it.

Let the order below be affirmed.

AMERICAN PIPE & CONSTRUCTION CO. v. WESTCHESTER COUNTY.

(Circuit Court of Appeals, Second Circuit. July 6, 1915.)

No. 236.

1. COUNTIES ⟸114—OFFICERS—SEWER CONSTRUCTION BOARD—SCOPE OF AGENCY—STATUTE.

Under Laws N. Y. 1905, c. 646, creating the Bronx Valley sewer commission, with authority to construct a sewer, and declaring that contracts therefor should be executed in triplicate by the contractor, on the one part, and the sewer commissioners, "acting for the county of Westchester," on the other part, where the sewer work was done in accordance with the contract with the commissioners, the county was liable therefor, since the commissioners acted for the county as its duly authorized agent.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 174, 175; Dec. Dig. ⟸114.]

2. COUNTIES ⟸129—CLAIMS—ENFORCEMENT.

Under the County Law (Consol. Laws N. Y. c. 11), where a duly authorized county sewer commission contracted for the construction of a sewer, and upon completion of the work refused to audit certain of the

contractor's claims, such contractor was not remitted by the refusal to mandamus and certiorari, or an action in equity for its remedy, but could sue at law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 197; Dec. Dig. ⊂=129.]

3. COUNTIES ⊂=129—CLAIMS—DEFENSE—ACTION AT LAW FOR PARTIAL BENEFIT.

Where a duly authorized county sewer commission contracted for the construction of a sewer, which would benefit only a portion of the county upon completion the county could not, in an action at law, resist the contractor's claim on the ground that, if the plaintiff obtained judgment, it would result in compelling the whole county to bear the expense of an improvement beneficial to only part of the county, there being no method by which, in an action at law, the county authorities could be compelled to confine a tax levy necessary to pay plaintiff's demand to the limited area benefited, since the right which a creditor has to obtain payment of a county is not to be confused with the right of the county to obtain funds with which to pay his claim; the manner in which taxes must be levied legally to pay all the bonds given to raise money to pay debt in such a case not affecting plaintiff's right to a judgment.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 197; Dec. Dig. ⊂=129.]

In Error to the District Court of the United States for the Southern District of New York.

This cause comes here on writ of error to review a judgment of the United States District Court for the Southern District of New York, which dismissed the complaint upon the ground that the plaintiff could not proceed at law.

The American Pipe & Construction Company, plaintiff herein, is a corporation organized and existing under the laws of the state of New Jersey, and duly filed the statement and designation required by the General Corporation Law of the state of New York in the office of the secretary of the state of New York, and has otherwise complied with the laws of that state authorizing foreign corporations to do business in New York. The Mack Paving & Construction Company, hereinafter mentioned, is a corporation organized and existing under the laws of the state of Pennsylvania, and it likewise has complied with the laws of the state of New York authorizing foreign corporations to do business in the state. The defendant is a municipal corporation created and existing under the laws of the state of New York and residing in the Southern district thereof.

The defendant, it is alleged, entered into a contract on January 16, 1908, with the plaintiff's assignor, the Mack Paving & Construction Company, hereinafter referred to as the Paving Company. The contract, however, was made directly with the Bronx Valley sewer commission. That commission was created by chapter 646 of the Laws of the State of New York for the year 1905, and by acts supplemental and amendatory thereto; and it is claimed that in what the commission did in this matter it was acting for and bound the county of Westchester. The contract of January 16, 1908, provided that the Paving Company should construct, complete, and equip for the county of Westchester certain sections of what is known as the "Bronx Valley sewer." That contract was modified subsequently by a farther contract of May 5, 1911. The contract as modified provided for the construction of a sewer of upwards of 15 miles in length, and is alleged to have been duly performed by and on behalf of the Paving Company, and the work was duly completed and delivered into the possession of the defendant, and was accepted by it on May 5, 1911.

The complaint covers 50 printed pages and sets up 55 claims, amounting in the aggregate to $891,952.86, for which it asks judgment, with interest. It

contains allegations of wrongful interpretation of the contract by the engineer in charge of the work of construction; the compelling of the contractor to construct the work in accordance with such erroneous and arbitrary adoption of prices for the work not provided in the schedule of unit prices; failure and refusal to certify, and false certification as to work done; arbitrary rejection of certain materials; arbitrary change of plan; prevention of work; damages for delay; loss of interest from false certification of monthly estimates; wrongful deferring of part of final payment; wrongful delay in securing use of easements necessary for the prosecution of the work; increased cost of work, owing to arbitrary changes; arbitrary reduction of unit prices; additional expenses of removing débris accumulated during the delay wrongfully caused; and wrongful refusal to render decisions promptly.

The answer denies that there is any basis in law or in fact for the claims made by defendant, and it demands judgment against plaintiff for the sum of $223,330.44, with interest, for certain payments made to the plaintiff by the defendant, which it is alleged were made illegally and without authority of law.

John C. Wait, of New York City (Herbert McKennis, of New York City, of counsel), for plaintiff in error.

Charles A. Van Auken, of New Rochelle, N. Y. (Arthur M. Johnson, of Mt. Vernon, N. Y., of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This action has been brought against a public corporation to recover compensation for work done in the construction of portions of a public sewer. The court below has dismissed the complaint, and a question has been raised which is of great importance to these parties.

[1] Although the contract was made with the Bronx Valley sewer commission the act of the Legislature of New York which created the commission and which gave it authority to construct the sewer declared that the contracts should be executed "in triplicate by the contractor or contractors on the one part and the said sewer commissioners, acting for the county of Westchester, on the other part." The county of Westchester needed a sewer in the Bronx Valley for the protection of the citizens living there. The law under which the work was done authorized the sewer commissioners to construct the sewer within the county of Westchester, with an outlet sanitary sewer through the city of Yonkers, for the purpose of preserving the health of the people of Westchester county. The commissioners are directed to file their oaths with the clerk of the board of supervisors of Westchester county and to report annually to that board. The county treasurer of Westchester county is ex officio a member of the board of sewer commissioners, who are to carry on the work for the best interests of the taxpayers and the people of Westchester county. In fact, the act authorizing this sewer recognizes in almost every paragraph that the work is for the benefit of the county, and is to be built and maintained by it. It is not necessary to complicate a very plain situation by a strained and technical interpretation of the relations of the parties. In entering into the contracts with the Paving Company the sewer commissioners acted for the county of Westchester, and the county is bound by the contracts made by its duly authorized agents, and is liable to pay for the work done in accordance with the terms of the contracts.

In Horton v. Andrus, 191 N. Y. 231, 83 N. E. 1120 (1908), the constitutionality of the act which created the Bronx Valley sewer commission and authorized it to construct the sewer was sustained. The question came up in a taxpayer's action brought against the commissioners to restrain them from undertaking or prosecuting the work. The decision of the New York Court of Appeals in that case established the fact that the act not only did not violate the Constitution of the state, but also that the obligations incurred under the act were county obligations. The act authorized the issuance of bonds by the county to raise the funds necessary for the construction of the sewer. The state Constitution prohibits a county from incurring any debts except for county purposes. The court held that the act required the county to incur a debt, and that it was a debt for a county purpose. "We think that it plainly is" a debt for such a purpose, said the court; and it was also said that the fact that the county was ultimately to be reimbursed by the local assessments provided by the act did not relieve the county from its primary obligation. It seems that a large part of Westchester county, including the towns of White Plains, Greenburgh, Scarsdale, East Chester, the city of Mt. Vernon, and part of the city of Yonkers, is to drain into this sewer. This territory, constituting the Bronx Valley, drains into the Bronx river, which is described as an insignificant stream and utterly inadequate longer to dispose of the sewage of this area, which has become quite densely populated. The act, therefore, authorized the construction of a trunk sewer to collect all this sewage and divert it from the Bronx to the Hudson river. The court said that the Legislature might have prescribed some special method of joint action between the several municipalities through which the sewer was to be constructed, but that it was not obliged to take that course. It added that:

"It seems to us more in conformity with the general frame of the state government that the prosecution of a work which exceeded the domain of any one municipality should be conferred upon the next higher political organization which was capable of performing it and within whose territory lay the whole improvement."

Assuming, then, that the contract made by the Bronx Valley commissioners is the contract of Westchester county, and that the obligation is the county's obligation, and that the plaintiff is the creditor of the county, we come to inquire whether he can assert his rights in this action.

[2] It is claimed that under the County Law of the state of New York (chapter 16 of the Laws of 1909 [Consol. Laws, c. 11], formerly chapter 686 of the Laws of 1892), a creditor of the county has only a choice of remedy as against the county; that he must either submit his claim to the county auditing officials for audit, which in this case would be to the Bronx Valley sewer commission, or without presenting the claim for audit bring an action at law. The complaint shows that the claims involved here were presented to the Bronx Valley sewer commission and that that board refused to audit them. It is argued from this that the refusal remitted the plaintiff to mandamus and certiorari, or an action in equity. We cannot concur in this construction of the law. As to these claims the Bronx Valley sewer com-

mission are legally constituted agents of the county of Westchester for the auditing of the claims. They had the sole authority to audit them, and when they refused to do so the county was bound by their action, which is to be taken as conclusive evidence of the intention not to audit them. But the right of the plaintiff to recover for work done for the county, and accepted by the county, cannot be defeated by the refusal of the county to audit his claims. Neither is the contractor under any obligation to compel by mandamus the board of sewer commissioners to do its duty. He has performed his work and not been paid, and the failure of the officials of the county to do what the law requires them to do cannot deprive the plaintiff of his right to bring an action at law to recover what is due under the contract.

The question raised here has already been passed upon in an analogous case by the Court of Appeals of New York. The provision of the County Law of the state provides for the bringing of actions by or against a county, and that a person having a claim may either sue directly upon it or present it to the supervisors for audit. The meaning of the provision was determined in New York Catholic Protectory v. Rockland County, 212 N. Y. 311, 106 N. E. 80 (1914). The court held that, if the claim there in suit was submitted for audit and disallowed erroneously, it could only be corrected on a review by certiorari; but if the board refused to audit it, or refused to recognize it, which the court said was equivalent to a refusal to audit, then the person having the claim had two courses open to him—one to compel an audit by mandamus, the other to bring an action directly against the county. The pleadings in the case at bar show that the claims of the plaintiff were submitted to audit by the board of sewer commissioners, as required by the act authorizing this work, and that audit was refused. If the claims had been audited and disallowed, then under the foregoing decision this action could not have been brought. The proper course would have been to review the disallowance by certiorari. But, not having been disallowed, we discover no reason why this suit could not be brought.

[3] The court below was of the opinion that the contracts these parties entered into were not made for the county as a whole, but only for a definite, specified portion of it, through which the sewer was being built, and that the duty of paying for and maintaining the sewer was a duty not shared by any other part of the county than the definite and specified portion. The theory of the court, therefore, was that the complaint should be dismissed, because, if the plaintiff obtained a judgment in the action, it would result in compelling the entire county to bear the expense of an improvement which the law intended should be borne by only that portion which was benefited by the improvement. It was upon that ground the court based its decision. Counsel for the plaintiff argued in this court that the motion papers were not broad enough to sustain the court in so deciding. The notice of motion stated that upon the pleadings in the action an application would be made to dismiss the complaint upon the merits, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and then specified the grounds for the claim of the defendant in that

behalf. The ground upon which the trial court based its opinion in dismissing the complaint was not one of the grounds specified in the notice of motion. The grounds specified related solely to the proper mode of proceeding, by presentation to the proper auditing authority, and then by mandamus and certiorari, or an action in equity.

In view of the conclusion at which we have arrived, it is not necessary to consider the technical objection which counsel has raised, and we shall pass upon the reason given by the court below for its decision. The court said:

"Such a judgment would be unlawful, because it is a greater and wider judgment than this plaintiff can ever be entitled to. There is no method suggested—and none occurs to me—by which in an action at law the authorities of the county of Westchester, or any of them, can be compelled to confine the tax levied, necessary to pay the plaintiff's demand (assuming it to be just and properly established), to the limited area which alone is responsible. It follows that this action at law is ill brought, and proceedings in equity must be resorted to."

We think the reason assigned constitutes no justification for holding that the plaintiff is not entitled to a judgment against the county. Under contracts which expressly provide that contractors are to be paid for public work out of assessments levied on the particular property benefited, the courts have held, in cases where the assessment has not been made, or, having been made, has failed because of some irregularity, that judgment may be had against the corporation, leaving it to take steps thereafter to reimburse itself for the money which it has been compelled to pay out of its general funds, by levying the proper assessment upon the special property benefited. And even if a public corporation has lost its power to make a subsequent assessment, that fact is no reason for declining to enter judgment against it. In Dillon on Municipal Corporations (5th Ed.) vol. 2, p. 1255, that distinguished authority states it as his opinion that:

"Where a contractor is to be paid by assessments, and the city has lost the power to make the assessments through the neglect or act of its officers, subsequently to the making of the contract, and without the fault of the contractor, a general liability attaches to the city to answer to the contractor for the resulting damages; the loss to the contractor therefrom being usually measured by the stipulated price."

It is true that the act under which these contracts were made provides for meeting the expenses connected with the work by the issuance by the county of bonds to be paid for by assessment and levy of taxes "upon the real property laid out on the plan and map approved as set forth in section 2 of this act as modified by this act, and not by levy upon the entire property in the county of Westchester." But the right which the creditor has to obtain payment from the county is not to be confused with the right of the county to obtain funds with which to pay his claim. The manner in which taxes can be paid to pay off the bonds related to the internal management of the corporation, and cannot affect the plaintiff's right to obtain a judgment upon his claims. In Davidson v. Village of White Plains, 197 N. Y. 266, 90 N. E. 825 (1908), Chief Judge Cullen writes:

"That this principle is correct cannot be gainsaid, but we must be careful to distinguish between a provision of law that prescribes how a creditor of

a municipal corporation may obtain payment of his claim and one which simply prescribes the method by which the corporation is authorized to obtain funds with which to pay the claim, merely regulating internal management of the corporation itself."

In Reilly v. City of Albany, 112 N. Y. 30, 19 N. E. 508 (1889), an action was brought upon a contract to recover for grading, paving, and flagging a street in the city of Albany. The contractor had substantially performed his contract in accordance with its terms, and was entitled to recover unless the provisions as to the time and mode of payment specified in the contract presented a defense to the action. It was contended that those conditions had not been complied with, and that therefore no liability had attached at the time the action was commenced. Under the terms of the contract the expense of the improvement was to be apportioned among the parties benefited, who were to be assessed for the sums for which they should be found liable. Payment was not to be made until the lapse of 30 days after due apportionment and assessment had been duly approved and confirmed by the common council of the city, and "until the same shall have been collected by the chamberlain from said assessments." In that case the cost of the improvements was to be paid by the city out of funds raised by an assessment upon the property of the locality benefited. The board of contract and apportionment made an apportionment and assessment which the common council approved and adopted. Interested parties protested the apportionment and assessment and the council's ratification of it. The matter was taken into the courts, and the proceedings were set aside as invalid. The board of apportionment refused to make a new apportionment or assessment. Thereupon an action was brought against the city to recover the contract price for the work. The action was sustained, and a judgment obtained against the city, which the Court of Appeals affirmed. The court held that, as the contractor had performed his work—

"he became entitled to demand payment for his labor when the funds for that purpose should be assessed, levied and collected by the regular agencies of the city having authority to raise means to discharge its liabilities. * * * When the contractor had performed his work according to his contract, he had no duty remaining to discharge, and then had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government, over whom he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations. That was a power lodged in the hands of the city, and the clear intent of the contract was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement. For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty. Cumming v. Mayor, etc., of Brooklyn, 11 Paige, 596; Sage v. City of Brooklyn, 89 N. Y 189; McCormack v. City of Brooklyn, 108 N. Y. 49 [14 N. E. 808]."

And the court declared that after the original apportionment and assessment was set aside it was the plain duty of the board to proceed to a new apportionment and assessment, and that its refusal to do so put no duty upon the contractor to seek a reversal of its determination by mandamus or otherwise. If the reason assigned by

the District Judge in the case at bar is sound, the Court of Appeals should have held that the plaintiff was not entitled to judgment, as it was a greater and wider judgment than he could "ever have been entitled to," because there was no "method by which the city could be compelled to confine the tax levied to the limited area which was alone responsible."

In our opinion the liability under the contracts involved is the liability of Westchester county. If it does not rest upon the county, it rests nowhere, for no political subdivision of the county has been created upon which the burden is imposed. The court below seems to have relied upon Holroyd v. Town of Indian Lake, 180 N. Y. 318, 73 N. E. 36 (1905). That case construes a different statute, chapter 451 of the Laws of 1900 of the state of New York. That act provided that the town board might establish a water district, and a permanent district organization was provided for the construction and maintenance of the water supply system, and the reasonable expenses were made a charge against the district. The action was brought against the town to recover damages for breach of a contract made by water commissioners of the water district. The court held that the action could not be maintained, for the reason that the contract was not made by the town, or by its officers, or for its benefit. The statute provided that a town might be sued upon a contract lawfully made by any of its town officers. The water commissioners, with whom the contract was made, the court said, were not town officers, and—

"their powers are limited to the construction and management of a water plant for the exclusive benefit of the water district. They do not act for the town, and no action on their part can make the town liable."

We think the facts of that case clearly distinguish it from the case at bar. In this case no political subdivision of the county has been created; no sewer district as a corporate entity distinct from the county has been established. The sewer commissioners, by the express language of the act which created them, act "for the county of Westchester," and, as said in Horton v. Andrus, supra, they acted for the benefit of Westchester county in constructing a county sewer "for general benefit of the inhabitants of the county. The prosecution of such an improvement would be a county purpose." As the work was done by the county through its agents, the board of sewer commissioners, and for a county purpose, and as the title to the sewer is in the county, we are unable to discover any reason why the county should not pay for it. The plaintiff was working for the county, and is entitled to have its pay from the county. The plaintiff is not interested in the parties from whom the county collects. That is a matter between them and the county. There is no justification in holding up the plaintiff, who has done the work, until the persons who are to pay the county are ascertained, and the amount assessed against each.

The order is reversed.

SIEG v. GREENE.

(Circuit Court of Appeals, Eighth Circuit. July 24, 1915. Rehearing Denied October 5, 1915.)*

No. 4348.

1. HOMESTEAD ⊜84—PROPERTY CONSTITUTING—UNDIVIDED INTEREST.
Under the Iowa statutes and decisions, the homestead claim attaches to the undivided interest of a tenant in common.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 121, 122; Dec. Dig. ⊜84.]

2. FRAUDULENT CONVEYANCES ⊜52—CONVEYANCE OF HOMESTEAD.
Under the Iowa statutes and decisions, a voluntary conveyance of the homestead is not fraudulent as to creditors, and the grantor need not receive full value, as his creditors cannot take it and have no concern about what he gets.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 118–127; Dec. Dig. ⊜52.]

3. BANKRUPTCY ⊜184—FRAUDULENT CONVEYANCES—FORCE OF STATE LAWS.
Under Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1913, § 9590), providing that that act shall not affect the allowance to bankrupts of exemptions prescribed by the state laws, state statutes and decisions control in determining whether a conveyance by a bankrupt of land in which he had a homestead interest was fraudulent as to creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⊜184.]

4. HOMESTEAD ⊜84—PROPERTY CONSTITUTING HOMESTEAD—EXTENT.
The Iowa statutes (Code 1897 and Code Supp. 1907, §§ 2972–2978) provide that the homestead embraces the house used as a home by the owner, that if he has two or more houses he may select which he will retain, and that if not within a city or town plat it must not contain more than 40 acres or embrace more than one dwelling house. S. owned an undivided half interest in about 97 acres of land, 10 acres of which was within the corporate limits of a municipality, but had not been platted. There were two houses on the land, one of which S. occupied with his family, and also a brick manufacturing plant occupying about 2 acres; the rest of the land being farm land. *Held*, that the homestead right was confined to the undivided half interest in 80 acres, including the dwelling house occupied by S., and excluding the brick plant and appurtenances and the other dwelling house.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 121, 122; Dec. Dig. ⊜84.]

5. BANKRUPTCY ⊜177—VOIDABLE PREFERENCES—DELAY IN RECORDING DEED.
A conveyance of land in which a bankrupt had a homestead interest was voidable as to the excess of the land over the homestead right, where the deed was not recorded until within four months before bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⊜177.]

6. BANKRUPTCY ⊜165—"VOIDABLE PREFERENCE"—TRANSFERS CONSTITUTING.
A partnership manufacturing brick, being insolvent, applied for assistance to continue operations to S., who was formerly a partner, owned an undivided half interest in the brick plant, and had theretofore purchased the other half interest. S., knowing of the firm's condition, advanced it money under an agreement, made in good faith, that the firm would manufacture brick for him to the value of the amount advanced, to be taken by him in the yard as soon as they were burned. The laborers in the yard were paid with S.'s money, and they understood the

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*For opinion on rehearing, see 227 Fed. 41.

bricks were being made for him. More than 30 days, but within 4 months, prior to bankruptcy, S. took possession of the plant and the brick already manufactured. *Held*, that the transaction was not a voidable preference, within Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (Comp. St. 1913, § 9644), making transfers by an insolvent within 4 months before bankruptcy, enabling a creditor to obtain a greater percentage of his debt than other creditors, preferential, and section 60b (section 9644), making such preferences voidable if the transferee had reasonable cause to believe that the transfer would effect a preference, since S. took possession in virtue of his right, created by the contract at the time it was made, and in satisfaction of an equitable lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ⊂⊃165.

For other definitions, see Words and Phrases, First and Second Series. Voidable Preference.]

7. LIENS ⊂⊃7—EQUITABLE LIENS.

Advancements made on the faith of certain property may give rise to an equitable lien, and such a lien may attach to property to be created, and not in being at the time of the agreement, and does not depend upon possession, but may exist by implication growing out of facts and circumstances creating the equitable right.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 26–28; Dec. Dig. ⊂⊃7.]

8. BANKRUPTCY ⊂⊃186—VOIDABLE PREFERENCES—IMPROVEMENTS.

Where one to whom a brick plant was transferred by a bankrupt within four months before bankruptcy made large expenditures in putting in new machinery and otherwise improving the plant, any property thus added was no part of the estate in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 285, 319; Dec. Dig. ⊂⊃186.]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Suit by Merritt Greene, trustee in bankruptcy of Size & Carpenter, against John A. Sieg. From a decree in favor of plaintiff, defendant appeals. Reversed and remanded, with directions.

For many years prior to 1903, John A. Sieg and William A. Size manufactured and sold brick at Marshalltown, Iowa, as co-partners in the name of Sieg & Size. Each of them owned an undivided half interest in a tract of land adjoining the town, ten acres of which was within the corporate limits, but had not been platted as town lots. The manufacturing plant was on the tract, from which material for making brick was obtained. There were also two residences, one of which was occupied by Size and his family as their home; and Sieg, who was a bachelor, lived with them, although he was away much of the time. They farmed the land, except some two acres occupied by the brick plant. Formerly the plant was in the northeast part of the tract, but was later moved south, near a railroad which crosses it.

In the latter part of 1902, Sieg withdrew from the firm and made an agreement with Charles E. Carpenter, who was the son-in-law of William A. Size, by which he agreed to sell and Carpenter agreed to buy Sieg's undivided half interest in all of the tools, machinery and appliances on and used with the yard in the manufacture of brick for the sum of $4,000, to be paid in stipulated installments; and also leased to Carpenter his undivided half interest in the brickyard and the house on the tract not occupied by the family of William A. Size for a term expiring January 1, 1908, at a yearly rental of $300, and also gave to Carpenter an option to buy the premises leased, and the right to extend the lease for five years after January 1, 1908, at the same rental. Carpenter did not keep his contract to purchase, nor pay the rentals un-

der the lease. There is no evidence to show an extension of the lease. Soon after the making of the contract and lease the copartnership of Size & Carpenter was formed for the purpose of continuing the manufacture and sale of brick, which the new firm proceeded to carry on. The record here leads to the conclusion that the new firm was composed of George S. Size, a son of William A., and Charles E. Carpenter, though the District Court on petition of creditors in bankruptcy adjudged that the firm was composed of William A. and George S. Size and Carpenter; however, that is immaterial in this proceeding.

About August 1, 1911, creditors filed their petition against the firm of Size & Carpenter and obtained an adjudication that the firm and its individual members, including William A. Size, were bankrupts as charged, and the appellee was duly appointed trustee of their estates.

On July 15, 1910, William A. Size and wife conveyed by warranty deed all of their undivided half interest in the tract of land to John A. Sieg, in consideration of his surrendering to the wife of Size the notes of William A. Size payable to Sieg, which with interest then amounted to something over $5,000. Sieg did not place this deed of record until June 29, 1911. On that day Carpenter turned over to Sieg and he took possession of the brickyard. The new firm ceased operations at that time.

In the summer of 1910, the firm of Size & Carpenter was without funds to continue the brick business. They were then insolvent and applied to Sieg for assistance to continue operation of the plant, and on July 22, 1910, he let the firm have $1,000 (by check), and a little later $2,000 more. He knew the firm was in a failing condition and was not willing to put up the money as a simple loan. So when he turned over the check he had an agreement with the firm by which he was to furnish the $3,000 for the manufacture of 600,000 brick which the firm was to make for him at that price ($5.00 per 1,000), and he was to take them on the yard as soon as they were burned. Size & Carpenter had no funds to meet the necessary expenses in the manufacture and Sieg knew it and for that reason he made the advancement under the agreement that the brick were to be his. The brick were manufactured as agreed, but Sieg got only about 550,000, some 200,000 of which were still green in the kilns when he took possession on June 29, 1911, and which were later burned at his additional expense. He got all of them within four months prior to the day bankruptcy petition was filed.

Sieg's money paid the laborers on the yard. They understood the brick were being made for him. He testified that the machinery and all the property at the plant had been his since 1908, when he bought out the half interest of W. A. Size in the brick plant. Carpenter had never kept up his payments, either under the lease or contract to purchase Sieg's half of the plant.

This suit, brought by the trustee against Sieg, was double in purpose, that is, to recover (1) the undivided half interest of William A. Size in the land which he conveyed to Sieg by deed of date July 15, 1910, and (2) the value of the brick received by Sieg from the bankrupts; and the bill charged that both transfers were voidable preferences and also fraudulent (Bankruptcy Act July 1, 1898, c. 541, §§ 60 and 67, 30 Stat. 562, 564 [Comp. St. 1913, §§ 9644, 9651]).

The trial court granted all that was asked. It entered a decree (1) canceling the deed from Size and wife to Sieg, (2) ordering that Sieg account to the trustee for rents after July 22, 1910 (date deed was acknowledged), and (3) that the trustee recover of Sieg $2,500, the reasonable value of 500,000 brick turned over to him by the bankrupts, and that Sieg pay the costs.

C. H. Van Law, of Marshalltown, Iowa, for appellant.

C. H. E. Boardman, of Marshalltown, Iowa, for appellee.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

LEWIS, District Judge (after stating the facts as above). [1-4]
1. One of the defenses was that the deed from Size to Sieg could

not be avoided on either ground stated in the bill or for any other reason, because the property conveyed was at the time of its conveyance the homestead of Size and his family who at that time and for many years theretofore had continuously resided on it.

The Iowa statute on the subject may be epitomized: Exemption of the homestead from judicial sale; requirement that husband and wife join in the conveyance to render it valid; embraces the house used as a home by the owner, and if he has two or more houses thus used he may select which he will retain, and if not within a city or town plat it must not contain in the aggregate more than forty acres, and must not embrace more than one dwelling house. Code of Iowa 1897 and Supplement thereto 1907, §§ 2972–2978. Under this statute the homestead claim attaches to the undivided interest of a tenant in common. Thorn v. Thorn, 14 Iowa, 49, 81 Am. Dec. 451; Bolton v. Oberne, 79 Iowa, 278, 44 N. W. 547. A voluntary conveyance of the homestead is not fraudulent as to creditors. Delashmut v. Trau, 44 Iowa, 613; Officer v. Evans, 48 Iowa, 557–560; Foreman v. Bank, 128 Iowa, 661, 105 N. W. 164; Bank v. Glick, 134 Iowa, 323, 111 N. W. 970; Dettmer v. Behrens, 106 Iowa, 585, 76 N. W. 853, 68 Am. St. Rep. 326; Wheeler, etc., Co. v. Bjelland, 97 Iowa, 637, 66 N. W. 885; Green v. Root (D. C.) 62 Fed. 191. The grantor in such a case need not receive full value. His creditors cannot take it, and have no concern about what he gets. Griffin v. Sheley, 55 Iowa, 513, 8 N. W. 343; Aultman v. Heiney, 59 Iowa, 654, 13 N. W. 856. The state statute and decisions control here. Bank v. Glass, 79 Fed. 706, 25 C. C. A. 151; Bankruptcy Act, § 6; Vitzthum v. Large (D. C.) 162 Fed. 685. The trustee cannot recover it. It was not an asset of the bankrupt estate, was beyond the reach of creditors and likewise of the trustee who represents them. But the right did not attach to that part of the tract used as a brickyard and its appurtenances. That was not a part of the farm, nor appurtenant thereto, and was not used as a part of the home. Mouriquand v. Hart, 22 Kan. 594, 31 Am. Rep. 200. At the time of the conveyance the entire tract contained 97.68 acres. The claim to the homestead right was confined to the undivided half interest in eighty acres. The other dwelling house and its appurtenant grounds occupied by Carpenter and family could not be included in the homestead of Size. The homestead exemption as claimed should have been sustained, and set off in eighty acres of the farm lands including the dwelling occupied by Size and family, and excluding the brick plant and yard, together with needed appurtenant ground, also the Carpenter dwelling and appurtenances, and also such additional acreage, if necessary, to bring the exemption within the limited area.

[5] Registration and record of the deed was required and this was not done until within the prohibited four months period; it was therefore voidable as to the excess over the homestead right. It follows that Sieg's liability for rent would also be confined to what he received on one-half of the excess.

[6, 7] 2. The issue as to Sieg's claimed liability for the value of the brick turned over to him within the four months period by the

bankrupts, is more difficult. In its consideration we confine the inquiry to whether that transaction operated to effect a preference rendered voidable by section 60a and b of the Act; and this, because the evidence entirely fails as a sufficient basis on which any claim that the transaction was in fact fraudulent, as charged in the bill, could be rested, and additionally there is no finding of fact that way by the trial court which might relieve us in part from a wholly independent consideration and conclusion in the matter. Thus coming to the question: Was it a preferential transfer voidable under the act by the trustee?, we first note our conclusion that nothing appears to cause us to doubt that the agreement covering the manufacture and advanced payments therefor was in entire good faith—we so accept it. It was complete in its terms, nothing was left open for further negotiation and settlement by the parties. It was final and binding on them, and each could have enforced performance, or obtained damages for its breach. The property which Sieg received was produced with the money which he advanced under the agreement, and when he received it no creditor of the bankrupts had acquired any right in it or against it under local law. He took possession of it not as a purchaser of that date, but in virtue of his right which was created by the contract at the time it was made with the bankrupts, to have the property subjected to the payment of his claim. He took over a product which his money had wrought, and in doing so satisfied an equitable lien, which he had long before acquired under the contract and the facts and circumstances surrounding the transaction. Advancements made on the faith of certain property may give rise to the lien. Howard v. Delgado, 121 Fed. 26, 57 C. C. A. 270; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075. It may attach to property to be created and not in esse at the time of the agreement. Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Wright v. Bircher, 72 Mo. 179, 185, 37 Am. Rep. 433. It does not depend upon possession, The Menominie (D. C.) 36 Fed. 199. It may exist by implication growing out of facts and circumstances which create the equitable right. Soc. of Shakers v. Watson, 68 Fed. 730, 739, 15 C. C. A. 632.

The principle under consideration and the facts necessary to constitute a right to an equitable lien are fully considered and aptly illustrated by this court in A., T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503, 82 C. C. A. 453. The railway company advanced money for coal to be delivered in the future. The coal company was put into bankruptcy and did not deliver the coal for which advancements were made. The railway company asked for an order directing the trustee to return to it the money so advanced as a preferential claim. This court, speaking through Judge Adams, said (153 Fed. 507, 82 C. C. A. 457):

"The money paid in advance entitled the railway company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement, interpreted in the light of the conditions surrounding the parties and as necessarily intended by them, was to set apart a sufficient amount of coal after it should be mined as security for the payment of advances made. This

result is not expressed in the conventional form of a mortgage or pledge, but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it as creating an equitable charge or lien, however inartificially it may have been expressed," and again (153 Fed. 509, 82 C. C. A. 459): "In the light of these authorities we have no hesitation in holding that the equitable charge created by the parties before the bankruptcy of the coal company should be enforced against the estate in the hands of its trustees."

This ruling was affirmed in 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729.

In Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, the rights of a mortgagee to after-acquired chattel property which, according to local law, did not come under the lien of the mortgage until possession should be taken, were involved. Possession was taken within the four months' period. In sustaining the right of the mortgagee to the property it was said (196 U. S. 523, 25 Sup. Ct. 309 [49 L. Ed. 577]):

"It can scarcely be said that the enforcement of a lien by the taking possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage is a conveyance or transfer within the Bankrupt Act."

Again (196 U. S. 524, 25 Sup. Ct. 309, 49 L. Ed. 577):

"The principle that the taking possession may sometimes be held to relate back to the time when the right so to do was created, is recognized in the above case. Sabin v. Camp [(C. C.) 98 Fed. 974]. So in this case, although there was no actual existing lien upon this after-acquired property until the taking possession, yet there was a positive agreement, as contained in the mortgage and existing of record, under which the inchoate lien might be asserted and enforced, and when enforced by the taking of possession, that possession under the facts of this case, related back to the time of the execution of the mortgage of April, 1891, as it was only by virtue of that mortgage that possession could be taken. * * * Although this after-acquired property was subject to the lien of an attaching or an execution creditor, if perfected before the mortgagee took possession under his mortgage, yet if there were no such creditor, the enforcement of the lien by taking possession would be legal, even if within the four months provided in the Act."

The Sabin-Camp Case there quoted and approved, is very much in point. See also Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Sexton v. Kessler & Co., 172 Fed. 535, 97 C. C. A. 161, 40 L. R. A. (N. S.) 639; affirmed 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; In re Bird (D. C.) 180 Fed. 229; M'Donald v. Daskam, 116 Fed. 276, 53 C. C. A. 554; In re Wittenberg Veneer & Panel Co. (D. C.) 108 Fed. 593; Tiffany v. Boatman's Institution, 18 Wall. 375, 388, 21 L. Ed. 868.

There is no evidence that the brick ever came "into the custody of the bankruptcy court" (Bankruptcy Act July 1, 1898, c. 541, § 47, 30 Stat. 557 [Comp. St. 1913, § 9631]), nor that at the time the petition in bankruptcy was filed they could have been transferred by the bankrupts or levied upon as their property (section 70 [section 9654]), but to the contrary, they had all been taken over by Sieg more than thirty days prior thereto. Galbraith v. Bank, 221 Fed. 386, 392, — C. C. A. —.

We think the transaction did not operate to effect a preferential transfer voidable by the trustee, and that the court erred in so holding and adjudging that Sieg account to the trustee for the value of the brick.

[8] 3. It appears that Sieg immediately after taking possession of the brick plant in June, 1911, made large expenditures in putting in new machinery and otherwise improving the plant. Of course, any property thus added at the sole expense of Sieg was no part of the estate in bankruptcy.

The decree of the court below is reversed with costs, and the cause remanded with directions to proceed in accordance with the views herein expressed.

It is so ordered.

MARTIN METAL MFG. CO. v. UNITED STATES & MEXICAN TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1915.)

No. 4366.

(Syllabus by the Court.)

1. RAILROADS ⟸171—RECEIVERS—ALLOWANCE OF CLAIMS—PRIORITY.

The claim of a creditor for payment out of the corpus of railroad property for necessary supplies furnished to a railroad company and used in the operation of the railroad is inferior in equity to the claims of bondholders under a prior mortgage, and is not entitled to preference in payment over them, in the absence of the diversion to the payment of unpreferred claims of current income from the payment of current expenses for wages, materials, supplies, and such necessities of operation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 554–576; Dec. Dig. ⟸171.]

2. RAILROADS ⟸171—RECEIVERS—ALLOWANCE OF CLAIMS—PRIORITY.

The expectation of a claimant, when he sells supplies or loans money to a mortgagor railroad company necessary for its operation, that he will be paid out of the current income of the company, is not sufficient to take a claim, otherwise not preferential, out of its class, and transfer it to the class entitled in equity to preference in payment over the claims of bondholders secured by a prior mortgage.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 554–576; Dec. Dig. ⟸171.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit by the United States & Mexican Trust Company and others against the Kansas City, Mexico & Orient Railway Company and others. From an order allowing the claim of the Martin Metal Manufacturing Company, intervener, as a general creditor, but denying it preference in payment out of mortgaged property, it appeals. Affirmed.

Jean Madalene, of Wichita, Kan. (S. B. Amidon, of Wichita, Kan., on the brief), for appellant.

F. H. Moore, of Kansas City, Mo. (Samuel Untermyer, of New York City, and Samuel W. Moore, of Kansas City, Mo., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

SANBORN, Circuit Judge. This is an appeal from an order allowing the claim of the intervener and appellant as a general creditor, but denying it a preference in payment out of the mortgaged property over the claims of the bondholders secured by a prior mortgage made February 1, 1901, upon the property, the after-acquired property, and the income of the Kansas City, Mexico & Orient Railway Company. A creditors' bill was filed against the Railway Company on March 7, 1912, under which the court appointed receivers, who took possession of its property. Subsequently, on August 7, 1912, the trustee under the mortgage brought a bill to foreclose it, and on December 26, 1912, the latter suit was consolidated with the former, the receivership was extended over it, and the income and property of the Railway Company was thereafter impounded for the benefit of the mortgage bondholders. On February 2, 1914, a decree of foreclosure of the mortgage and of sale of the mortgaged property was rendered, wherein the court adjudged that the mortgage was a first lien upon the property to secure the payment of bonds issued thereunder to the aggregate amount of $24,538,000. On January 27, 1914, the Martin Metal Manufacturing Company intervened in the consolidated cause, prayed that its claim for $1,730.20, the purchase price of certain tanks, culverts, and parts of culverts which the Railway Company bought between October 18 and December 10, 1911, and used in the operation of the railroad, should be paid out of the income or out of the proceeds of the mortgaged property in preference to the payment of the claims of the mortgage bondholders. The intervener alleged in its petition its sale of its property to the Railway Company and the latter's use of it in the operation of the railroad within six months preceding the appointment of the receivers under the creditors' bill, but more than six months before the income of the Railway Company was impounded for the benefit of the mortgage bondholders by the extension of the receivership over the suit to foreclose the mortgage; that it sold its property with the understanding and expectation that the purchase price thereof would be paid out of the income of the Railway Company; and that instead of paying its claim the managing officers and directors of the Railway Company diverted the income to the payment of interest on the mortgage bonds, to the payment of other indebtedness of the company, and to payment for the construction of the railroad, all of which expenditures inured to the benefit of the bondholders. The trustee under the mortgage admitted the purchase and use of the tanks and culverts at the time stated, but denied that they were sold with the understanding or expectation that they would be paid for out of the income of the Railway Company,

and denied the alleged diversion of the income. Testimony was taken on the issues framed on these pleadings to the effect that the intervener expected payment for its goods out of the current earnings of the railroad, but no evidence was presented that there had ever been any diversion of the current earnings of the property of the Railway Company from the payment of its current expenses of operation for wages, materials, supplies, and other like necessities, to the payment of interest on the bonded debt, or to the payment of other claims of the non-preferential class. In this state of the evidence the court below denied the claim of the intervener all preference in payment over the claims of the holders of the bonds.

The intervener contends that this ruling was erroneous, because bonds aggregating a larger amount than was authorized by the mortgage were issued thereunder, and because its claim is entitled in equity to preference in payment over the claims of the holders of the mortgage bonds. The first reason for a reversal of the ruling rests on the claim, which has been first stated in this court, that bonds to the amount of $24,538,000 were issued under the mortgage, when bonds to the amount of only $14,220,000 were authorized by it. But the mortgage authorized the issue of bonds whose aggregate amount is measured by the number of miles of railroad tracks laid by the Railway Company, the character and location of these tracks, the terminals and terminal facilities, the necessary rolling stock, equipment, repairs, improvements, etc., acquired and required by the company. No issue on this question was presented below, no trial of any such issue was had, no evidence was introduced upon it, and it is too late for the intervener to present the question of the validity of the bonds issued under the mortgage in this court now, after the court below in its decree of foreclosure rendered February 2, 1914, which has not been challenged by any appeal by the intervener, adjudged that bonds to the amount of $24,538,000 were issued under the mortgage and directed the sale of the mortgaged property for not less than $6,001,000 to pay them. Moreover, as the argument of counsel concedes that the bonds to the amount of $14,220,000 were authorized to be issued, and were issued, and as the mortgaged property was authorized to be sold, and was sold, under the decree of foreclosure for $6,001,000, it is immaterial to the claim of the intervener for a preference in payment whether the balance of the issue of bonds was valid or void, for, unless the intervener is entitled to preferential payment over the holders of the bonds to the amount of $14,220,000, it can obtain no benefit from a preference over the balance of the issue. The first ground for a reversal of the decision below is therefore untenable.

[1] Was the claim of the intervener entitled in equity to preference in payment over the claims of the bondholders secured by the prior mortgage? There is no claim or evidence that the receivers have, or that they or the Railway Company ever have had, since the purchase of the property sold by the intervener, any income of the railroad property in excess of the amounts expended by them in payment of the ordinary current expenses of the railroad for wages, materials, supplies, and other such necessities of its operation, nor

was there any evidence that any of them ever diverted any of the income from the payment of this class of preferential claims to the payments of claims not of this class. The only source, therefore, from which the claim of the intervener can be paid, is the corpus of the mortgaged property.

But a claim to payment out of the corpus of railroad property, although of the general preferential class, such as a claim for coal, or ties, or supplies, sold to the Railway Company within six months prior to the receivership and necessary for the operation of the railroad, is inferior in equity to the claims to such payment of bondholders secured by the lien of a prior mortgage. It is only in the exceptional case which arises when current income has been diverted from the payment of current expenses for wages, materials, supplies, and other necessities of operation, and, leaving such expenses unpaid, has been applied to the payment of interest on the bonds, or of claims for construction, or for unnecessary betterments, or matters of that nature, so that the payments inured to the direct benefit of the bondholders, that such a claim may be preferred to those of the holders of the bonds secured by the mortgage. And even then it can be preferred only to the extent of the diversion. As there was no such diversion in the case in hand, the claim of the intervener was inferior in equity to those of the bondholders. Gregg v. Metropolitan Trust Co., 197 U. S. 183, 190, 25 Sup. Ct. 415, 49 L. Ed. 717; Carbon Fuel Co. v. Chicago, C. & L. R. Co., 202 Fed. 172, 174, 120 C. C. A. 460.

[2] The expectation of the intervener that its claim would be paid out of the current earnings of the Railway Company is not sufficient to take it from the class of general claims and place it in the class of preferential claims. If such an expectation were sufficient for this purpose, liens of prior mortgages upon railroads would be idle, for nearly all general creditors undoubtedly expect payment out of the current incomes of the companies. Even loans of money to pay current expenses, or to keep a railroad company a going concern, in reliance upon and in expectation of payment out of the current earnings of the railway company, are ineffectual to transfer claims for their payment, otherwise without equitable preference, to the class of preferential claims. Morgan's Co. v. Texas Central Railway, 137 U. S. 171, 196, 197, 198, 199, 11 Sup. Ct. 61, 34 L. Ed. 625; United States Trust Co. v. Western Contract Co., 81 Fed. 454, 463, 26 C. C. A. 472, 481; Contracting & Building Co. v. Continental Trust Co., 108 Fed. 1, 4, 47 C. C. A. 143, 146.

The order below was right, and it is affirmed.

MOUNDAY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.
Rehearing Denied September 27, 1915.)

No. 4294.

1. POST OFFICE ⊂=48—MISUSE OF MAIL—SCHEME TO DEFRAUD—INDICTMENT.
An indictment under Penal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), alleging the devising of a scheme to defraud, and the placing of a letter in the post office to execute the scheme, and describing the scheme as one by which defendants would "pretend" certain things, is sufficient.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂=48.

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

2. INDICTMENT AND INFORMATION ⊂=101—PERSONS TO GRAND JURY UNKNOWN —SEVERAL COUNTS.
An indictment for use of the mails to effectuate a scheme to defraud, containing several counts, each charging the scheme was to defraud a person named, different in each count, and various others to the grand jurors unknown, is not bad, at least as against a motion in arrest, on the ground that the allegation in each count, that the grand jury did not know the other persons, was false, as the indictment is to be taken as a whole, and, so considered, it appears that all such persons known to the grand jury were named.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 272–277; Dec. Dig. ⊂=101.]

3. CRIMINAL LAW ⊂=1186—APPEAL—REVERSAL—PLEA IN ABATEMENT AND MATTERS OF FACT.
Any error in determining the question of fact involved in a plea in abatement, whether an indictment was procured by use of certain papers, obtained by an illegal seizure, cannot avail; Rev. St. § 1011, as amended by Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 318 (Comp. St. 1913, § 1672), prohibiting reversal in the Supreme Court or in a Circuit Court for error in ruling a plea of abatement, other than to the jurisdiction, or for any error in fact; and Act March 3, 1891, c. 517, § 11, 26 Stat. 829 (Comp. St. 1913, § 1651), extending to the Circuit Courts of Appeals all provisions of law in force regulating the methods and systems of review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215–3219, 3221, 3230; Dec. Dig. ⊂=1186.]

4. CRIMINAL LAW ⊂=878—ACQUITTAL ON ONE COUNT—EFFECT—MISUSE OF MAIL.
The gist of the offense under Penal Code, § 215, being the use of the post office in the execution of a scheme to defraud, and not the scheme itself, acquittal on one count, because of failure to prove the deposit of a letter as charged therein, does not operate as an acquittal on all the counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098–2101; Dec. Dig. ⊂=878.]

5. CRIMINAL LAW ⊂=1213—CRUEL AND UNUSUAL PUNISHMENTS—PERSONS ENTITLED TO RAISE QUESTION.
One convicted of use of the post office to effectuate a scheme to defraud, not having been punished to the extent provided for one offense, cannot complain that the statute would be unconstitutional, as imposing

a cruel and unusual punishment, if under it the depositing of each letter is an offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304–3309; Dec. Dig. ⊂⊃1213.]

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Don A. MounDay and another were convicted, and bring error. Affirmed.

See, also, 208 Fed. 186.

Hiram C. Root, of Topeka, Kan., for plaintiffs in error.

Fred Robertson, U. S. Atty., of Topeka, Kan. (Francis M. Brady, Asst. U. S. Atty., of Topeka, Kan., on the brief), for the United States.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. [1] The defendants below were convicted of violating section 215 of the Penal Code. They complain that their conviction was erroneous for the following reasons:

First, that the indictment did not state facts sufficient to constitute a public offense. The indictment contained ten counts. The language of the first count may be taken as illustrative of the point made against the indictment. After having alleged that the defendants unlawfully, knowingly, fraudulently, designedly, and feloniously devised a scheme and artifice to defraud, the indictment proceeded to describe what the scheme was. It alleged that the defendants would enter into a "pretended real estate business"; that they would "pretend" that they had purchased and owned certain land; that they would "pretend" and represent said land to be highly adapted to the cultivation of sugar beets; that they would "pretend" that a line of railroad would be built; that they would "pretend" that they would construct a sugar factory; that they would "pretend" that they had placed commercial securities to the amount of $500,000 in the hands of a trustee. It is claimed that the indictment is faulty for the reason that it alleges that the defendants were only to "pretend" to do something, and does not allege that they did anything. This view of the language of the indictment arises from a misconception of the crime with which the defendants were charged. The crime charged was the devising of a scheme or artifice to defraud, and the placing or causing to be placed a letter in the post office of the United States, addressed to some person, for the purpose of executing such scheme or artifice. In Gould v. United States, 209 Fed. 730, 126 C. C. A. 454, we said:

"While in the case at bar the use of the post office establishment in the execution of a scheme to defraud is the offense which the statute denounces, and while it is held that the scheme must be sufficiently set forth, so as to acquaint the defendant with the particulars thereof, still the scheme need not be set forth with that particularity which would be required if the scheme was the gist of the offense. Brooks v. United States, 146 Fed. 223 [76 C. C. A. 581]; Lemon v. United States, 164 Fed. 953 [90 C. C. A. 617]; Brown v.

United States, 143 Fed. 60 [74 C. C. A. 214]; Hyde v. United States, 198 Fed. 610 [119 C. C. A. 493]."

If counsel had not devoted 12 pages of his brief in the elaboration of the point sought to be made, we should not have thought it deserved any consideration whatever. The whole scheme was a false pretense; that was the character of the scheme. It was not necessary that any false pretense should be actually made. The deposit of the letter in the mail to effectuate the scheme was the gist of the offense, and the letter might accomplish this purpose, without making a false pretense.

[2] Another contention against the validity of the indictment is the fact that each count thereof charges that the scheme was to defraud a person named and various other persons to the grand jurors unknown. It is argued that as there were ten counts in the indictment, and in each count one person was named as the one to be defrauded, that the allegation in each count that the grand jurors did not know the other persons was false, as the names of the other persons appear in the other counts of the indictment, showing that the grand jurors did know who the other persons were. The indictment must be taken as a whole, and, so considered, it appears that all the persons that the grand jurors did know were named. The defendants intended to defraud all persons who should do business with them, that is, the public, and they did not know themselves, when they devised the scheme to defraud, the particular persons who would be defrauded. When it is considered that the indictment was only attacked by motion in arrest, it is difficult to discuss the question with proper restraint.

[3] It is urged that the trial court erred in not sustaining the plea in abatement interposed by the defendants to the indictment, based on the ground that it was procured by the wrongful use before the grand jury of testimony and evidence which was obtained by an illegal search and seizure of their private papers and documents. The plea in abatement was heard by the trial court upon plea, answer, replication, and evidence introduced by both parties. The question involved was wholly a question of fact. We have considered the evidence submitted to the trial court, and, while we agree that the conclusion reached was the right one, we are of the opinion that we would have no power to reverse the judgment, even if we differed with the trial court, for the reason that section 1011, R. S. U. S., as amended by Act Feb. 18, 1875, c. 80, § 1, reads as follows:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

The plea in abatement interposed by the defendants below was not a plea to the jurisdiction, and the question decided was one of fact, so that our power to reverse in case of error is limited by the statute quoted in two particulars. First, the plea in abatement was not to the jurisdiction; second, the decision was one of fact. Miles v. United States, 103 U. S. 304, 26 L. Ed. 481; Jeffries v. Mutual Life Insurance Company of New York, 110 U. S. 309, 4 Sup. Ct. 8, 28 L. Ed. 156; Stephens v. Monongahela Bank, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct.

321, 23 L. Ed. 862. By Act March 3, 1891, c. 517, § 11, it is provided that:

"All provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." 26 Stat. 829.

[4, 5] It is next contended that under section 215 of the Penal Code the defendants could not be punished but for one offense, viz., the devising of one scheme or artifice to defraud. There is nothing in this contention. It has been the uniform holding of the courts that the gist of the offense is the use of the post office in the execution of the scheme to defraud and not the scheme itself. Gould v. United States, supra; Sandals v. United States, 213 Fed. 572, 130 C. C. A. 149; United States v. Young, 232 U. S. 156, 34 Sup. Ct. 303, 58 L. Ed. 548; In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174; In re De Bara, 179 U. S. 320, 21 Sup. Ct. 110, 45 L. Ed. 207. This contention is made in view of the acquittal of defendants on the tenth count. It is also claimed that if the depositing of each letter is an offense the statute would be unconstitutional, as imposing a cruel and unusual punishment; but defendants were not punished to the extent provided for one offense, hence they may not complain.

The prosecution failed to prove the deposit of a letter as charged in the tenth count, and a verdict on that count was returned in favor of the defendants. Defendants claim that this acquittal on the tenth count operated as an acquittal upon all counts. As the theory of the defendants upon which this contention is based is erroneous, the contention based thereon fails. No error appearing in the record the judgment below must be affirmed.

And it is so ordered.

TRAPP v. TERRITORY OF NEW MEXICO.

(Circuit Court of Appeals, Eighth Circuit. July 12, 1915.)

No. 3777.

1. HOMICIDE ⊂=190—EVIDENCE—UNCOMMUNICATED THREATS.
Evidence of uncommunicated threats of deceased against defendant's father, in whose defense he claims to have acted, is admissible as bearing on the probability of who was the aggressor; the evidence as to who fired the first shot, or made the first assault, being in conflict.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399–413; Dec. Dig. ⊂=190.]

2. HOMICIDE ⊂=300—SELF-DEFENSE—POINT OF VIEW OF JURY—INSTRUCTIONS.
Defendant in homicide, claiming self-defense or defense of his father, is entitled to an instruction that in considering his guilt the jury should place themselves as nearly as possible in his situation at the time, and then consider and decide, from that station, whether or not the testimony established beyond a reasonable doubt that he did not believe, or did not have reasonable ground to believe, that deceased was about to kill or inflict great bodily injury on one of them; and it is not enough to in-

struct merely to acquit if the jury have reasonable doubt as to defendant having had a reasonable ground to apprehend design of deceased to so do

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⊂⊃300.]

3. HOMICIDE ⊂⊃174—EVIDENCE—FLIGHT.

The killing being admitted and established, and the only question being whether it was justified, evidence of his flight is irrelevant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359–371; Dec. Dig. ⊂⊃174.]

4. CRIMINAL LAW ⊂⊃351—EVIDENCE—FLIGHT.

It is only a flight to avoid arrest on a charge of a crime that is evidence of the identity of the person charged with being the perpetrator, when that question is in doubt, and not flight shown to be for another purpose.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778–785, 930–932; Dec. Dig. ⊂⊃351.]

In Error to the Supreme Court of the Territory of New Mexico.

Malcolm Trapp was convicted of homicide (16 N. M. 700, 120 Pac. 702), and brings error. Reversed, and new trial directed.

W. W. Gatewood, of Roswell, N. M., for plaintiff in error.

Frank W. Clancy, Atty. Gen., for the Territory of New Mexico.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

SANBORN, Circuit Judge. On January 4, 1910, Webb J. McAdams, a constable and deputy sheriff, and Clay Davidson, another deputy sheriff, went to the dug-out and home of John C. Trapp with a pretended warrant for his arrest that was illegal, and, after calling him to the door, he arose and started to the door, a colloquy arose between him and McAdams, when shooting commenced, and McAdams was killed in the affray by a shot fired by the defendant below, Malcolm Trapp, a son of John C. Trapp, about 21 years of age. At the time of the shooting John C. Trapp, his sons Malcolm, John, a boy about 19 years of age, and three younger sons were with him in his home, and there was evidence tending to show that shots were fired into it by McAdams and Davidson, and out of it by Malcolm Trapp and John Trapp. John C. Trapp, Malcolm Trapp, and John Trapp were indicted for the murder of McAdams, were tried, and John C. Trapp and John Trapp were acquitted, and Malcolm Trapp was convicted of manslaughter and sentenced to imprisonment at hard labor for not less than five years nor more than ten years. He has sued out a writ of error, and assigned many reasons why, in the opinion of his counsel, the Supreme Court of New Mexico should have reversed the judgment against him.

[1] He has specified as error the refusal of the court below to admit in evidence testimony of threats of McAdams against his father, John C. Trapp, which had not been proved to have been communicated to him, the defendant Malcolm Trapp. It is essential to a clear understanding of the question raised by this specification that the situation and relation of the parties at and preceding the shooting should

be in mind. These facts were disclosed by the evidence at the trial. There was positive testimony that on January 4, 1910, when the shooting occurred, the two deputy sheriffs who came to the dug-out fired the first shots, and there was positive testimony that Malcolm Trapp fired the first shot. So that there was a direct conflict in the evidence on the issue which party was the aggressor. There was testimony that John C. Trapp had lived on the farm where the shooting occurred, three or four miles from Corona, nine years, that he had been engaged in truck farming, and that he had been a justice of the peace for a year during that time. There was testimony that McAdams was a constable and a deputy sheriff; that he had the reputation of being a violent and dangerous man; that in December, 1908, John C. Trapp killed a beef creature which he owned and had raised on his farm, brought the beef to Corona, and sold it; that McAdams arrested him for wrongfully selling the beef, and demanded that he should plead guilty; that he refused, was tried, and acquitted; that on June 3, 1909, John C. Trapp and his wife came to Corona, riding with Malcolm Trapp in their wagon; that McAdams, without any warrant, locked John C. Trapp up in a cell, and kept him there several hours on that day, although the justice of the peace warned him that he had no right to do so; that in November, 1909, John C. Trapp sued McAdams for this false imprisonment; that McAdams then told Mr. Gilbert, about November 27, 1909, shortly after that suit was brought, that Trapp would not live long enough to see the outcome of it; that he was going to get him, and take him up on the flat, and shoot his head off; that Gilbert talked to him, and told him not to do such a thing, and he replied that he was sure he was going to kill him; that on December 28, 1909, Davidson arrested Trapp in Roswell, a place about 115 miles from Corona, to which Trapp had moved his wife and five of his children, and to which he was about to remove the remainder of his family, for having that gun in his wagon on June 3, 1909, and Trapp gave bond to appear in Corona to answer the charge on January 4, 1910; that he appeared there on that day, took a change of venue, and gave a bond, with Mr. Jump and Mr. Holzman as sureties; that he then went home with his sons Malcolm and John, built a fire, and ate supper; and that they were sitting before the fire in their dug-out when McAdams and Davidson came with the illegal warrant, called John C. Trapp, who arose and entered into a colloquy with McAdams, and the shooting commenced. In the course of the trial Mr. Jump, who served the summons on McAdams in Trapp's suit for false arrest about November 26, 1909, testified that McAdams then said to him that he would have Trapp in the Lincoln jail inside of 24 hours, and Mr. Thompson testified that on November 28, 1909, McAdams told him that he was going out to arrest Trapp and take Cleve Hibbler along; that he told McAdams that he thought it was an imprudent thing for him to take Hibbler along, and McAdams answered, "I am taking out Hibbler, and get him and Trapp into a fight and kill one another." The court struck out this testimony, because there was no proof that these threats were communicated to the defendant Malcolm Trapp; but there was uncontradicted evidence that

McAdams and Hibbler went out to Trapp's place near Corona and inquired for him, but failed to find him on that November 28, 1909, when the statement to Thompson was made, and McAdams' statements, though uncommunicated, tended strongly to show which party was probably the aggressor on January 4, 1910, when McAdams next met Trapp, where he might, with possibility of escaping punishment, attempt to carry out his threats.

It is the general rule that on the trial for a homicide uncommunicated threats are not admissible in evidence, because such threats cannot have had any influence upon the mind or intent of the defendant. But there is an exception to this rule as well established as the rule itself. It is that where the alleged crime was committed in a sudden affray, and there is a conflict in the evidence upon the question, and there is doubt which party fired the first shot, made the first assault, or was the aggressor, uncommunicated threats of death or great bodily harm to the defendant, his father, or other near relative he claims to be trying to defend, are admissible in evidence, not on account of their influence on the mind or intent of the defendant, but because they tend to prove the probability that he who made the threats, rather than his opponent, fired the first shot, made the first assault or was the aggressor. Wiggins v. People, 93 U. S. 465, 467, 23 L. Ed. 941; Allison v. United States, 160 U. S. 203, 215, 16 Sup. Ct. 252, 40 L. Ed. 395; State v. Felker, 27 Mont. 451, 71 Pac. 668, 671; State v. Shadwell, 26 Mont. 52, 66 Pac. 508; State v. Hennessy, 29 Nev. 320, 90 Pac. 221, 225, 13 Ann. Cas. 1122; Wood v. State, 128 Ala. 27, 29 South. 557, 558, 86 Am. St. Rep. 71; Wharton's Criminal Evidence, § 757; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; People v. Scoggins, 37 Cal. 676; Roberts v. State, 68 Ala. 156. The evidence at the trial and the charge of the court made the issue which party fired the first shot, or made the first assault, one of the most important in the trial; and this case, wherein a young man is claiming, not without substantial evidence to support that claim, that he committed the unfortunate homicide in his own home, in defense of his father against an attack of one who had repeatedly threatened his life, is one in which the defendant ought not to be deprived of any legal evidence presented in his favor. The rejection of the testimony of Thompson and Jump to the threats of McAdams was a fatal error in the trial of this case.

[2] Counsel for the defendant complains of the court's refusal to give his requested instruction:

"That in considering the guilt or innocence of the defendants, and of each of them, you should view the facts and circumstances of the case as nearly as you can from their respective standpoints, and put yourself as nearly as you may in their respective places, and see and consider the situation as in your judgment it must at the time have appeared to them, and if upon so doing you cannot say from all the evidence before you that you are convinced beyond a reasonable doubt of the guilt of some one or more of the defendants, then you should find him or them of whose guilt you are not convinced not guilty."

But the counsel for New Mexico argue that there was no prejudicial error in this refusal: (1) Because the requested instruction omits

the essential element of the defendant's belief and reasonable ground to believe that they were in imminent danger of death or great bodily harm when the homicide was committed, but that element was embodied in another request of defendant's counsel and in a portion of the charge given by the court; and (2) that the essence of the requested instruction was given to the jury in the eleventh paragraph of the charge, which reads in this way:

"You are instructed that voluntary manslaughter is justifiable when committed by any person in the lawful defense of such person, or of his or her parent, brother, or child, when there shall be reasonable ground to apprehend a design on the part of the person slain, or of any one acting with him at the time of such design, to commit a felony upon, or to do some great bodily injury to, such person, parent, or brother, or child shall be at the time. Therefore, if from the evidence you have a reasonable doubt that, at the time of the killing of said Webb J. McAdams, said Malcolm Trapp had a reasonable ground to apprehend a design on the part of the deceased and said Clay Davidson, or either of them, to commit a felony upon said John C. Trapp, or do him some great bodily harm, or to commit a felony upon or to do either of the other defendants some great bodily harm, you will acquit the defendants."

A homicide, when committed by one in defense of himself, his parent, brother, or child, is undoubtedly justifiable, when he has reasonable ground to believe, and does believe, that the person slain is about to kill or inflict great bodily injury upon him, his parent, brother, or child, unless he takes the course he pursues, and unless the jury is satisfied from the evidence beyond a reasonable doubt that such person committed the homicide without such belief, or without reasonable ground therefor, it is its duty to acquit. It is not clear that this was the meaning or effect of the eleventh paragraph of this charge, and, however that may be, that paragraph fails, and so does the entire charge, to express the gist of the instruction requested by defendants' counsel. It fails utterly to convey the idea that in determining the questions whether or not the defendants had reasonable ground to believe and did believe that they were in imminent danger of the loss of life, or great bodily harm, from the deceased at the time they fired their shots, and that in order to prevent such death or harm it was necessary for them to fire, the jury should place themselves as nearly as they could in the defendants' situation at that time, and then consider and decide from that station, in view of all the facts and circumstances in evidence, whether or not the testimony established beyond a reasonable doubt that the defendants did not so believe, or did not have reasonable ground for such a belief. In view of this fact, the court should have given the instruction requested. Allen v. United States, 150 U. S. 551, 561, 562, 14 Sup. Ct. 196, 37 L. Ed. 1179; Hickory v. United States, 151 U. S. 303, 311, 14 Sup. Ct. 334, 38 L. Ed. 170; Wharton on Homicide (Bowlby's 3d Ed.) pages 455–458, par. 286; Territory v. Gonzales, 11 N. M. 301, 326, 327, 328, 68 Pac. 925. In Hickory v. United States, 151 U. S. 303, 316, 14 Sup. Ct. 334, 339 (38 L. Ed. 170), the Supreme Court said:

"As was said in Allen v. United States, 150 U. S. 551 [14 Sup. Ct. 196, 37 L. Ed. 1179], we do not think that the doctrine is practicable which tests the question whether a defendant was entitled to excuse on the ground of self-

defense, or exceeded the limits of the exercise of that right, or acted upon unreasonable grounds, or in the heat of passion, by the deliberation with which a judge expounds the law to a jury, * * * or with which judgment is entered and carried into execution."

[3] The court also erred in charging the jury that the flight of a person immediately after a crime has been committed with which he is charged, if you shall first find that there has been a crime committed, is a circumstance which the jury may consider in determining the probabilities for and against him; that is, the probability of his guilt or innocence. If a homicide had been proved or admitted, and the issue whether or not defendant Malcolm Trapp was the perpetrator had been in doubt, the instruction might have been appropriate and applicable. But when this charge was given to the jury, the fact that Malcolm Trapp shot and killed McAdams was admitted and established beyond doubt. The only question remaining was whether or not he was justified in killing him. His flight had no tendency to prove whether the Trapps or the deputy sheriffs fired the first shot, or committed the first assault, or whether or not Malcolm Trapp was justified in shooting McAdams.

[4] There is another reason why this instruction was erroneous. It is a flight to avoid arrest and trial on a charge of a crime that is evidence of the identity of the person charged with being the perpetrator, when that question is in doubt, and there was no evidence of any such flight in this case. The evidence was that John C. Trapp had moved his wife and five of his children to Roswell, and had gone there himself, leaving the remaining five of his children in the old home near Corona, before he was arrested at Roswell for carrying the gun in the wagon; that he had thereafter returned to Corona to answer that charge on January 4, 1910; that at the time of the shooting he and his five sons were in the dug-out near Corona; that immediately after the affray they were afraid of another attack by a mob, and the father and his two older sons went directly to Mr. Gatewood, Mr. Trapp's attorney in Roswell, told him what had happened and that Malcolm wanted to give himself up; that the attorney immediately telephoned the jailer or sheriff to come to his office; that the sheriff came, and Malcolm Trapp at once surrendered himself and was placed in jail.

The conclusion of the whole matter is that there was fatal error in the trial of this case, and in the decision of the Supreme Court of New Mexico affirming the judgment. Let the judgment of the Supreme Court and that of the trial court be reversed, and let the case be remanded, with instructions to grant a new trial.

UNITED STATES v. FERGUSON et al.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.)

No. 4428.

INDIANS ⟸13—COMMISSION TO FIVE CIVILIZED TRIBES—ENROLLMENT—CONCLUSIVENESS.

Under Act April 26, 1906, c. 1876, 34 Stat. 137, providing that for all purposes the quantum of Indian blood possessed by any member of the Five Civilized Tribes shall be determined by the rolls of citizens thereof approved by the Secretary of the Interior, Act June 21, 1906, c. 3504, 34 Stat. 325, requiring the Secretary of the Interior, on completion of the approved rolls, to prepare and print the same in a permanent record book, and Act May 27, 1908, c. 199, § 3, 35 Stat. 312, declaring that the rolls of citizenship of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen, the Seminole Roll of Indians by Blood, as prepared by law, is conclusive, and not subject to collateral attack.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. ⟸13.]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by the United States against Walter Ferguson and another. From a judgment of dismissal, the United States appeals. Affirmed.

Archibald Bonds, Sp. Asst. U. S. Atty., of Claremore, Okl. (D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Sp. Asst. U. S. Atty., both of Muskogee, Okl., on the brief), for the United States.

Harry H. Rogers, of Tulsa, Okl. (N. A. Gibson, of Muskogee, Okl., on the brief), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

CARLAND, Circuit Judge. This is an action commenced by appellant for the purpose of canceling certain conveyances purporting to convey lands which had theretofore been allotted to Suk-pi-e-chee, or Henehar Kochokney, deceased, a full-blood member of the Creek Tribe or Nation of Indians. The conveyances were executed by Marche Yekcha, son and heir of Suk-pi-e-chee, subsequent to April 26, 1906, and were not approved by the Secretary of the Interior or judge of the county court. It is claimed by appellant that Eliza, the mother of Marche Yekcha, was a full-blood Seminole Indian, and that therefore Marche Yekcha was a full-blood Indian, subject to the restrictions against the alienation of Indian lands. The land in controversy was duly selected by and patented to Henehar Kochokney, who died March 3, 1903. Marche Yekcha was enrolled as a half-blood opposite No. 1278 on the Seminole Roll of Indians by Blood.

At the trial appellant offered to show by the testimony of three witnesses, to wit, Jacob Harrison, Concharty, and Catcha Holatka, that the mother of Marche Yekcha was a full-blood Seminole Indian. The trial court ruled that the Seminole Roll of Indians by Blood was conclusive upon the question as to the quantum of Indian blood pos-

sessed by Marche Yekcha, and that as the act of Congress of April 26, 1906, contained no restrictions as to mixed-blood Indians, decided that the appellant could not maintain the action and dismissed the bill. It thus appears that the only question for decision is as to whether the Roll of Seminole Indians by Blood as prepared by law is conclusive against collateral attack. As bearing upon the question we set forth the following excerpts from the legislation of Congress. Section 22 of the Act of Congress of April 26, 1906 (34 Stat. 137, c. 1876), provides:

"That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent. * * *"

Section 19 of the same Act of Congress of April 26, 1906, provides:

"* * * And for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior. * * *"

The Indian Appropriation Act of June 21, 1906 (34 Stat. 325, c. 3504), among other things provides:

"That the Secretary of the Interior shall, upon completion of the approved rolls, have prepared and printed in a permanent record book such rolls of the Five Civilized Tribes, and that one copy of such record book shall be deposited in the office of the recorder in each of the recording districts for public inspection. * * *"

The following is the record concerning Marche Yekcha in the Seminole Roll of Indians by Blood:

"Seminole Roll, Indians by Blood.

"No. 1278: Name, Yekcha, Marche; Age, 30; Sex, M; Blood, ½. Tribal Enrollment: Year, 1897; Band, Echo Emarthoge; No. 1; Census Card No. 380."

By section 3 of the Act of May 27, 1908 (35 Stat. 312, c. 199), Congress again declared its purpose of making the rolls conclusive evidence as follows:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes. * * *"

This court, in Malone v. Alderdice, 212 Fed. 668, 129 C. C. A. 204, and in Nunn v. Hazelrigg, 216 Fed. 330, 132 C. C. A. 474, decided that:

"The Commission to the Five Civilized Tribes, which made the enrollment of their citizens and freedmen, was a quasi judicial tribunal empowered to determine who should be enrolled and what land should be allotted and in what way it should be allotted to every citizen and freedman, and its adjudication of these questions and of every issue of law and fact that it was necessary for it to determine in order to decide these questions is conclusive and impervious to collateral attack."

The Circuit Court for the Eastern District of Oklahoma in the case of Bell v. Cook, 192 Fed. 597, decided the question in the same way.

To the same effect is Yarbrough v. Spaulding, 31 Okl. 806, 123 Pac. 843; Lawless v. Raddis, 36 Okl. 616, 129 Pac. 711.

It results that the ruling of the trial court in excluding evidence offered for the purpose of showing that the mother of Marche Yekcha was a full-blood was correct, and the judgment below is affirmed.

DELANO et al. v. PEIRCE.

(Circuit Court of Appeals, Eighth Circuit. August 4, 1915. Rehearing Denied October 11, 1915.)

No. 4197.

1. CARRIERS ⟸320—CARRIAGE OF PASSENGERS—ACTIONS—EVIDENCE.
In an action for injuries received by a passenger, evidence *held* sufficient to go to the jury, raising an inference that the train was negligently operated, so as to lurch and sway from side to side, causing it to collide with some object on the right of way.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. ⟸320; Negligence, Cent. Dig. § 301.]

2. DAMAGES ⟸172—ACTIONS—EVIDENCE.
In a personal injury action, it was not error to permit plaintiff to testify that his services were worth $2,000 as a farmer and a ranchman.
[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490–492, 501; Dec. Dig. ⟸172.]

3. APPEAL AND ERROR ⟸206—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—OBJECTION.
In a personal injury action, where counsel did not at the time object to the form of a question on the ground that it permitted plaintiff to combine income received from his farm operations with his personal services, the matter cannot be raised on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1273, 1283–1289; Dec. Dig. ⟸206.]

4. WITNESSES ⟸330—EXAMINATION—CROSS-EXAMINATION.
In an action by an injured passenger, where the engineer testified that the track was about perfect, so trains could run 80 or 90 miles an hour with safety, he may be cross-examined as to numerous derailments in that vicinity, to test his testimony concerning the roadbed.
[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106–1108; Dec. Dig. ⟸330.]

In Error to the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Action by Albert Peirce against Frederic A. Delano and others, as receivers of the Wabash Railroad Company. There was a judgment for plaintiff, and defendants bring error. Affirmed.

John Lee Webster, of Omaha, Neb. (James L. Minnis, of St. Louis, Mo., on the brief), for plaintiffs in error.

M. F. Harrington, of O'Neill, Neb. (Dunham & Aye, of Omaha, Neb., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

AMIDON, District Judge. This is a suit for personal injuries. Plaintiff below, Peirce, was a passenger on the Wabash Railroad in charge of the defendants as receivers, traveling from Centralia to Moberly, Mo. He was riding on a limited passenger train, which was running at about 50 miles an hour. There was evidence that it swayed badly, owing to the condition of the track. It passed through the town of Rennick without stopping. At or about that point the window opposite which the plaintiff was sitting was crushed in. Two other windows on the same side of the car were destroyed, and the frame of one of them broken. Plaintiff's evidence tended to show that the entire windows were knocked out. After the accident the car was searched, and no missiles were found in it which could have caused the injury. There was evidence tending to show that at the time of the accident the train was passing a freight train on the siding at Rennick. Plaintiff himself probably jumped into the aisle as the result of the shock, and received injuries which rendered him unconscious. The plaintiff recovered judgment, and defendants bring error.

[1] The complaint charges that the train was negligently operated, so as to cause the car suddenly to lurch and sway violently from side to side, and that through the carelessness of the defendants the train collided with some object on defendants' right of way and under their control.

At the close of the evidence defendants moved for a directed verdict, upon the ground that there was no substantial evidence tending to show that the accident was caused through any fault of theirs; that whether the accident was caused by a missile hurled by some miscreant, or was caused by some object adjacent to the track upon which the train was running was a mere matter of conjecture. In support of this motion counsel cites a list of cases, of which Pennsylvania Railroad Co. v. McGaffrey, 149 Fed. 404, 79 C. C. A. 224, Thomas v. Pennsylvania & Reading R. R. Co., 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416, and Deagle v. N. Y. & New Haven R. R. Co., 217 Mass. 23, 104 N. E. 493, are examples. There, however, the evidence showed that a missile was thrown into the car through a window. Such evidence points to the act of a miscreant rather than the negligence of the company. Here no missile was found, and the injury to the car justified the inference that the accident was caused by some object on the right of way, or more probably by projecting scrap iron with which some of the cars of the freight train were loaded. To call such an inference a mere guess is only to apply a term of vituperation to an inference which counsel does not wish to have made.

[2, 3] Plaintiff was permitted to testify as to the value of his services. He stated they were worth $2,000 a year. He was a farmer and ranchman. After plaintiff had rested his case, defendants moved to strike this evidence out. He now insists that the question permitted the witness to combine income derived from his farming operations with his personal services. We do not think the question was open to that objection, and, if it was, counsel should have called specific attention to that feature at the time, so that the question might have

been framed in such a way as to confine the answer more clearly to the value of personal services.

[4] The engineer in charge of the passenger train had testified that the roadbed of the Wabash, between Centralia and Moberly, was about perfect, so that trains could run 80 or 90 miles an hour with safety. On cross-examination he was asked, over defendants' objection, about numerous derailments that had occurred on the line. We think this was a proper test of his testimony about the roadbed. Some of the questions were objectionable as to their form, but we do not think that defect is of sufficient importance to justify disturbing the verdict.

The judgment is affirmed.

ATCHISON, T. & S. F. RY. CO. v. BOARD OF COM'RS OF DOUGLAS COUNTY, COLO., et al.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1915.)

No. 4326.

TAXATION ⊂=608—LEVY AND ASSESSMENT—CORRECTION.

That the state board of equalization has violated its duty in denying the petition of a railway company to review an assessment without hearing does not entitle the carrier to relief in equity, in the absence of evidence of fraud, accident, or mistake, or of a showing that it was prejudiced, and that the assessment ought to have been corrected.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. ⊂=608.]

Appeal from the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Suit by the Atchison, Topeka & Santa Fé Railway Company against the Board of County Commissioners of the County of Douglas, Colo., and others, to restrain the collection of taxes. From a denial of a temporary injunction, plaintiff appeals. Affirmed.

Henry T. Rogers, of Denver, Colo., and S. T. Bledsoe, of Oklahoma City, Okl. (Pierpont Fuller, of Denver, Colo., Gardiner Lathrop, of Chicago, Ill., and Daniel B. Ellis, Lewis B. Johnson, and George A. H. Fraser, all of Denver, Colo., on the brief), for appellant.

A. L. Doud, of Denver, Colo. (J. M. Taylor, of Castle Rock, Colo., and A. J. Fowler, of Denver, Colo., on the brief) for appellees.

N. H. Loomis, of Omaha, Neb., and C. C. Dorsey, of Denver, Colo., amici curiæ.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The railway company filed its bill in the trial court, claiming that the taxes levied upon it by the defendant county, for the year 1912, were void, and asking that their collection be restrained. Application was made for a temporary injunction. The case was heard before Judge Riner. He required the parties

to submit their evidence orally. The railway company produced its witnesses, who were examined and cross-examined. At the conclusion of plaintiff's case the trial court denied the application for a temporary injunction, and plaintiff appeals. The court stated its reason for its decision as follows:

"In view of the principles of law that must be applied in the determination of this case, I do not think you (referring to the plaintiff) have made a case for temporary relief. I do not recall a scintilla of evidence that tends to show fraud, accident, or mistake, or any other grounds for equitable jurisdiction. Now, so far as this county assessment is concerned, it seems to me that the assessment was as fair as any that has come under my observation in any tax case that I can recall."

The assessor was the only witness who testified upon the matter of the assessment of lands and other property in the county, and his testimony stands before the court undisputed.

Appellant urges two grounds of complaint: First. It claims that other railroad property was assessed at a much lower valuation than its property, and that other property in the county was likewise assessed at a lower valuation. For the purpose of having the assessment made by the state tax commission reviewed, it filed a petition with the state board of equalization, which is vested with power to review such assessments, setting forth in general terms the grounds of its complaint. The statute required the board of equalization to fix a time for the hearing of such petition, and to notify the petitioner and give to it an opportunity to be heard and to produce evidence. The state board of equalization failed to do this, but when the period within which such a review could be had was about to expire, it made an order denying the petition of plaintiff, and other like petitions, without any hearing. The order also approved the assessment. Second. It is claimed that the assessment of property for the purpose of taxation is a quasi judicial act, and that in an action at law to recover back taxes paid under protest the assessment cannot be collaterally attacked. It is therefore argued under this head that the Colorado statute permitting a recovery of illegal taxes, does not apply. In support of this Stanley v. Supervisors of Albany, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000, and Western Union Telegraph Co. v. Missouri, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116, are cited.

As to the first ground of complaint, we think the action of the state board of equalization was a clear violation of its duty, and of the rights of the railway company. That, however, is not enough to entitle the railway company to relief in a court of equity. It must show that it was prejudiced; in other words, it must show that the assessment was unfair, and ought to have been corrected by the state board of equalization. This it attempted to do before Judge Riner. It produced the evidence before him which the board of equalization ought to have heard. He considered it, and found that there was no just cause of complaint against the assessment. The evidence amply warranted his conclusion. Certainly there was very substantial evidence to support his decision. That being the case, we ought not to disturb his order.

As to the second ground, the cases referred to arose where there

was no statute giving the right to recover taxes for erroneous assessments. The statute of Colorado in express terms gives that right, so the authorities cited are not controlling in this case.

Finally this case is clearly ruled by our opinion in Union Pacific Railway Co. v. Commissioners of Weld County, 217 Fed. 540, 133 C. C. A. 392, and 222 Fed. 651, — C. C. A. —.

The order is therefore affirmed.

ESTES v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1915.)

No. 4360.

1. INDICTMENT AND INFORMATION ⊂=125—DUPLICITY—INTRODUCING LIQUOR INTO INDIAN COUNTRY.

Where an indictment charged that defendant introduced spirituous liquors "into the Indian country, to wit, the Rosebud Indian reservation, into and upon a certain allotment of one Maggie Bordeaux," etc., such indictment was not bad for duplicity, as charging the introduction into the Indian reservation, as well as the Indian allotment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. ⊂=125.

Introducing intoxicating liquors into Indian country, see note to Joplin Mercantile Co. v. United States, 131 C. C. A. 171.]

2. INDIANS ⊂=38—INTRODUCING LIQUORS INTO INDIAN COUNTRY—INDICTMENT—SUFFICIENCY—"ALLOTMENT."

Where an indictment charged defendant with introducing spirituous liquor "into and upon a certain allotment" of an Indian, such indictment, although there was no allegation that the title to the land was held in trust by the government, stated facts constituting a public offense, since the word "allotment" is the term ordinarily and commonly used to describe land held by Indians after allotment, and before the issuance of the patent in fee that deprives the land of its character as Indian country.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⊂=38.

For other definitions, see Words and Phrases, Second Series, Allotment.]

3. CRIMINAL LAW ⊂=304—EVIDENCE—JUDICIAL NOTICE—PRESIDENT'S SIGNATURE ON INDIAN PATENT.

In a prosecution for introducing intoxicating liquors into Indian country, the admission in evidence of the trust patent to the Indian allotment involved, without other proof than the patent itself, was proper, since the court will take judicial notice of the signature of the President of the United States.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. ⊂=304.]

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Ed Estes was convicted of introducing spirituous liquors into Indian country, and he brings error. Affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

J. G. Bartine and C. W. Bartine, both of Oacoma, S. D., for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D., and E. W. Fiske and George Philip, Asst. U. S. Attys., both of Sioux Falls, S. D.

Before SANBORN and CARLAND, Circuit Judges, and LEWIS, District Judge.

PER CURIAM. The indictment in this case charged the defendant with introducing spirituous liquors into the Indian country, to wit, the Rosebud Indian reservation, into and upon a certain allotment of one Maggie Bordeaux, an Indian of the Sioux Nation and Rosebud Tribe or band of Indians, which said allotment was and is described as follows, to wit: The northwest quarter (N. W. ¼) of section twenty-six (26), township forty-two (42) north, of range twenty-nine (29) west of the sixth principal meridian, in Mellette county, state of South Dakota.

[1] It was objected by demurrer that the indictment was bad for duplicity, in that it charged the introduction of the liquor into the Indian reservation as well as the Indian allotment. This objection is hypercritical. It is well known that allotments exist within Indian reservations, and a person of common understanding, on reading the indictment, would understand that the charge was narrowed to the allotment.

[2] It was further objected that the indictment did not state facts constituting a public offense, in that there was no allegation that the title to the land was held in trust by the government. The word "allotment" is the term ordinarily and commonly used to describe land held by Indians after allotment and before the issuance of the patent in fee. So understood, the statute which provides that the title to such allotment shall be held in trust by the government need not be pleaded.

[3] It is urged that the trial court erred in admitting in evidence the trust patent without other proof than the patent itself. This was not error. The court would take judicial notice of the signature of the President of the United States. Wharton on Evidence, § 317; Underhill on Evidence, 514; 3 Rice, Criminal Evidence, pp. 13, 14.

There is no merit in any of the errors assigned.

Judgment affirmed.

CHADBOURNE et al. v. EQUITABLE TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Eighth Circuit. September 7, 1915.)

No. 4271.

RECEIVERS ⇐158—ALLOWANCE OF ATTORNEY'S FEES—FUND.

The allowed claim of a firm of attorneys, who had rendered service to a railroad more than six months prior to the appointment of its receivers, while not entitled to a preference over the claims of bondholders, was entitled to payment out of any funds in the hands of the receivers not subject to the lien of the mortgage securing such bondholders.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. ⇐158.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Eastern District of Missouri; Elmer B. Adams, Judge.

Action by Thomas L. Chadbourne, Jr., and others, against the Equitable Trust Company of New York and others. Order denying motion to grant plaintiffs' allowed claim a preference denied, and plaintiffs appeal. Modified and affirmed.

F. N. Judson, of St. Louis, Mo., and A. J. Shores, of New York City (Judson, Green & Henry, of St. Louis, Mo., on the brief), for appellants.

Wells H. Blodgett, of St. Louis, Mo., for appellee Wabash R. Co.

B. Schnurmacher, of St. Louis, Mo. (Theodore Rassieur, of St. Louis, Mo., and Murray, Prentice & Howland, Pierce & Greer, George Wellwood Murray, and Lawrence Greer, all of New York City, on the brief), for appellee Equitable Trust Co.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. Appellants are a firm of lawyers who rendered services for the Wabash Railroad Company more than six months prior to the appointment of receivers of that company. They filed a petition in the lower court to have their claim for fees established, allowed, and ordered paid. The court allowed the claim at $65,000, but on a motion to grant it a preference the same as claims of laborers and other employés, the application was denied, the court "being of the opinion that said claim is not of a character entitling it to any priority in the matter of payment over the claims of the bondholders represented by the complainant, the Equitable Trust Company." It was ordered "that the prayer of the petitioners that their said claim be paid out of the funds in the hands of the receivers be and the same is hereby denied." It is claimed by petitioners that there is a fund of some $4,000,000 in the hands of the receivers which is not subject to the lien of the mortgage represented by the Equitable Trust Company; that this fund accrued from earnings due to the company at the time the receivers were appointed, for services previously rendered, but which had not at the time been collected. The appellants insist that the order in the language in which it was framed really amounts to a denial of their claim after establishing it, because it denies their right to be paid "out of funds in the hands of the receivers." At the argument counsel stated that petitioners would be satisfied with an order directing the payment of the claim out of any funds in the hands of the receivers not subject to the lien of the mortgage represented by the Equitable Trust Company. We think they are entitled to such a modification of the order. We do not express any opinion, however, as to their right to payment out of the $4,000,000 fund above referred to. That question was not passed upon by the trial court.

The order will be that the order appealed from be modified, so as to provide for the payment in due course of administration of petitioners' claim out of any funds in the hands of receivers not subject

to the lien of the mortgage to the Equitable Trust Company, the trial court to pass upon the rights of all parties to any such fund; and, as so modified, the order is

Affirmed.

CADILLAC MOTOR CAR CO. et al. v. AUSTIN.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2766.

1. PATENTS ⊜165—CONSTRUCTION OF CLAIMS.
An element which expressly characterizes and limits one claim of a patent, and by which alone it substantially differs from another claim, will not be read into the latter, when not necessary to make it operative.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⊜165.]

2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—CHANGE-SPEED GEARING.
The Austin patent, No. 1,091,618, for change-speed gearing for automobiles, was not anticipated, and discloses invention, the device being the first practically operative two-speed axle drive gearing; also *held* infringed as to claims 9 to 12, inclusive.

3. PATENTS ⊜26—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
If the selection of elements from existing machines into a complete combination has, for the first time, produced from a practical and commercial aspect, a new result, invention may well be predicated thereon.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊜26.
Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

4. PATENTS ⊜168—CONSTRUCTION OF CLAIMS—AMENDMENT OF APPLICATION.
That the claims of a patent as granted were introduced by a voluntary amendment, and are broader than those in the original application, does not deprive the patentee of the right to have them construed as broadly as their language implies, nor of the right to hold as an infringer one who, with knowledge of the original claims, built a structure which avoided them, but which is within the broader claims.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. ⊜168.]

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by Walter S. Austin against the Cadillac Motor Car Company and others. Decree for complainant, and defendants appeal. Affirmed.

Infringement suit by Austin against the Cadillac Company, based upon claims 9, 10, 11, and 12, of patent No. 1,091,618 for "change-speed gearing," issued to Austin March 31, 1914, on application filed August 12, 1913, in renewal of application filed February 16, 1911. From the usual interlocutory decree for injunction and accounting, the Cadillac Company appeals.

The specification classifies the invention as relating to change-speed gearing, "especially adapted to automobiles." In the common form of this machine, the engine crank shaft, running longitudinally of the car, is clutch-connected to a propeller shaft, extending back in the same axial line into bevel-gear engagement with the rear axle, which is thus driven, and which drives

the car. In the simplest form of clutch connection between engine shaft and propeller shaft, the two must always revolve at the same speed. In transmitting the power from the propeller shaft to the axle through the bevel gearing, it is obvious that the relative speeds of driving shaft and driven axle can be determined by adopting any desired ratio between the number of teeth on the driving shaft-carried pinion as compared with the number on the driven axle-carried gear. To illustrate: It may be assumed that, for ordinary speed on average roads, the best ratio is 3 to 1—that is, three times as many teeth upon the axle gear as upon the shaft pinion—and it will follow that for each shaft revolution the wheels will make one-third of a revolution. It is clear that no such permanent or fixed relation, "direct drive," between engine speed and axle speed will meet the varying conditions of service; and so it has been common to interrupt the propeller shaft by interposing between its front and rear severed portions selective transmission devices, whereby the relation between the speeds of engine and of propeller shaft may be varied. A short parallel countershaft, carrying gears of different sizes, corresponding gears upon the propeller shaft, and means for sliding some of these gears longitudinally, or, perhaps for using none of them and clutching the two parts of the shaft directly to each other, enable the operator to select the ratio which he prefers; and if, for example, he selects a ratio of 4 to 1 in his transmission, and has a ratio of 3 to 1 in his direct drive, he will have an effective final ratio of 12 to 1, as between his engine and his driven axle, resulting in the so-called "low speed." It is obvious, too, that this indirect method of transmission, by breaking the continuity of the propeller shaft and interposing gearing, is less desirable than if the driving power comes directly from engine to axle, and so it is commonly understood that the direct drive or the "high speed" is to be preferred wherever conditions permit. It was Austin's idea to increase the flexibility of this direct drive by providing alternative gear pairs between shaft and axle and by providing selective mechanism, whereby the driver can cause one of two driving pinions on his shaft to drive either one of two beveled gears upon the axle, whereby, for example, the driver may shift the connection from one to the other and change the gear ratio from 3 to 1 to 2 to 1, so causing a complete revolution of the wheels to each two revolutions of the engine shaft, and increasing the speed of the car 50 per cent. without changing the speed of the engine. The very considerable practical advantages of this result are conceded, although there are disadvantages, and the ultimate balance will not necessarily and always be favorable. Such favorable net result, which will make the idea practically worth while, was to be attained only by exercising either a high degree of skill or a considerable amount of invention, as the two may be classified, in minimizing the bad and emphasizing the good among the attendant conditions.

What Austin did was to provide, at the rear end of his propeller shaft, a small bevel pinion fixed thereon and to carry just forward thereof another and larger bevel pinion fixed to a sleeve surrounding the driving shaft. In front of this sleeve the shaft carried a longitudinally sliding clutch, splined upon and always revolving with the shaft, but capable of being engaged with or disengaged from the pinion-carrying sleeve. It resulted that while the smaller pinion would always revolve with the shaft, the larger one would or would not, according as it was clutched thereto or unclutched therefrom. These two pinions were always in mesh with the corresponding bevel gears on the differential housing (thus ultimately revolving the axle), the forward pinion and the outside gear having the high, or 2 to 1, ratio, and the rear pinion and the inside gear having the low, or 3 to 1, ratio. Since it is clear that both gear pairs could not be clutched to and fast upon shaft and axle, respectively, at the same time without stripping some of the gears, and since when Austin's clutch pinion was fast to the shaft, both pinions thereon must revolve, he made the inner or low-speed gear loose upon the axle, and provided a clutch sliding longitudinally on the axle and always revolving therewith, but engaging the inner gear to the axle only when desired. He then connected his clutch on the shaft and his clutch on the axle by toggle levers so that they automatically acted together, and when one was thrown in, the other was thereby necessarily thrown out. It followed that if the forward pinion on the shaft was made fast thereto, it would drive the outer gear and so drive

the axle, but while the rear pinion would also drive the inner gear, the latter would be free from the axle and would run idle thereon. If the forward pinion was unclutched from the shaft, the inner gear would be driven by the rear pinion, and the inner gear being then fast to the axle, it would cause the outer gear also to revolve, this, in turn, would drive the forward pinion, and the latter, being free from the shaft, would run idle thereon. It therefore resulted that, of the four gear members, three were always fast and one always idle.

The defendant's device employs the same two gear pairs; that is, two driving pinions on a propeller shaft, and two driven gears upon the axle. The four gear members have the same relative form, size, mounting, and arrangement as in Austin's, in all particulars except one; the smaller and rear (being the low-speed) driving pinion, instead of being fixed on the propeller shaft, is carried upon a sleeve concentric therewith, and which may be clutched thereto, and the other member of the pair, the inner or low-speed driven gear, is fixed to the axle instead of being clutch-connected thereto. In other words, the high-speed gear pair is wholly the same in both machines and the low-speed gear pair is the same, excepting that the capacity of being detached from its shaft is transposed from one member to the other. Of the four gear members, three are always fast and active, one always loose and idle.

The case presents the questions whether the claims in suit can properly be so read as to cover defendant's device, and, if so, whether they are valid. Claim 10 may fairly be considered typical of the group sued upon, and it reads as follows: "In a change-speed gearing for automobiles, the combination of the axle, differential gearing, and a suitable housing, an outer driven beveled gear secured to said housing and an inner driven beveled gear nested with the outer beveled gear, either one or the other of which is adapted to be connected to drive the differential gearing structure to operate the said axle, a propeller shaft, a bearing for the inner end thereof, an inner pinion thereon adapted to mesh with the inner driven beveled gear, and an outer pinion concentric therewith adapted to mesh with the outer beveled gear, the outer gear and pinion being of higher ratio than the inner gear and pinion, and means for coupling either the outer beveled gear and pinion, or the inner beveled gear and pinion to said propeller shaft to drive the said axle, co-operating for the purpose specified."

F. P. Fish, of Boston, Mass., for appellants.

F. L. Chappell, of Kalamazoo, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. Defendant insists that whatever invention Austin made extended only to the relative arrangement of his clutched and fixed gear members, and hence that his patent must be confined to a device carrying one clutched driving pinion and one clutched driven gear, with connections whereby the two clutches have an in and out automatic action. We cannot so interpret claim 10. Its language is not incapable of such a limitation, when it is read in connection with the specification; but when we compare the various claims, including those not in suit, we find that this particular clutch construction and arrangement are expressly specified in, and seem to be the dominant thought of, another group of claims, while not mentioned in the group of claims in suit. This comparison clearly shows that the latter were intended to be distinguished and characterized by the provision that the outer gear and pinion were of higher ratio than the inner gear and pinion.

It follows that, under the familiar rule which we have several times followed and applied (Scaife v. Falls City Co., 209 Fed. 210, 214, 126 C. C. A. 304; National Co. v. Mark, 216 Fed. 507, 521, 133 C. C. A. 13), we will not read into one claim elements which expressly characterize another, by which alone the two substantially differ and which are not necessary to make the former operative; and that if Austin's only real invention resided in his peculiar clutch mechanism, claim 10 would be void, because broader than the invention.

2. If the words of claim 10 are given quite ordinary and normal meanings, the claim clearly reads upon defendant's device, which has all the parts named, and in their specified, mutual relationship. Its sliding clutch, engaging one or the other of the pinions and so driving one or the other of the fixed gears, fully responds to the phrase—

"means for coupling either the outer beveled gear and pinion or the inner beveled gear and pinion to the said propeller shaft to drive the said axle."

Aside from the contention that the special clutch arrangement should be read in, only two questions of failure to respond to the terms of the claim are raised. One is whether the defendant's inner driven beveled gear is "nested" with the outer beveled gear. This word "nested" is not of very precise meaning. In Austin, the outer surface of the inner gear ring rests, in part, against the inner surface of the outer ring; in the Cadillac, both rings are supported upon and carried by the same back frame, though the two are not in actual contact; but in each case, looked at from the face side, there is no appreciable annular space between the two gears, and the face plane of the inner gear projects beyond the outer just about half of the thickness of the ring. From the face side, the difference between the two devices is not noticeable; and the word "nested" is not inapt to describe the relations between the two gears and their respective supports, as found in the Cadillac structure. The other suggestion is that in the Cadillac, the inner driving pinion is not "on" the shaft ("an inner pinion thereon") because it is not integral with the shaft, as in Austin, or carried solely thereby. It surrounds the shaft, revolves with or upon the shaft, and would be carried thereby and would operate if it had no other support, but through its surrounding outer pinion and frame bearings external thereto, it would be kept in place if the shaft were removed. We find no reason for giving to "thereon" so limited a meaning as defendant's contention requires, and we must think that the mechanism of the claim is used by defendant.

[2] 3. These considerations lead us to conclude that the vital question is whether, construing the claim as we do and considering what others had already done, there was invention in the combination claimed. In deciding this question, one fact stands out as important, and, we think, controlling. This fact is that, although it was common mechanical knowledge that with constant speed in a driving shaft, the speed of a right-angled driven shaft could be changed by providing two pairs of driving pinions and driven gears and clutching one or the other pair to the shaft, and although certain advantages to be de-

rived from employing this principle upon an automobile were very apparent, and although numerous skilled engineers and inventors had tried for many years to accomplish this result in a commercially useful way, Austin was the first man who practically succeeded and who built a marketable automobile with a two-speed axle.[1] The strongest evidence of the lack of any prior practically operative device and of Austin's success is furnished by the defendant's conduct. There are, in the record, a number of earlier patents illustrating various conceptions of an automobile axle having two or more speeds; there is no affirmative evidence that any of them ever came upon the market. The Cadillac Company had long been among the leaders in the industry; its skilled engineers, who testified as witnesses in this case, doubtless thoroughly knew the practical art and its history the world over, and their admission that Austin's two-speed axle was the first one they had ever seen practical enough to impress them favorably, and their failure to say they ever heard of any other on the market, are evidence enough that there was no such predecessor. Of course, if any one of these earlier patents disclosed Austin's complete combination, it would be of little or no importance that they never came into use; but the rule is quite different when the issue is whether modifications and rearrangements amount to invention.

Some apparent instances of earlier adoption of this idea in practice turn out to be exceptions that emphasize Austin's real priority. Defendant's chief engineer testifies that two or three "two-speed axles" built into automobiles had been demonstrated to him by other inventors in an effort to interest him and his company, and that he had been taken to ride in automobiles so equipped; and while his testimony implies that they worked well enough, neither he nor his company was attracted by these devices, or paid any further attention to them, and the devices dropped out of sight. On the contrary, after the Cadillac Company had thus "turned down" such devices and had considered and discarded various designs and plans for a two-speed axle, and after Austin had kept one or more of his in use for a year or so, he exhibited it at the Chicago show, in January, 1913. Defendant's chief engineer saw it there, was attracted by it, and at once procured Austin to ship him an axle for trial. This was built into a Cadillac car and used for a time. The company negotiated with Austin for the right to use his invention, but apparently became satisfied both that his royalty demands were exorbitant, and that he would not, upon his pending application, secure a patent broad enough to be of very much value. It thereupon returned his axle and declined further to consider a contract with him. However, it immediately modified some theretofore discarded two-speed axle designs so as to put the device in the form which we have described as "defendant's device," put this upon all its cars for the annual season then beginning, and extensively advertised its two-speed axle as the greatest advance in the automobile art made by any manufacturer in any country. Indeed, it exploited an inter-

[1] Austin is himself an automobile manufacturer, and his machines, containing the invention, have been made and sold, though in limited number.

national award made to it as depending partly upon this ground.[2] It may not be clear that, as compared with the prior art, Austin made any new invention, but it is quite clear that, as compared with the prior art plus Austin, defendant's engineers did not; and it follows that their advertising claims go far toward crediting Austin with an epoch-making invention. This kind of advertising does not demonstrate anything; but unless the defendant was acting in bad faith—which should not be presumed—it shows that defendant's present insistence on the trifling character of what Austin did is an afterthought. In such a situation, the courts must be very reluctant to say that the step in advance taken by the patentee was only mechanical skill.

The French patent to the Minerve Company, dated in 1904, presents, perhaps, the closest approximation to the Cadillac structure. Indeed, defendant insists that the Minerve device is the prototype of defendant's; and it would go without saying that if in fact defendant has followed the Minerve disclosure with only those changes and adjustments obvious to the skilled automobile mechanic, or if the same construction of claim 10 of the Austin patent necessary to make it read upon the Cadillac will also cause it to read upon the Minerve, the claim is not valid. A careful study of this French patent so becomes necessary. It had a four-speed axle, and was intended to provide, by this mechanism alone, all the necessary variety of speeds. At the rear end of its propeller shaft, it carried four concentric sleeves, each of which, at its rear end, carried a beveled gear constituting a driving pinion. The pinion gear faces were approximately in the same vertical plane, whereby it resulted that each of the three outer pinion gears was dished partly or wholly around the next within. A so-called sleeve upon the axle carried fixed thereon four-beveled gears. Each was carried upon an independent disc, spider, or other frame, and these were spaced well apart along the sleeve. Each gear meshed with the corresponding sleeve-carried pinion. A sliding clutch on the shaft fastened thereto any one of the four pinion sleeves, leaving the other three to be driven idle. The gears on the axle sleeve were of substantially the same diameter. From this construction, it followed that the outside gear pair had the highest ratio, resulting in high speed in the axle, while the innermost pair resulted in low speed. The drawing indicates that the ratios, commencing at the inside, were approximately, 4 to 1, 2 to 1, 1½ to 1 and 1⅕ to 1. We have already stated the reasons why it is to be presumed that this Minerve device never came into use. In addition, it is pointed out that a ratio as low as 12 to 1 is necessary to meet common conditions, and that, if the Minerve was built so as to give that ratio, and with the smallest practicable driving pinion, the driven gear must have such a radius that the gear

[2] "Public attention is focusing upon one car, and especially upon a principle in that car which distinguishes it from other cars. This car is, as you will surmise, the Cadillac; and the principle is its two-speed direct drive axle. Partly because of that principle, the Cadillac rides differently, and, it is said more luxuriously than most other cars. * * * The qualities which won the Dewar Trophy * * * are peculiar in the Cadillac. They flow out of Cadillac standardization, Cadillac methods, Cadillac ideals, and the Cadillac two-speed direct drive axle."

case would drag on the ground. Other defects are pointed out, which, it is said, would prevent practical and successful use; but it is not clear just how far such defects may be due to an imperfect drawing [3] or might be remedied by fairly skillful construction.

Defendant says if we throw away either the outer two or the inner two of the Minerve gear pairs, we have the Cadillac construction. This is, superficially and broadly, true; but more exact comparison shows three elements specified in the combination of Austin's claim 10 and found in defendant's structure, which are not in the Minerve. These are: (1) In Austin and in the Cadillac, the outer driven gear is seated directly on the differential housing. This gives a broad and rigid support, and it is carried into the claim by the words "secured to said housing." In Minerve, the gear nearest the part which may be the housing it at a considerable distance away, and there is no direct connection. The axle sleeve on which the gear frame is centrally mounted does by its revolution ultimately drive the axle and the differential gears; but the patent does not indicate how this is done, nor indeed is it clear that the drawing shows any revolving differential housing. The gear is thus unsupported for the greater part of its diameter, and more free to vibrate. We cannot be sure that it is "secured to the differential housing" within Austin's contemplation. (2) In Austin and in the Cadillac, the inner driven gear is "nested" in the outer. Even in the rather narrow sense that the inner gear ring is partly withdrawn inside of the plane of the face of the outer ring, and that the outer furnishes a rigidity of support to the inner, either by rather direct contact, as in Austin, or because the supporting frame of one merges into that of the other, as in the Cadillac; in no such sense are the Minerve gears "nested." They lie in wholly independent planes, and neither as to 1 and 2 or 3 and 4 does the outer furnish any support to the inner. Their only connection is through their common axis. (3) In Austin, as in the Cadillac, the rear end of the continuous propeller shaft rests in a bearing carried by the rear axle structure, thus tending to maintain the perfect respective positioning of the driving pinions and driven gears. This is made an element of the claim by the words "a bearing for the inner end" of the shaft. In Minerve, the outer pinion sleeve is carried in a fixed bearing, each sleeve closely surrounds and supports the one next within it, and when the shaft and inner sleeve are not clutched together, the shaft finds its bearing therein. The differences between carrying the shaft end in this complex structure, with four bearing surfaces between it and the frame, and carrying it directly in the frame are obvious and may be important.

It is not necessary to decide just how closely Austin should be limited to his form of each one of these three elements. It is enough to say that, as to each, he departs from Minerve to some extent, and that, to the full extent of his departure, the Cadillac does the same, both as to each of these three and as to the combination of the three with each other, and as to the combination of the three with all the

[3] For example, the clutch shown in the drawing could not be passed from one sleeve to the next without engaging both at once. This at least indicates that the drawing was not made from a working device.

other named elements of the claim. This complete construction was taken from Austin, and it is not, in its entirety, to be found elsewhere.

In addition to these differences between Minerve and Austin, the two were intended for use in different environments. Austin used his patented invention in connection with the ordinary gear box, whereby two speeds upon the axle became sufficient, and he became independent of any attempt to get his low speed at the axle; the Minerve undertook to dispense with the ordinary gear box and provide at the axle all necessary transmissions, and thereby met new problems, perhaps practically insuperable. It is true that the gear box transmission is not an element of claim 10, and cannot be read in; but nevertheless, in deciding whether Austin invented anything over the Minerve builder, it is quite appropriate to observe that the two were working under different surroundings and upon different operative theories.

Upon the whole, we are well convinced that Austin's successful machine, as specified in claim 10, involved invention, as compared with the Minerve—probably impractical—construction.

[3] It is true that each one of these missing elements can be found in some one of the prior patents; but this is not enough to negative invention. If the selection of elements from existing machines into a complete combination has, for the first time, produced, from a practical and commercial aspect, a new result, invention may well be predicated thereon; and if producing more of a woven fabric within a stated time was a "new result" within the meaning of this familiar rule (Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177), so must be the additional mileage per gallon of gasoline, the saving of wear and the additional ease of riding, all of which the Cadillac Company so strongly attributed to the two-speed axle.

We have said that claim 10 is characterized and distinguished from the other claims by the provision that the high-speed gear pair should be on the outside; and we are referred to patents (like Smith, No. 933,864, November 7, 1911) which are said to anticipate, excepting that they have the high-speed gear inside; and it is argued that there can be no invention in the mere reversal of the position between high and low, because this is all a matter of designing and proportioning the respective number of teeth in the pinion and gear. It is shown that upon prior structures of this general class, some had the high-speed pair outside and some inside, and we cannot doubt that the transposition of these pairs would, prima facie, seem to be within the expected skill of the gear designer; but questions of invention cannot be decided on such prima facie rules. The automobile probably presents, as never before, the problem of adapting rather delicate mechanism and adjustments to the hardest kind of hard usage. Under such conditions, theoretical judgment in advance of practice is not convincing, and there is less room than in some other fields for safely assuming that a particular change in structure involves no invention. Certain it is that in an automobile structure of this type, and which carried the outer driving gear fixed upon a differential housing, and the inner "nested" therein, no one had put the higher gear pair outside. In the two or three instances which more or less respond to this de-

scription, the high had been on the inside. The very fact that there are distinct and great advantages in having the high on the outside —a fact not only apparent when it is pointed out, but confessed by defendant, which adopted this form in preference to the other—and that several successive inventors failed to notice it and adhered to the other form, tends to show that the substitution was not obvious. That there were likely to be such difficulties about the substitution as to cause mechanics to think it was impracticable in an automobile is illustrated by what defendant's experts have done. From the basis of their commercial device, they have made a drawing showing the low speed outside, to demonstrate how simple the transposition is, yet they have been compelled to reduce the diameter of their inner gear so considerably as materially to affect the mechanical problems involved, and the inner pinion cannot be inserted or removed by sliding forward along the shaft. They have also, for the same purpose, designed a transposition of high and low as applied to the Dewald French patent of 1905, but in the end, they have a high ratio of about 1 to 1, and a low of about 1⅓ to 1, a result hardly worth the trouble, because the low is higher than the highest high used outside of a racing car. True, this lack of much difference between the two ratios results from a faithful transposition of what Dewald shows, and to get the necessary practical ratios would require reorganizing his structure; but this confirms the impression that it never proved worth building. Questions of size, weight, accessibility, lubrication, suitability for very high-speed revolution, etc., complicate what, in other situations, might be simple. After a considerable period of discussion with Austin, and experimenting with his device, defendant's engineers seemed to be impressed with this feature—high speed outside—as its chief merit. Other more or less similar devices with low speed outside were open to defendant; one such patent it owned, and yet it adopted and persisted in using Austin's precise form of combination, so far as concerns this feature. Under such circumstances, it cannot safely be said that the transposition of the gear ratios, with all the changes which were involved and which followed, was a thing which, in its combined conception and execution, involved nothing but skill. We think this conclusion more consonant than the other would be with the view of invention taken by the Supreme Court in (e. g.) Expanded Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034, and Diamond Co. v. Consolidated Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, and by this court in (e. g.) Schiebel Co. v. Clark, 217 Fed. 760, 133 C. C. A. 490, and Davis v. New Departure Co., 217 Fed. 775, 133 C. C. A. 505. Mast v. Stover, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, is not inconsistent; the change in gearing there considered involved none of the complications we have recited.

[4] There is no doubt that Austin at first regarded his relative arrangement of gear members and clutches as characteristic of his invention, both according to the specification and to the claims which were allowed on his original application. The idea of one fixed member and one clutch member upon the shaft and one of each upon the axle was inherent in all these. The defendant's device does not in-

fringe those claims. While the first specification notices the disposition of the gears with the high outside, this was urged as desirable because of an advantage which was due to his form of clutch and not due to his relative gear ratios; but after all this had taken place, Austin took further counsel, abandoned his application, and filed another one in renewal; and upon his new application he obtained the issue of claim 10. We see in this situation no estoppel against giving to claim 10 the full breadth implied by a natural construction of its words. Estoppel comes from accepting a narrower claim which the Patent Office makes the condition of the grant. Here, the narrow claims, which would not have reached the defendant's structure, were not accepted as the full measure of the grant, but were refused, and the applicant deliberately insisted upon and secured the claims which he thought appropriate.

Very likely the necessity for these new claims was brought to Austin's attention by his dealings with defendant, and by observing defendant's later structure. Speaking now of the additional character given to the combination by having the high outside, if this feature had not been embodied in Austin's structure, but had later been added by defendant, and Austin had then secured a generic claim reaching to the form which he had not made, we might well apply what Judge Wallace said in Westinghouse Co. v. New York Co. (C. C.) 87 Fed. 882, 884, and hold that he was endeavoring to gather unto himself an invention which the defendant had made; but that is not the case here. This feature of Austin's device was completely present in the structure which he brought to defendant. His original failure to claim it when not used in combination with his peculiar clutch ought not, on any principle, to prevent him from claiming it as soon as the propriety of doing so occurred to him. Although during the negotiations Austin furnished defendant with copies of his claims as they stood, we cannot see that defendant was misled. The fact that this feature—high outside—was regarded by Austin as his chief advance, and that he so presented it to defendant clearly appears, as does the further fact that Austin then notified defendant that he had employed other advisers, and that he expected to be able to get better claims. A defendant who proceeds to manufacture under such circumstances has nothing to complain of if the applicant succeeds in getting better claims and if the courts sustain them.

We do not imply that defendant is to be condemned as having acted unfairly. Although the Austin device convinced defendant that the two-speed axle was or could be made practical, it had a perfect right to manufacture such an axle, if it did not infringe upon the patents of Austin or any one else. It kept away from Austin's claims, as they had so far been formulated. In view of the state of the art, as defendant then examined it, its officers may well have been advised and have believed that Austin could not procure any patent which would cover their form. The question of patentability is too close to justify assuming that there would be any bad faith in such belief. Each party endeavored to get the rights and advantages which the patent laws secured to him as an inventor or a manufacturer; and the ques-

tions of patentability and infringement we have intended to decide upon their merits, and without assuming that either party acted unfairly toward the other.

The decree below is affirmed, except as to claims 13 and 14, withdrawn after appeal. The relative character of these claims and claims 9–12 and the history of the withdrawal do not justify awarding, on this account, costs of the appeal against Austin; neither party will recover costs in this court. A new decree should be entered upon claims 9–12 only.

BROWN & SHARPE MFG. CO. v. L. S. STARRETT CO.

(District Court, D. Massachusetts. November 13, 1912.)

No. 77.

PATENTS ⇐328—VALIDITY AND INFRINGEMENTS—MICROMETER CALIPERS.

The Spalding patent, No. 717,296, for micrometer calipers, having especial reference to an improved device for clamping the spindle, discloses invention, even though the general form of clutch or locking means used was known and used in other arts, taking into consideration the fact that in adapting it to calipers it was essential to provide against the least disturbance of the position of the spindle, and the claims while narrow and specific are entitled to a reasonable range of equivalents. Also, *held* infringed.

In Equity. Suit by the Brown & Sharpe Manufacturing Company against the L. S. Starrett Company. On final hearing. Decree for complainant.

Wilmarth H. Thurston, of Providence, R. I., for plaintiff.
Robert W. Hardie, of New York City, for defendant.

BROWN, District Judge. The bill charges infringement of letters patent No. 717,296, December 30, 1902, to F. Spalding, assignor to Brown & Sharpe Manufacturing Company, for micrometer calipers. The specification states:

"This invention has reference to an improved device for clamping the spindle of a micrometer caliper or gauge.

"Micrometer calipers or gauges consist usually of a frame having an anvil at one end and a spindle partly screw-threaded and in screw-thread engagement with the opposite end. These calipers or gauges are used in the arts for the accurate measurement of parts and are usually constructed to determine microscopic differences within one $^1/_{1000}$ of an inch. When the accurate measurement has been taken by a micrometer caliper or gauge, it is desirable to lock the spindle, so as to retain the exact position of the same. To lock the spindle and maintain the same in the position when the measurement is taken, it is important that the spindle should not be rotated or moved longitudinally in the slightest degree, so that the measurement taken will not be altered.

"The invention consists in the peculiar and novel construction of a split-spring clamping-ring, and means for actuating the same, as will be more fully set forth hereinafter."

The means for locking the spindle consist of a split clamping-ring arranged to surround the spindle, the clamping-ring having an inclined

or tangential surface; an actuating-ring surrounding the clamping-ring; a roller interposed between the split-ring and the actuating-ring and located in the space formed by the inclined or tangential surface; and a projection upon the split-ring which engages a slot in a portion of the frame which forms the bearing of the spindle. The projection and slot prevent the split-ring from turning with the actuating-ring.

These parts are placed in a transverse slot formed in the micrometer frame or spindle bearing.

The specification states:

"The split-ring b may now be placed into the actuating-ring c, the member b^5 in the wedge-shaped cavity between the split-ring and the actuating-ring, as is shown in Fig. 3, and the assembled parts may be slid into the slot a^7, with the projection b^1 in the seat c^2. The spindle is now placed in position, extending through the split-ring, which ring is held against rotation."

The spindle may be locked by rotating the actuating-ring, thereby moving the roller toward the split-ring, to contract the ring and clamp it on the spindle. It may be released by the reverse movement of the actuating-ring.

The complainant contends that the advantage of this construction is the effective locking of the spindle without any disturbance of its adjusted position, and the further advantage of ease of assembling the parts and of removing the same, if desired.

The claims in suit are:

"1. The combination with the spindle of a micrometer caliper, the bearing of the spindle, a transverse slot in the bearing and a cavity in the wall of the bearing, of a split-ring, a projection on the split-ring, a tangential plane on the split-ring, an actuating-ring inclosing the split-ring, and a member operated by the actuating-ring and operating the split-ring, as described.

"2. In a micrometer caliper, the combination with the frame of the caliper, the anvil, the spindle, the bearing for the spindle, and the micrometer mechanism, of the slot a^7, the seat c^2 in the wall of one side of the slot, the split-ring b, the projection b^1 on one face of the split-ring, the plane b^2 and shoulder b^4, on the split-ring, the member b^5, and the actuating-ring c^1, as described."

The defendant contends that the device shown in the patent is lacking in patentable novelty, and shows that the prior art contains a number of patents showing micrometer calipers or gauges with means for locking the adjusting screw or spindle in position. The patents cited are: Starrett, No. 433,311; Spalding, Nos. 557,445 and 645,838; Bellows, Nos. 456,875 and 612,601; Wells, No. 641,173.

A transverse slot in the frame of a miscrometer caliper to receive an actuating-ring, for controlling a locking mechanism, is shown in patents to Bellows, No. 612,601, and to Wells, No. 641,173. There is also evidence that this feature of construction was shown in calipers made by Starrett in 1898. In none of these patents, however, nor in the Starrett micrometer caliper in evidence, is found the clamping or locking means of the patent in suit. The defendant contends, however, that brakes and clutches, with a split-ring with tangential surfaces with rollers or balls, were in use, and that these clutches are similar in construction and principle to that of the patent in suit.

Special reliance is placed upon the patent No. 613,619, November 1, 1898, to F. L. Clapp, for back-pedaling brake.

The principal proposition of the defendant is that, micrometer gauges having been used with some form of clutch for locking an adjusting screw in position, there was no invention in substituting one old form of clutch in such connection in place of a clutch heretofore used on micrometer gauges. It is argued that the idea of applying a clutch to a multiplicity of objects is inherent in the very nature of a clutch. This argument assumes that only the ordinary considerations applicable to clutches or brakes in general are applicable to the problem of the patent in suit. The patents of the prior art show a number of attempts at a solution of the problem of providing an efficient and convenient locking device for a micrometer caliper. In the general art of clutches or brakes there existed the problem of firmly engaging a shaft, but it does not appear from the defendant's showing in respect to the general art of clutches that there was involved the problem of locking a spindle securely without the possibility of minute disturbances of the adjustment of the spindle. In micrometer calipers used for accurate measurement of parts and constructed to determine microscopic differences within $^1/_{1000}$ of an inch, the problem would seem to be of a different nature from that ordinarily involved in applying a clutch. If therefore it could be fairly said that in general principle, and considered merely as clutches, the device of the patent in suit and that of Clapp were similar, there would still remain the question whether there was room for invention in adapting a clutch operating upon this principle to the specific purpose of use in a delicate measuring instrument and to the improvement of micrometer calipers either in respect to the feature of locking the spindle without disturbance, or in respect to convenience of manufacture.

The patents of the prior art relating to micrometer calipers indicate clearly the need for locking means which shall prevent disturbance of the spindle. None of them shows the use in this specific branch of art of the split-ring with its tangential surface, roller, and actuating-ring. There is nothing in the Clapp patent to suggest that in this somewhat complicated structure is a form of clutch which is better adapted than other clutches for the secure locking of a micrometer spindle and for convenient assemblage with an actuating-ring and a micrometer frame.

The argument of the defendant on the question of invention seems erroneous in ignoring the specific requirements of the art of manufacturing precise instruments like that with which the patent is concerned.

The defendant also raises a defense based upon the file wrapper. This defense is in effect that the claims in suit are to have a very limited construction by reason of the rejection of other claims. I have carefully considered the contention of the defendant upon this point, but am of the opinion that the complainant is not in this case reasserting claims rejected by the Patent Office, but stands upon narrower and more specific claims.

The defendant's infringing devices are shown in patent to Starrett, No. 806,594, December 5, 1905; also, in patent to Starrett, No. 873,626, December 10, 1907; and in patent to Starrett, No. 928,889, July 20, 1909.

The Starrett patent, No. 806,594, shows an actuating-ring in a transverse slot, inclosing a clamping-ring, or, as it is called in Starrett's specification, "an annular spring tongue." This is formed from a cylindrical bushing by sawing two deep parallel transverse slots which nearly sever the bushing. The portion of the bushing between the slots substantially resembles the complainant's split-ring, being so constructed as to afford a recess for a roller and to yield to pressure when, by a movement of the actuating-ring, the roller is pressed upon it, thus clamping the spindle. This "ring-shaped tongue" is held against rotation by frictional engagement of the ends of the bushing with a bore of the micrometer frame.

A very slight movement of the actuating-ring, "even the twenty-fifth part of a revolution, moves the roller forward toward the shallower part of the recess with a wedging action, which springs that part of the tongue inwardly and locks the spindle firmly."

This patent therefore seems to put emphasis upon the efficiency of special locking means which is substantially that of the patent in suit.

While the means for holding the ring against rotation is different, I am of the opinion that there is nothing in the file wrapper, nor in the general principles of law relating to the interpretation of claims, which prevents the complainant from claiming a reasonable range of equivalents in respect to the means of holding the ring against rotation. The invention lay in the general combination of coacting parts, rather than in the specific means for holding the ring against rotation. A mere transposition of a slot and a projection, or the provision of two projections and two recesses for these projections, is merely a variation in the way of performing the single function of holding the ring against rotation. This does not touch the co-operative action of the parts which lock the spindle. A construction of claim 1 which can be thus avoided is, in my opinion, too narrow.

The device of this patent, however, does not seem to embody the particular advantages in the assembling of the parts which is characteristic of complainant's device, although in other respects it is, in my opinion, an infringement.

The Starrett patents 873,626 and 928,889 present even a closer resemblance to the patent in suit than the Starrett patent 806,594. What has been said about the reversal or variation of means for holding the ring against rotation is specially applicable to these patents. These patents also show an appropriation of the special features of the patent in suit which give particular advantages in the assemblage of parts.

The differences in construction which the defendant points out may possess some special advantages, but this does not justify the defendant in appropriating the substance of the complainant's patent. An improver does not acquire title to the invention of another upon which he makes improvements.

The defendant comments upon the absence of evidence that the patented device has been used by the trade, and suggests that the court should infer from the absence of proof on this point a lack of commercial success, and that this should weigh against the complainant. Such an inference, however, would be entirely unwarranted in view of the

stipulation that "complainant's exhibit, complainant's micrometer" is a specimen of the micrometer calipers of commerce as manufactured and sold by the complainant herein under the patent in suit.

It appears that the defendant was duly notified of complainant's contention that there was infringement, in January, 1908, and pointed out, as the specific difference between the device of the patent in suit and of the Starrett patent, No. 873,626, "there is no seat in the slot in the wall of our combination, and no projection of the split-ring in our patent." This seems too narrow a test of the question of the substantial similarity of the devices.

I am of the opinion that the patent in suit is valid, and that the defendant infringes both claims 1 and 2. A draft decree for the complainant may be presented accordingly.

BROWN & SHARPE MFG. CO. v. L. S. STARRETT CO.

(District Court, D. Massachusetts. July 29, 1915.)

No. 77.

1. PATENTS ⟸328—INFRINGEMENT—MICROMETER CALIPERS.
   The Spalding patent, No. 717,296, for micrometer calipers, relating especially to an improved device for clamping the spindle, *held* infringed by the device of the Starrett patent, No. 1,098,694.
2. PATENTS ⟸243—INFRINGEMENT—OMISSION OF PARTS IN MECHANICAL DEVICE.
   Infringement is not avoided by eliminating a separate element of a patented combination, where its function is transferred to one of the remaining elements by adding thereto an integral part specially designed to perform the function of the omitted element in substantially the same way.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 382-384; Dec. Dig. ⟸243.]

In Equity. Suit by the Brown & Sharpe Manufacturing Company against L. S. Starrett Company. On final hearing. Decree for complainant.

Wilmarth H. Thurston, of Providence, R. I., for complainant.
Ellis Spear, Jr., of Boston, Mass., for defendant.

BROWN, District Judge. By supplemental bill of complaint infringement is charged of letters patent No. 717,296, December 30, 1902, to Spalding, for micrometer calipers, by the manufacture and sale by the defendant of micrometer calipers constructed according to letters patent to Starrett No. 1,098,694, June 2, 1914. The subject-matter of the patent in suit is referred to in the opinions of this court dated November 13, 1912 (225 Fed. 993), and of the Circuit Court of Appeals in L. S. Starrett Co. v. Brown & Sharpe Mfg. Co., 208 Fed. 887, 126 C. C. A. 47.

The previous devices manufactured by the defendant, and which have been held to infringe the patent in suit, are described in letters

patent No. 806,594, December 5, 1905; No. 873,626, December 10, 1907; No. 928,889, July 20, 1909. Intermediate between these patents for devices which have been held infringements and the patent under which the defendant's device now in question in the present case is constructed, is patent to Starrett No. 1,006,508, October 24, 1911, which, so far as appears, has not been in suit and is not directly involved in this suit, but only as disclosing an intermediate construction tending to show the development of the defendant's device now complained of.

[1] The complainant's argument that the difference between the three-part locking device of the patent in suit and the two-part locking device of the defendant involves a mere change of form rather than of substance seems to be fortified and well illustrated by this intermediate patent.

In the defendant's device the means for locking the spindle consists of an actuating-ring inclosing a split-ring. The split-ring may be placed inside of the actuating-ring and both slid into a transverse slot formed in the micrometer frame—in this respect resembling the device of the patent in suit.

The features which now require special consideration are certain elements of the combinations claimed:

"A split-ring, a projection on the split-ring, a tangential plane on the split-ring, an actuating-ring inclosing the split-ring, and a member operated by the actuating-ring and operating the split-ring, as described."

The principal question is whether the defendant's device contains the last element—"a member operated by the actuating-ring and operating the split-ring."

In the Spalding patent this member was a roller—a separate and independent member. Rotation of the actuating-ring in turn rotated the roller and rolled it over a tangential plane on the split-ring toward the split, thus contracting the ring and clamping it on the spindle.

The defendant's split-ring is provided with an outer surface in the form of a cam and referred to as an involute surface. The outer surface of the split-ring is eccentric to its inner surface, thus making an inclined plane of the outer surface of the split-ring. The operating ring has a correspondingly formed eccentric or involute inner surface. When the operating ring is applied over the split-ring with the shoulder *19'* of the operating ring adjacent to the shoulder *16'* of the split-ring, the thickest part of the operating ring lies over the thinnest part of the inclosed split-ring, giving the maximum accommodation for the split-ring in the operating ring. The mode of operation for clamping the spindle is as follows:

The operating ring may be so turned that its inner surface will move towards the gradually thickening portion of the inner ring, and will thus crowd the inner ring inward and clamp it upon the spindle. In the Spalding device the force exerted by the revolution of the operating ring was exerted through the roller, which, when wedged into the upper portion of the space between the outer ring and the inclined plane of the inner ring, formed a projection that, by pressure against

the split-ring, contracted it. It will be seen from the intermediate Starrett Patent, No. 1,006,508, October 24, 1911, that the provision of a fixed seat for a roller, as shown in Fig. 3, or of a fixed stud in the operating ring, as shown in Fig. 5, instead of a roller seated in a slot of said operating ring, would be so slight a change from the device of the Starrett patent that infringement would not be avoided, since there would still be a separate member operated by the actuating-ring and operating the split-ring.

Merely to deprive the roller of its movement along the inclined plane by giving it a fixed location while retaining it for the performance of its function of compressing the split-ring would avoid neither the letter of claim 1 nor substantially change the combination. The claim is not limited to a rotary member, and the Starrett intermediate patent shows that to so limit it would be unjust.

It is the complainant's contention that the defendant's device has not eliminated the element described by Spalding as "a member operated by the actuating-ring and operating the split-ring." This question cannot be answered by considering whether or not there is a member entirely separate, as in the Spalding patent; for a mechanically distinct member of a combination may well be a part permanently attached to another part. The teeth of a circular saw are members, operated by the wheel to which they are attached, and operating upon the material to be sawed.

In considering whether we have a member, we inquire if there is a part specially formed for a special function. Whether it is attached to another part, or whether two members may be made out of a single piece of material, is often an unimportant consideration. The members of a machine, as of a man, may have permanent attachment.

The modification whereby Starrett's roller as a separate part has been eliminated consisted in changes in the form both of the split-ring and of the actuating-ring. The split-ring of Spalding was provided with a tangential plane or straight cam surface. In the defendant's device it is provided with a curved cam surface. Mr. Burlingame, complainant's expert, testifies that this is an immaterial variation, and that one form of cam surface is the mechanical equivalent of the other. He points out that Figs. 2 and 4 of Starrett's patent, No. 928,889, show a cam surface which is curved. The inner involute or cam surface of the actuating-ring formed integral with it is an addition for the purpose of acting upon and compressing the split-ring. The actuating-ring with the inner cam surface corresponds to the actuating-ring and fixed roller of the intermediate Starrett patent, No. 1,006,508. Mr. Burlingame is of the opinion that the one construction is the mechanical equivalent of the other.

[2] Mr. Livermore, defendant's expert, lays considerable stress upon the difference between a three-part and a two-part construction. It does not seem, however, that in this case the mere elimination of a separate part is of consequence if its function is transferred to a corresponding member newly added and specially designed to perform the same function in substantially the same way. The complainant cites, upon this point: Enterprise Mfg. Co. v. Shakespeare

Co., 220 Fed. 304, 309, — C. C. A. —; Pedersen v. Dundon, 220 Fed. 309, 311, — C. C. A. —; Bundy Mfg. Co. v. Detroit Co., 94 Fed. 524, 538, 36 C. C. A. 375; Standard Caster Co. v. Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109.

The testimony of complainant's expert to the effect that defendant has not eliminated a member which transforms the rotary movement of the actuating-ring into pressure upon the clamping-ring, but has merely made it an integral part of the clamping-ring, seems reasonable. This involved a change of form both of this member and of the split-ring; but the direct clamping action (resulting from the location of the actuating-ring around the clamping ring or split-ring, the use of an inclined plane on the split-ring, and a co-operating member operated by the actuating-ring and operating upon the split-ring), which seems not to have been attained by the devices of the prior art, is attained in defendant's device, as well as in complainant's. The importance of this is stated by Starrett in his patent for the defendant's structure:

"It is of the utmost importance that the spindle be held or clamped by means which shall impart no rotative tendency by the clamping motion."

The course of development of defendant's device seems to have been, first, to eliminate the forward rotation of the roller upon the inclined plane, and to fix its location. This was no substantial change in principle, nor was it a material change when a bolt head was attached to the actuating-ring to co-operate with an inclined plane on the split-ring.

The next step was to modify the form of the inclined plane on the split-ring and to add the operating member to the actuating-ring as an integral part of it.

It is contended, although it is in dispute as matter of fact, that the defendant's device is more positive in action than complainant's. This disputed point is immaterial. Improvement, if shown, would not justify infringement.

Though infringement is cleverly disguised, the disguise is made apparent by the intermediate patent to Starrett, No. 1,006,508, and the testimony of complainant's expert justifies a finding of infringement.

The decree will be for the complainant.

In re HEYMAN.

(District Court, E. D. Pennsylvania. March 22, 1915.)

No. 4436.

1. BANKRUPTCY ⇐136—COLLECTION OF ASSETS—NONCOMPLIANCE WITH ORDERS—PUNISHMENT.

A noncompliance on the part of a bankrupt with an order requiring her to turn over to her trustee goods found to have been concealed by her does not necessarily require an order for an attachment against her, since

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the order to turn over the goods relates to, and may be wholly based upon, the facts existing at the time of the petition in bankruptcy, and may rest upon presumptions arising out of what the bankrupt has done, while an attachment for contempt must rest on conditions at the time of the commitment, and upon a finding of present contumacy, which must be based upon proof, and not on presumptive probabilities.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂=136.]

2. BANKRUPTCY ⊂=136—COLLECTION OF ASSETS—NONCOMPLIANCE WITH ORDERS—PUNISHMENT.

Where the fact of contumacy on the part of a bankrupt in failing to comply with an order requiring her to turn over to her trustee goods concealed by her is clear, it is the court's duty to grant an attachment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂=136.]

3. BANKRUPTCY ⊂=136—COLLECTION OF ASSETS—NONCOMPLIANCE WITH ORDERS—PUNISHMENT.

A bankrupt should not be subjected to an indefinite term of imprisonment under an attachment for noncompliance with an order requiring her to turn over goods found to have been concealed by her, upon a finding of a seriously controverted fact reached without the sanction and support of the verdict of a jury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂=136.]

In Bankruptcy. In the matter of Ruth Heyman, individually and trading as the Heyman Company, bankrupt. On motion for reargument of rule for attachment. Motion denied.

See, also, 214 Fed. 491.

Alfred T. Steinmetz, J. Howard Reber, and Abraham M. Beitler, all of Philadelphia, Pa., for trustee.

Joseph Singer, of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. This motion was heard because the court recognized it to be prompted by the best of motives. The hearing took, as was natural, the form of a reargument of the whole question. The respect which every court feels for the opinion of the bar calls for a fuller statement of the reasons on which the refusal of an attachment in this case was based. Special value is given to the views expressed by the eminent counsel by whom the argument is voiced. The motion for a reargument is, however, based upon a misapprehension. This flows from a failure to read the judgment rendered, as every judgment should be read, in the light of the facts of the particular case in which the judgment is pronounced.

[1] An order was made on this bankrupt to turn over to her trustee goods to the concealment of which she was found to have been a party. Anticipating, however, the very situation which has now arisen, the court, in making the order, called attention to the distinction between making such an order and issuing an attachment for noncompliance. For obvious reasons, the court declined at that time to discuss the facts, contenting itself with confirming the report of the referee. The referee, in his findings and in the order recommended, was evidently and properly guided by the ruling made by Judge McPherson, then

sitting in the District Court, in the case of, In re Epstein, 206 Fed. 568, and Epstein v. Steinfield, 210 Fed. 236, 127 C. C. A. 54. The referee, having followed, as he was bound to do, the lines thus laid down for his guidance, could not be convicted of error, and the report was in consequence confirmed. It by no means follows, however, that because the order was made an attachment should issue for noncompliance. There is, it is true, a narrow path of logic which leads from order to commitment. The order has been made. Having been made, it should be obeyed. Noncompliance, therefore, merits punishment.

To so argue, however, ignores the distinction which, whatever may be the rule in other jurisdictions, Judge McPherson declares to prevail in the Third Circuit. An order to pay relates to, and may be wholly based upon the antecedent condition of facts existing at, the time of the petition in bankruptcy. The fact then found Judge McPherson calls the first fact. An attachment for contempt must, however, rest upon conditions at the time of commitment. The fact then found he calls the second fact. The one may rest upon presumptions arising out of what the bankrupt has done. The other is justified only by the finding of a present mental attitude. In a word—contumacy. A like distinction governs the practice in making these different findings. The referee receives the evidence and hears the testimony. From this he makes his findings and recommendation of an order. On review the court applies the well-known rule for determining the facts. This the court can with safety do. The finding that the bankrupt had the property at one time may carry the implication that he still has it. This is at most, however, a mere presumption, and may not only be overcome by proof, but its weight may be destroyed by the very evidence from which the first fact is found. An order which strips a man of his liberty cannot safely be based upon presumptive probabilities. The court which makes the order must take upon its conscience to find this second fact, and base the commitment on the finding. The distinction was applied in and is illustrated by the case of In re Krichevsky (D. C.) 219 Fed. 347.

There is involved, also, a rule of policy. This is disclosed by the Epstein Case. Trustees, creditors, and others concerned may well take the Epstein Case for their guidance. Armed with proof of the first fact, they may ask for an order to pay over, and make the best they can of this or any remedy in the nature of civil process within their reach. They may resort to the punitive provisions of the Criminal Code. Sentence then follows the findings of a jury. If they ask for a commitment otherwise, the second fact must be in the case. The mere existence of the first order calls for a commitment only when the proof of the first fact carries with it a finding of the second. A commitment based on the first fact without the second is nothing less than imprisonment for debt. This was truthfully said to be "its practical side, and the only practical side it had."

[2, 3] Where the fact of contumacy is clear, the duty laid upon the court is inexorable. It is not made clear by the mere fact that the first order has been made. The fact for the purposes of an attachment is not established by the findings of a referee. Since this case arose,

provision has been made by Act Oct. 15, 1914, c. 321, § 22, 38 Stat. 739, for the determination by a jury of the facts in certain contempt proceedings. Such a finding carries a sanction in cases involving personal liberty which no other finding does. It was this thought which introduced the qualification into the conclusion before reached. It will be observed that the statement was expressly confined to the special features of this case, wherein we have only the referee's finding of the first fact and the court's order thereon. To this conclusion we still adhere, that under all the features of this case this bankrupt—

"should not be subjected to an indefinite term of imprisonment based upon a finding of a seriously controverted fact reached without the sanction and support of the verdict of a jury."

We feel called upon to add that this had sole reference to the inability of the court to find the second fact against the bankrupt, and to the argument addressed to us that we should find it from the referee's report and the former order of the court, which was expressly based upon a finding of the first fact. We wish further to add, because of comments in which the kindness of heart of counsel prompted them to indulge, that considerations of sex and the maternal responsibilities of this bankrupt, while they have affected, have not influenced, the court. These spring from the quality of mercy, not that of justice.

The order discharging the rule for an attachment will stand.

UNITED STATES v. JIN FUEY MOY.

(District Court, W. D. Pennsylvania. May 12, 1915.)

No. 6.

CONSPIRACY ⇐43—INDICTMENT—SUFFICIENCY.

Under Revenue Act Dec. 17, 1914, c. 1, 38 Stat. 785, § 1, requiring all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium to register and pay an annual tax, and making it unlawful for any person, so required to register, to do any such act with opium without having registered and paid the tax; section 2, making it unlawful for any person to sell, barter, exchange, or give away the drug, except on an order, in a prescribed form, of the person receiving it, with an exception in favor of the dispensing of the drug to a patient by a physician registered under the act, and by a dealer to a consumer on the prescription of a physician so registered; and section 8, declaring it unlawful for any "person" not registered under the act, and who has not paid said tax, to have in his possession any of said drug, and declaring such possession presumptive evidence of a violation of said sections 8 and 1, with an exception in favor of possession of any of the drug which has been prescribed in good faith by a physician so registered —an indictment charging defendant with conspiring with M. to have a dram of opium in the possession and under the control of M., and as the overt act charging that defendant issued to M. a prescription therefor, in bad faith, knowing it was not given for medical purposes, but for supplying one addicted to the use of opium, is insufficient; the unlawful thing charged consisting in having the drug in the possession and under the control of M., the word "person," in section 8, referring only to those required by the act to register and pay the tax, and it not being alleged

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

M. had the drug in his possession for any of the purposes for which he would have to register and pay the tax.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⊂⊃43.

For other definitions, see Words and Phrases, First and Second Series, Person.]

Jin Fuey Moy was indicted for conspiring to commit a crime under Act Dec. 17, 1914, c. 1, 38 Stat. 785. Indictment quashed.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa.

N. S. Williams and W. S. McDowell, both of Pittsburgh, Pa., for defendant.

THOMSON, District Judge. This is a revenue act; and unless it is such, save as to those provisions which relate to the transportation of drugs in interstate commerce, it would perhaps violate the provisions of the Constitution of the United States.

The first section of the act requires that all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register and pay an annual tax of $1 to the government. The act also makes it unlawful for any person required to register under the terms of the act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs, without having registered and paid the special tax. The second section makes it unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

The act definitely excepts from the provisions of section 2 the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice, and also to the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under the act. There are also other exceptions to the provisions of section 2.

The indictment in question is drawn under the provisions of section 8 of this act, and the particular portion of the section on which the government relies to sustain the illegality of the possession by Martin is as follows:

"That it shall be unlawful for any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section 1 of this act."

There is a provision in this section that the section shall not apply—

"to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this act."

Turning to the indictment itself, we see that the defendant is charged as follows: With unlawfully, willfully, knowingly, fraudulently, and feloniously conspiring and agreeing with Willie Martin and divers persons to the grand jurors unknown to commit an offense against the United States, to wit, to unlawfully and feloniously have in the possession and under the control of the said Willie Martin opium and compounds and salts and derivatives and preparations thereof, to wit, one dram of morphine sulphate. There are ten counts in the indictment, all charging the offense of conspiracy in the same general way. The overt act set forth in the indictment consists in issuing to the said Willie Martin a written prescription for one dram of morphine sulphate, and that he, the said defendant, did not issue said prescription in good faith; that is to say, that he then and there well knew that the morphine sulphate then and there prescribed was not given for medicinal purposes, but for the purpose of supplying one addicted to the use of opium and the compounds, salts, and derivatives and preparations thereof. The other overt acts in the indictment are of the same general character.

The unlawful act, therefore, charged against the defendant, is not the improper or unlawful dispensing of a drug, whether in good or bad faith, but consists in having in the possession and under the control of Martin certain drugs. The indictment, therefore, cannot be sustained, unless the having in the possession and under the control of Martin of certain drugs is an unlawful thing and a violation of the act of Congress.

In reading the eighth section in connection with the remaining sections of the act of Congress, when it provides that it shall be unlawful for any person not registered under the provisions of this act to have in his possession certain drugs, I think that the word "person" should be held to refer to the persons with whom the act of Congress is dealing; that is, the persons who are required to register and pay the special tax in order to import, produce, manufacture, deal in, dispense, sell, or distribute. And there is no allegation in the indictment that Martin had in his possession these drugs for any of these purposes.

The indictment, therefore, could not be sustained, unless the mere fact of having the drug in his possession is a violation of the law. If so, any person would be presumptively guilty and subject to indictment, and have the burden of proof cast upon him under this section, if he had any small amount of the prescribed drug in his possession, without any reference to the purpose for which it was to be used, whether legitimate or otherwise.

On account of the view which the court entertains as to the scope of the act of Congress, the motion to quash the indictment is sustained, and a general exception is noted to the government, and they will be given any special exception that may be desired.

HUNTER v. BAKER MOTOR VEHICLE CO. et al.

(District Court, N. D. New York. August 25, 1915.)

1. CORPORATIONS ⟸542—CORPORATE PROPERTY—TRUST FUND.
Assets of the corporation belong to it, and are held in trust for the carrying on of its business and the payment of its just debts and obligations the balance, if any, belonging to the stockholders; and such assets may be followed into the possession of any one who has obtained them through fraud or without consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. ⟸542.]

2. WORDS AND PHRASES—"WAIVER."
The doctrine of "waiver" implies knowledge, and is not applicable to one who has acted without full knowledge of all the facts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

3. CORPORATIONS ⟸542—DISSOLUTION—RIGHTS OF CREDITORS.
A creditor held a valid claim against a corporation which was dominated and controlled by another corporation. Subsequently the debtor corporation became insolvent, and all the creditors, except plaintiff, agreed that an extension of time for the payment of its debts might be granted. The receiver in bankruptcy was subsequently appointed, who applied for permission to sell the property of the corporation in bulk. In this agreement plaintiff was induced to join, in consideration of the execution of a contract and bond whereby his claim was to be paid in full out of the proceeds of the sale; the agreement being to pay him "such sum or sums as he may be entitled to in law out of the amount received by the receiver herein for distribution to creditors." *Held*, that the contract contemplated the payment of plaintiff's claim in full, and not a percentage pro rata with other creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. ⟸542.]

4. CORPORATIONS ⟸1—CORPORATE EXISTENCE—LEGAL ENTITY.
The fiction of corporate entity may be disregarded, where the corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1, 3–6; Dec. Dig. ⟸1.]

At Law. Action by Louis R. Hunter against the Baker Motor Vehicle Company and another to recover upon a bond. Judgment for plaintiff.

See, also, 190 Fed. 665.

This action was brought to recover upon a bond given by the defendants to the plaintiff, the amount of recovery to be determined by facts entirely outside anything stated in such bond as to amount, except as certain language of such bond confines the liability to a certain matter. The amount claimed is $8,329.75 and interest from January 4, 1908. It was tried before the court, a jury trial having been duly waived.

Elisha B. Powell, of Oswego, N. Y., for plaintiff.

Willard P. Jessup, of New York City (Warnick Kernan, of Utica, N. Y., of counsel), for defendants.

RAY, District Judge. The defendants concede that the plaintiff is entitled to recover the sum of $1,167.31, without interest, less the costs and disbursements of the defendants in this action, which they claim they are entitled to recover, on account of an offer of judgment made and served but rejected. The plaintiff claims that he is entitled to recover the sum of $8,329.75, with interest from January 4, 1908.

The Facts.

The defendant the Baker Motor Vehicle Company at all the times mentioned was, and now is, a corporation organized and existing under the laws of the state of Ohio. The defendant American Bonding Company was and is a corporation of the state of Maryland. The plaintiff was and is a citizen and resident of the state of New York. The C. B. Rice Company was a corporation organized and existing under the laws of the state of New York, and its certificate of incorporation was duly filed January 2, 1907, with the secretary of state and in New York county, N. Y., January 23, 1907. On the 16th day of August, 1907, the Baker Motor Vehicle Company of New York was duly organized and incorporated, and thereafter existed and still exists, under the laws of the state of New York, with its offices and principal place of business in the city of New York.

At that time the plaintiff, Louis R. Hunter, had a valid claim against said C. B. Rice Company, amounting to $9,204.85, subsequently, and January 4, 1908, adjudicated in an action in the Supreme Court of the state of New York then pending at $8,329.75, including costs. Just prior to the organization and incorporation of the said the Baker Motor Vehicle Company, of New York, the creditors of said C. B. Rice Company, except this plaintiff, who refused to sign and did not assent thereto, signed the following:

"Whereas, the C. B. Rice Company is insolvent, and it appears to the creditors for their best interest that the business should not be wound up, but should be continued, in order that as large a sum as possible may be received from the assets, and they are willing to grant an extension of time for that purpose; and

"Whereas, it is proposed to organize a new corporation, which will take over all the assets of the C. B. Rice Company, subject to its liabilities, and subject to a further provision that, in the event of liquidation, all debts contracted after August 1, 1907, by the C. B. Rice Company, or the new company to be organized, with creditors assenting to such extension, shall have preference over the debts existing at that time:

"Therefore, in consideration that a new corporation is organized to succeed to the business of the C. B. Rice Company and assume its obligations by a contract providing that, in the event of the liquidation and dissolution of the said new corporation, all debts contracted on or after August 1, 1907, with creditors assenting to such extension, shall have preference over debts existing at that date, the undersigned hereby agree that it will accept in payment of its claim against the C. B. Rice Company the note of the new corporation, payable one year after date, with interest at the rate of 6 per cent. per annum, for the amount of said claim, and in the event that the new corporation is managed without a loss for the said period of one year that it will extend the time of payment of said note for the further period of one year, the said notes to be subject to a provision that in the event of liquidation they will be subsequent in payment to all claims arising against the C. B. Rice Company or the new company after August 1, 1907, in favor of creditors assenting to such extension."

Thereupon the Baker Motor Vehicle Company of New York was organized and incorporated; its certificate being dated and acknowledged August 9, 1907. The defendant the Baker Motor Vehicle Company, the Ohio corporation, was a creditor of said C. B. Rice Company, and its claim was $58,313.08 out of a total indebtedness of $79,831.98, excluding this plaintiff, or of $89,036.83, including this plaintiff.

The actual assets of the C. B. Rice Company were then valued at $116.657.07, and in point of fact at a fair valuation were worth more than enough to pay all the just debts and obligations of the C. B. Rice Company. The assets of the C. B. Rice Company were actually entered on the minute book of the New York Baker Motor Vehicle Company at the value or worth of $116,657.07, and upon the same book were entered the liabilities as $79,831.98. Thereupon, without the consent of this plaintiff, the C. B. Rice Company, by bill of sale, etc., transferred all of its assets to this new corporation, the Baker Motor Vehicle Company of New York. This transfer was without consideration, other than that the Baker Motor Vehicle Company of New York assumed or agreed to assume and pay all the *liabilities* of the C. B. Rice Company, in the following language, viz.:

"The Baker Motor Vehicle Company of New York shall and by its acceptance hereof does assume and agree to pay off the liabilities of the C. B. Rice Company as the same appear upon the books (error and omissions excepted) on the 31st day of July, 1907."

"Error and omissions excepted" clearly refer to the words "as the same appear upon the books." This claim of this plaintiff was then being disputed and contested by the C. B. Rice Company.

The evidence establishes that this C. B. Rice Company was in fact organized and controlled by the Baker Motor Vehicle Company of Ohio, this defendant, and used by it as an instrumentality or agency for carrying on its own business under that name and selling its goods in the state of New York. The Rice Company was dominated by this defendant the Baker Motor Vehicle Company of Ohio, and really controlled by it.

The organization and incorporation of this new (or New York) Baker Motor Vehicle Company was brought about and caused intentionally by the Baker Motor Vehicle Company, the Ohio corporation, and those representing and acting for it by general authority, for the express purpose of taking over the assets of the C. B. Rice Company, and well knew what was done. The authorized capital stock of this New York Baker Motor Vehicle Company was $10,000, with only $500 paid in, and with this sum of $500 it commenced business, took over the assets of the C. B. Rice Company, and paid off all the creditors of that company except this plaintiff, and also a few who received money by its notes in the following form, viz.:

"New York, Aug. 16, '07.

$.....

"Aug. 1, 1908, the Baker Motor Vehicle Company of New York promises to pay ..... dollars with interest at the rate of six per cent. per annum, payable annually, to the order of ....., who by acceptance hereof agrees that, if the business of the Baker Motor Vehicle Company of New York is conducted without loss until August 1, 1908, the time of payment hereof will

be extended to August 1, 1909, and agrees further that the payment will be subsequent and deferred to all claims against either the C. B. Rice Company or the Baker Motor Vehicle Company of New York arising on or after August 1, 1907. Baker Motor Vehicle Company of New York,
"By ..... President."

These notes of the New York Baker Motor Vehicle Company were accepted by such creditors, except plaintiff, and except a few who received cash, in payment *of their claims* respectively. This transaction left the C. B. Rice Company without any property or assets of any kind or description, and without any business, and also left this plaintiff without any security, or any one to look to for the payment of his claim, except as he could sue, recover judgment, and pursue the assets of the C. B. Rice Company in the hands of this new corporation, the Baker Motor Vehicle Company of New York, or sue that corporation on its assumption of and agreement to assume and pay all the liabilities of the C. B. Rice Company, which he might do if such assumption and agreement included the claim of the plaintiff.

It is not necessary to go through this evidence in detail, it would take too long, but it appears that the Baker Motor Vehicle Company, the Ohio corporation, this defendant, had an agency in New York City for the sale of its products, automobiles and their parts, and having some trouble sent C. B. Rice, who had been in its employ for some time as salesman, to correct matters, which he successfully did. It then continued the business with Rice as manager, but he carried on the business in his own name. It was defendant's business in fact, and Rice had a salary and a percentage of the profits. This was continued up to the fall of 1906, when the New York office or business was found to be indebted to the home office or business in the sum of about $80,000 or $85,000. In December, 1906, the Rice Company was incorporated. Defendant company took all the stock issued, $65,000, in payment of the $65,000 due it from the business conducted by Rice, after a credit of $20,000 for goods returned had been given. This new company was organized with its general manager, Mr. White, its treasurer, Mr. Norton, and its secretary, Mr. Goss, on the board of directors, and these men, constituting a majority of such board, owned all of the stock. Thus controlling the board of directors, the business was run until January 23, 1907, when an agreement was made to sell Rice $15,000 of the stock for cash and $50,000 for his notes, but *retaining* the power to vote the stock. Thereupon two of the Ohio directors resigned, and Rice put in his wife and brother-in-law in their places; but as a condition defendant Baker Motor Vehicle Company took back the resignations of these two new directors. The defendant also gave Rice an agency contract, with the condition that, if the management was not satisfactory to them, they could cancel it at any time. It is seen that the control was really in the hands of the defendant company. Later a supplementary agreement was exacted by which the defendant company kept control until all the stock should be paid for. The Rice Company did business seven or eight months, when the defendant Baker Motor Vehicle Company asserted that the situation was not satisfactory, and thereupon canceled the agency contract, and thereby destroyed the business of the Rice Company, and

then declared it insolvent, etc. Then it was that the new (or New York) Baker Motor Vehicle Company was formed and the transfer made. Then the Rice Company voted to transfer all its property to the new company; Rice voting the 94 shares of stock, which the defendant company alone had the right to vote. The board of directors of this new company included the attorney for the defendant company, its general manager, and a Mr. Platt, a person absolutely in defendant company's interest and controlled by it. Mr. Platt had been made president of the Rice Company for about one week only, the last week of its existence, and he was made president of this new company. He was given this New York agency, which the defendant had asserted was worth and had valued at $10,000, without his giving or agreeing to give anything for it.

Then follows what has already been described. In October, 1908, bankruptcy proceedings were instituted against this new corporation. The suit of Mr. Hunter, this plaintiff, was on the day calendar for trial when that bankruptcy proceeding was commenced. An injunction order was obtained against Hunter. It was stated by Mr. Kelly, attorney for the defendant company, the Baker Motor Vehicle Company, that the transactions were such that this new or New York Company, the alleged bankrupt, "is or may be ultimately liable in case a judgment (by Hunter) is obtained against said C. B. Rice Company in said suit," referring to the suit of Mr. Hunter against that company. Mr. Kelly, the attorney for the defendant company, was active and in control in all these proceedings, and, having had a receiver appointed in the bankruptcy proceedings, applied for an order authorizing this receiver to sell all the assets of the alleged bankrupt company in bulk. This receiver had no title to the property. He could not sell without the consent of each and every creditor of the alleged bankrupt, including Hunter. The property was not perishable. Mr. Hunter opposed the proposed sale, and the matter ought to have ended then, so far as a sale was concerned, and would have ended then, but for the fact that Mr. Hunter was induced to consent to a sale in bulk on condition he received a bond for the payment of the amount of his claim. The following is the agreement made, viz.:

"It is hereby stipulated and agreed by and between the Baker Motor Vehicle Company (of Ohio) and Louis R. Hunter, who claims to be a creditor herein, that the order may be granted herein as prayed for by the Baker Motor Vehicle Company (of Ohio) upon the condition that said order provides that a bond in the sum of fifteen thousand ($15,000) dollars, with an approved surety company as surety, be given by the Baker Motor Vehicle Company (of Ohio) to Louis R. Hunter, which said bond shall be conditioned that the Baker Motor Vehicle Company (of Ohio) will pay to the said Louis R. Hunter such sum or sums as he may be entitled to in law out of the amount received by the receiver herein for distribution to creditors on said Louis R. Hunter's claim as set up in a certain suit pending in the Supreme Court of New York, County of Oswego, wherein Louis R. Hunter is plaintiff and Clarence B. Rice and the C. B. Rice Company are defendants.

"Dated New York, November 16, 1908.

"The Baker Motor Vehicle Company,
"By George H. Kelly, Its Attorney,
"Louis R. Hunter,
"By William D. Reed, His Attorney."

The bond given does not follow the terms of or recite the agreement, but its meaning is plain enough when read in connection with and in view of all the facts. So far as material here it reads as follows:

"The condition of this bond is that.

"Whereas, Louis R. Hunter claims to be a creditor of the Baker Motor Vehicle Company of New York, in the sum of seventy-five hundred ($7,500) dollars, interest and costs; and

"Whereas, the Baker Motor Vehicle Company of New York is in bankruptcy in the District Court of the United States for the Southern District of New York:

"Now, therefore, witnesseth that, if the Baker Motor Vehicle Company (of Ohio) shall pay, or cause to be paid, to the said Louis R. Hunter such sum or sums as he, the said Louis R. Hunter, may be entitled in law to receive, out of the amount received by James N. Rosenberg, receiver in bankruptcy of the Baker Motor Vehicle Company of New York, for distribution to creditors of said Baker Motor Vehicle Company of New York, upon the said Louis R. Hunter's claim as it is set up in a certain suit now pending in the Supreme Court of the State of New York, County of Oswego, wherein the said Louis R. Hunter is plaintiff and Clarence B. Rice and the C. B. Rice Company are defendants, then this obligation to be null and void; otherwise, to remain in full force and effect.

"The Baker Motor Vehicle Company,
"[Seal.] By Fred R. White, V. Pres.
"R. C. Norton, Secy. and Treas.
"American Bonding Company of Baltimore,
"By Jas. L. D. Kearney, Res. Vice President."

The defendant Baker Motor Vehicle Company, the Ohio corporation, took the entire property in bulk on this receiver's sale for far less than its value, a sum sufficient to pay a small percentage only of the debts, not including the plaintiff, who, as a condition of assenting to such sale, exacted the said agreement to pay him—

"such sum or sums as he may be entitled to *in law* (not bankruptcy proceedings) out of the amount received by the receiver herein (the bankruptcy proceedings) for distribution to creditors on said Louis R. Hunter's claim as set up in a certain suit pending in the Supreme Court of New York, County of Oswego, wherein Louis R. Hunter is plaintiff and Clarence B. Rice and the C. B. Rice Company are defendants."

"[Signed] The Baker Motor Vehicle Company,
"By George H. Kelly, Its Attorney.
"Louis R. Hunter,
"By William D. Reed, His Attorney."

The bankruptcy proceedings have not been heard of since, and it is conceded that no adjudication was made or further proceedings taken, unless to confirm such sale. The actual value of the property that went to such receiver was at least $40,000, but it was sold to the defendant company for $18,000. If it was the understanding and intention of the parties to such agreement, or contemplated by them in making and signing the agreement, that Hunter, when his claim was established—that is, liquidated in the suit in the Supreme Court—and presented and proved in the bankruptcy proceedings, was to have his percentage of what the property sold for only, there was no necessity for the agreement. That was assured in any event. The bankruptcy proceedings were pending; the receiver had been appointed by the court, and he and hence the court itself had the property. It was in

custodia legis, and nothing could deprive Mr. Hunter, the plaintiff, of his percentage, if he had a claim against the Baker Motor Vehicle Company of New York, and which fact had been conceded. The receiver was under bonds, and the trustee, when appointed, would be under bonds, to safely keep, etc., this property, so it might be distributed in due course to creditors. It is self-evident that the purpose and intent was to eliminate Mr. Hunter from the proceedings, allow the property to be purchased by this defendant, the Baker Motor Vehicle Company, taken by it at less than its value on its agreeing to pay and giving bond to pay in full the claim of Mr. Hunter when established in the Supreme Court. Otherwise the giving of the agreement and bond was an idle ceremony, and Mr. Hunter was no better off than he would have been without such bond and agreement, unless it be that as the claim was originally against the Rice Company, and it was out of business and without assets, which had been transferred to the alleged bankrupt, Baker Motor Vehicle Company of New York, it was the purpose to make it *sure* that the claim would be recognized as a valid and legal claim against that corporation when presented as such, if so presented, or, if not, that then the Baker Motor Vehicle Company of Ohio, this defendant, would pay Hunter a sum equal to what such dividend would amount to.

The property of the Rice Company, Mr. Hunter's debtor, had gone into the possession of the Baker Motor Vehicle Company of New York under the circumstances stated, and without any consideration whatever, except the agreement to assume and pay the debts of said Rice Company as hereinbefore set forth. In truth this was but a transfer to the real owner of the assets. Such bankruptcy proceedings having been commenced, these assets and others, or their proceeds, were to be transferred to the Baker Motor Vehicle Company, the defendant corporation, by the receiver, which in fact was but a return to it of its own property; and the question is what sum, if anything, the plaintiff, Louis R. Hunter, was entitled to receive or collect, not from such property or assets, his claim against the Rice Company then in litigation having been thereafter duly and judicially established by a judgment, but what sum was and is he entitled to recover from these defendants? Do the words "in law" and "out of the amount received by the receiver herein," etc., cut off and exclude any equitable remedy Hunter had, and limit him to what he could have recovered in an action at law against the Baker Motor Vehicle Company of New York and the assets held in the name of that corporation? Is that the meaning and effect? Or do those words mean what Hunter was legally entitled to recover in any form of action from such corporation, the defendant, on account of its having received, and being the owner under the circumstances stated of, the entire assets of the Rice Company? And the words "amount received," do they mean the amount of *money* actually received by such receiver, or the value of the property that came into the receiver's hands?

[1] Reading the agreement and bond, in writing, and considering them in connection with all the facts and circumstances then existing and those which had existed prior to their execution, and also considering what was proposed to be done and the court was asked to do, we

are to arrive at our conclusion. The agreement was signed by an attorney acting for the plaintiff here, the objector in the bankruptcy court, and his authority has not been questioned or disproved. This action does not seek to set aside, cancel, or annul that agreement. In fact, the action is based on the agreement and bond. The assets of a corporation belong to it, and are held in trust for the carrying on of its business, and the payment of its just debts and obligations; the balance, if any, for its stockholders. Such assets in equity constitute a trust fund for such purposes. They may be followed into the hands and possession of any one who has them, and who obtained them through fraud or without consideration. Here the defendant the Baker Motor Vehicle Company of Ohio does not occupy the position of a purchaser in good faith and for value, and the Baker Motor Vehicle Company of New York occupied no such position. This entire business from start to finish was that of the Baker Motor Vehicle Company, and its doing the business in the names of others, corporations or individuals, either for convenience or safety, did not and does not change this fact. The debt due Hunter was its debt, and the business and property on which Hunter relied, and had the right to rely, was in fact the property and business of that company, defendant here. It is true that this plaintiff did not know that fact, and the truth has developed gradually.

[2] It is not necessary, in view of all the facts, for this plaintiff to rely on any equitable lien on the property of the one corporation transferred to the other without consideration, and then to the real owner, and seek to have that lien declared and impressed on such property or its proceeds in the hands of either corporation. This plaintiff waived nothing, as the doctrine of waiver rests on full knowledge of the facts. 7 Am. & Eng. Encyclopedia of Law, p. 155, citing several cases. It is there said:

"Waiver implies knowledge, and one cannot be held to have forfeited any rights by reason of acts done in ignorance of the extent of those rights. Thus, if workmanship contracted for has been inadequately performed, one who accepts it in ignorance of the deficiency does not waive his right to insist upon the defect. So, too, if he has been put off his guard or misled by the conduct of the other party, a waiver induced by such deception will not be charged against him."

In 40 Cyc. 252, 253, 254, and 256, it is said, citing cases:

"The act of waiving, or not insisting on, some right, claim, or privilege; a foregoing or giving up of some advantage, which, but for such waiver, the party would have enjoyed; an election by one to dispense with something of value, or to forego an advantage he might have taken or insisted upon; the giving up, relinquishing, or surrendering some known right; an intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment or waiver of such right; the intentional abandonment or relinquishment of a known right; the relinquishment or refusal to accept a right; a voluntary relinquishment of some right; the voluntary relinquishment of some existing right; the voluntary relinquishment of a known right; a voluntary relinquishment of the right that one party has in his relations to another; the voluntary abandonment or relinquishment by a party of some right or advantage; a voluntary surrender and relinquishment of a right; the voluntary relinquishment or renunciation of some right; the voluntary and intentional abandonment, renunciation, or relinquishment of a known legal right; the voluntary relinquishment of some known right, benefit, or advan-

tage, and which, except for such waiver, the party otherwise would have enjoyed; the voluntary yielding up by a party of some existing right; a neglect or omission to insist upon a matter of which a party may take advantage at the time when it ought to be done, so that it may operate as a trap to the other party, to insist upon it afterwards; the passing by of a thing, or a refusal to accept it; the renunciation of some rule which invalidates the contract, but which, having been introduced for the benefit of the contracting party, may be dispensed with at his pleasure; an implied consent by a failure to object. * * * Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead. Waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do. Waiver involves the acts and conduct of only one of the parties; estoppel involves the conduct of both."

[3] Here plaintiff was ignorant of the facts making the defendant Baker Motor Vehicle Company of Ohio liable for the entire debt. I am of the opinion that the terms of the agreement and bond are sufficiently broad, and the wording of such instruments does not at all limit defendant's actual liability, and that plaintiff may recover the full amount due him. All this property and business came from and started with the Baker Motor Vehicle Company, the Ohio corporation, defendant here, and was placed in the hands of the C. B. Rice Company, a corporation formed to conduct the business of selling such property in New York, and which corporation was dominated, controlled, and really managed by the said defendant corporation for its own benefit. Then, when Mr. Hunter, this plaintiff, was pressing for payment of his claim, then about $7,500, the creditors' agreement was signed by all except this plaintiff, the new corporation, organized with the same name as the Ohio corporation, which was the real owner and manager, and which retained the control and management of this New York corporation, and in fact owned it and all the property, and then, when the claim of Mr. Hunter was about to go to judgment, and when the trial of the case in court could no longer be postponed, and when matters were about to be rounded up, and the claim adjudicated, and proceedings to collect begun, the bankruptcy proceedings were resorted to, and the appointment of a receiver procured, and an injunction against Hunter obtained, and then the transfer, through this receiver, of all the property back to the defendant Baker Motor Vehicle Company of Ohio, was proposed and finally procured, and that corporation took the property for about 50 per cent. of its true value to apply on its alleged claim against the corporation really owned, dominated, and controlled by it. In short, this defendant company or corporation got its property back, but under circumstances which, on the mere face of things, as they appeared from the incorporation papers, would compel Hunter to accept, in payment of a just claim of about $8,000, something like $1,000. It was this that Mr. Hunter was refusing to do and that he refused to do. It was this refusal that led to the making of the agreement and the execution of the bond.

It seems to me clear that, if the parties had had in mind only an agreement to pay Hunter his percentage of his claim as established in the pending suit, treating it as a valid claim against the Baker Motor Vehicle Company of New York, and not anything else, they would have so said in plain and unambiguous terms. That is not what was said in the agreement and bond, although the defendants assert

and claim such is the construction that should be put upon those instruments, and that such only is the legal effect. To this contention this court cannot assent. And I have discovered no equities which at all militate against the construction this court puts upon those instruments, interpreted as they must be in the light of all the surrounding facts and circumstances. The equities all demand that interpretation. The alleged claim of the Baker Motor Vehicle Company of Ohio, the defendant, against this Baker Motor Vehicle Company of New York, its own adjunct, agent, and instrumentality, and in fact part of its own self, was largely in excess of the amount due to this plaintiff, and as against this plaintiff said Baker Motor Vehicle Company of Ohio was not and is not entitled to anything from the property of or in the hands of the Baker Motor Vehicle Company of New York, and which came to the receiver, and even if this case is rested on a percentage of the claims of creditors, excluding the Baker Motor Vehicle Company of Ohio, the plaintiff is entitled to 100 cents on the dollar of its said claim or judgment.

[4] The Ohio company was and is, of course, entitled to all of the property and all of its proceeds after paying all the creditors. The Ohio company was not and is not a creditor entitled to share in that property or its proceeds as against its other creditors. In Re Watertown Paper Company, 169 Fed. 252, 255, 94 C. C. A. 528, 531, 22 Am. Bankr. R. 190, 194, 195, the Circuit Court of Appeals, in this (the Second) circuit, per Noyes, C. J., said:

"Now, it is an elementary and fundamental principle of corporation law that a corporation is an entity separate and distinct from its stockholders and from other corporations with which it may be connected. The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation, or prevent the enforcement against the insolvent estate of the one of an otherwise valid claim of the other. * * * Unless, therefore, it can be shown that some exception to the general rule of separate corporate existence and liability applies in this case, it must follow that the claim of the Pulp Company should have been allowed. The only exceptions to that rule possibly applicable here are: (1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation."

This case is covered by the second exception set forth in the quotation. As between the two corporations the defendant was the owner of all the property. As between the defendant corporation, Baker Motor Vehicle Company, and the said C. B. Rice Company, and then the Baker Motor Vehicle Company of New York, the first-named Baker, etc., Company owned all the assets and property, and was liable for all their debts incurred in the prosecution of the business. As between each of the said companies, Baker Motor Vehicle Company of New York, C. B. Rice Company, and this defendant company, and their creditors, such creditors are entitled to be paid from the assets of such first-named corporation in preference to said defendant Baker Motor Vehicle Company of Ohio. The Baker Company of New York was successor merely of the C. B. Rice Company. The legal fiction of

distinct corporate entity is disregarded, when necessary to do so in order to circumvent fraud, and also when a corporation is so organized and controlled and its affairs are so conducted as merely to make it an instrumentality or adjunct of another corporation. And it matters not how deftly the transaction is concealed by a succession of adjuncts and instrumentalities with corporate names all under one control, nor how many bankruptcies of these adjuncts are put through for the benefit and emolument of the real company or corporation, which in fact owns and controls the business. When, as here, these adjuncts are used as mere agents for all purposes, except the payment of their just debts, the liability of the real managing and controlling corporation is neither released nor shifted, unless by some arrangement or agreement made by the creditor with knowledge of the facts, so as to create either an estoppel or ratification. Any other rule, adopted or sanctioned by the courts, not only defeats justice, but opens the door for the perpetration of the grossest frauds. In Re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609, we have an application of this exception to the general rule of corporate entity. It was there held:

"A partnership engaged in the commission business, and in buying and selling merchandise, acquired for partnership purposes 99 per cent. of the outstanding stock of a manufacturing corporation; the remaining shares being held by relatives of one of the partners. The partners held about equal amounts of the stock, and, as directors and officers, managed the business of the corporation; the partnership taking and selling all of its output. *Held*, that the corporation was merely an agency of the partnership, and its property assets of the bankrupt estate, to which the receivership of such estate would be extended, and the respective rights of partnership and corporate creditors would be determined in the bankruptcy proceedings."

In Gay v. Hudson River Electric Power Company, 187 Fed. 12, 15, 109 C. C. A. 66, the same doctrine was considered, but the order in that case was affirmed on other grounds.

There are other grounds on which, in my opinion, this plaintiff is entitled to recover; but it is not necessary to discuss them. I find and hold that the C. B. Rice Company, a corporation, and the Baker Motor Vehicle Company of New York, a corporation, were in fact mere instrumentalities or adjuncts of the Baker Motor Vehicle Company, the Ohio corporation, this defendant, and organized and managed and controlled by it for the purpose of selling its products and property, and that, in performing these functions and duties for the defendant corporation, the Rice Company incurred this indebtedness and obligation to this plaintiff, and that of the liability the defendant corporation was well aware; that the organization and incorporation of the Baker Motor Vehicle Company of New York was procured by the defendant corporation, and managed and controlled by it, not only to sell its own products, but for the purpose of taking over the assets in the hands of the Rice Company, and to defeat the claim of this plaintiff; that nevertheless the Baker Motor Vehicle Company of New York, having received all the assets and having assumed the indebtedness, including that to the plaintiff, all with the knowledge and at the instigation of defendant, became liable for such indebtedness to the plaintiff, as was the defendant itself, of course; that the defendant corporation took part in the bankruptcy proceedings and obtained

the assets through the form of a sale to it; that as against this plaintiff the defendant, both at law and in equity, was not entitled to share in the proceeds of such assets as a creditor; and that, excluding the the defendant Baker Motor Vehicle Company as a creditor in distribution, there was sufficient to pay this plaintiff in full, and that plaintiff is entitled to recover of the defendant Baker Motor Vehicle Company and its surety, American Bonding Company of Baltimore, the sum of $8,329.75 and interest thereon from February 4, 1908, less amount owing by plaintiff to Baker Motor Vehicle Company of New York, $692.69, with interest thereon from October 14, 1908, or $11,128.02, and also costs of this action.

There will be a judgment accordingly, with costs.

UNITED STATES v. WEEKS.

SAME v. WOOD & SELICK.

(District Court, S. D. New York. October 28, 1912.)

Nos. 4–425, 4–426, 4–427, 4–500.

1. INDICTMENT AND INFORMATION ⟸4—FOOD AND DRUGS ACT—VIOLATION—PROSECUTION BY INFORMATION.

Prosecution for violation of Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1913, §§ 8717–8728), by information, is proper.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 24–27; Dec. Dig. ⟸4.]

2. FOOD ⟸15—FOOD AND DRUGS ACT—VIOLATION—MISBRANDING—"COMPOUND."

Where a package labeled "Fruit Wild Cherry Compound" contained an imitation of Wild Cherry essence in part for the genuine Fruit Wild Cherry, there was no violation of the Food and Drugs Act by misbranding, since the word "compound" was a noun indicating that the Fruit Wild Cherry was in composition or combination with something else; the term meaning a mere combination of two or more elements, ingredients, or parts, a compound substance.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⟸15.

For other definitions, see Words and Phrases, First and Second Series, Compound.]

3. FOOD ⟸15—FOOD AND DRUGS ACT—STATEMENT OF INGREDIENTS.

The Food and Drugs Act does not require that ingredients of a compound, not poisonous or deleterious, be stated on the package.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⟸15.]

4. FOOD ⟸5—FOOD AND DRUGS ACT—VIOLATION—COLORING.

The coloring of a compound is not in violation of the Food and Drugs Act so long as it is the proper and natural result of the mere combination of the elements of the compound, and not of the addition of artificial coloring.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. ⟸5.]

5. FOOD ⟸15—FOOD AND DRUGS ACT—MISBRANDING.

The labeling of a package, consisting chiefly of imitation of Wild Cherry essence artificially colored, as "Fruit Wild Cherry Compound," was a violation of the Food and Drugs Act by misbranding, since the phrase "Fruit Wild Cherry Compound" conveys a representation that

the dominant element in the combination is genuine Fruit Wild Cherry, to which has been added something else in the nature of an essence to make the product as labeled.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⊂=15.]

Upon informations against Oscar J. Weeks and others charging the misbranding of food. Defendants moved to quash. Motion denied. See, also, 224 Fed. 64.

Henry A. Wise, U. S. Atty., and H. Snowden Marshall, and Walter Jeffreys Carlin, all of New York City, for defendant.

MAYER, District Judge. There are four cases, and the defendants have filed motions to quash in each. As to the three cases (4–426, 4–425, and 4–427), I decided on oral argument favorably to the government's contention on all but one point, and upon that I reserved decision.

[1] The proposition in question is that the informations should be quashed because they are not supported by verification or oath showing personal knowledge or probable cause. The proceeding by information, as in this case, is an ancient method of procedure, which has come to us from the common law of England, and it is well settled that this method of procedure is proper here. The law on the subject is concisely stated in Bishop on Criminal Procedure.

The demurrers in three of the cases are therefore disallowed.

[2] In the case against Weeks (No. 4–500), demurrer has been interposed upon the additional ground that the counts of the information and each of them are insufficient and fail to charge an offense. The information is in two counts. In the first count the information states that the article of food was labeled as follows:

"Fruit Wild Cherry Compound. Guaranteed to contain no Ether or Chloroform. From O. J. Weeks & Co. Specialties for Manufacturing Bakers, Confectioners and Ice Cream Makers, New York, N. Y. U. S. Serial Number 2049." "Guaranteed under the Food and Drugs Act, June 30, 1906"

—and being so labeled was adulterated, in that a substance, to wit, an imitation Wild Cherry essence, had been mixed and packed with the article of food purporting to be Fruit Wild Cherry Compound, so as to reduce and lower and injuriously affect the quality and strength of the article. It is further stated that the article is adulterated, in that an imitation Wild Cherry essence had been substituted in part for the genuine article, Fruit Wild Cherry, which the article purports to be, and further that the article is adulterated, in that it has been colored in a manner whereby inferiority is concealed.

Briefly, the information attacks the propriety of the label. It is obvious from reading the label that there is no suggestion that the article purports to consist wholly of Fruit Wild Cherry. The very phraseology negatives any such suggestion. In this connection it may be well to comment on Frank v. United States, 192 Fed. at page 869, 113 C. C. A. at page 193, cited by the government. There it will be

noted that the article was called "Compound White Pepper." The court said:

"A primary label, 'White Pepper Compound,' would doubtless fairly indicate that the article is a compound of white pepper and some other ingredient. * * *"

Then the court goes on to say that the term "Compound White Pepper" does not necessarily import the same idea as "White Pepper Compound," and calls attention to the fact that the adjective "compound" is sometimes used colloquially as meaning "having added strength." But the word "compound" in the case at bar, as in the phrase "White Pepper Compound," is a noun, and indicates that the Fruit Wild Cherry is in composition or combination with something else. A good many dictionary definitions will be found, and it is necessary only to cite one which is concise and clearly stated:

"That which is compound or compounded; anything that is a combination of two or more elements, ingredients or parts; a compound substance." Standard Dictionary.

Assuming that the article does not contain any added poisonous or deleterious ingredients, there is nothing to prevent the combination of Fruit Wild Cherry with an imitation Wild Cherry essence, and it is obvious that the purchaser is at once notified by the title that the article in question does not consist wholly of Fruit Wild Cherry, but that Fruit Wild Cherry is only one of the ingredients, in combination with other ingredients.

[3] The government asks me to hold that the ingredients of the compound must be stated on the package. I find no warrant in the statute for any such holding. The statute was carefully drawn after extended discussion, and certainly, if Congress had intended that the ingredients of a compound should be set forth upon the label, the statute would have so stated. I have not overlooked the case of William Henning & Co. v. United States, 193 Fed. 52, 113 C. C. A. 382. In the report of that case there is nothing to indicate how the label read, and for all I know it may have been subject to the criticism for use of the word "compound" as in the Frank Case, or there may have been some other fact which contributed to the decision.

[4] The statement under this count that the article had been colored in a manner whereby inferiority is concealed is of no consequence. The coloring may have been the proper and natural result of the combination. There is in this count no allegation of artificial coloring.

For the reasons briefly outlined, the demurrer to this count is sustained.

[5] The second count refers to the same label, but here it is stated that the article consists chiefly of imitation "Wild Cherry essence artificially colored." This, to my mind, presents an entirely different situation. I think the phrase or name "Fruit Wild Cherry Compound" conveys to the mind a representation that the dominant element in the combination is genuine Fruit Wild Cherry, and that to this genuine Fruit Wild Cherry has been added something else, for instance, in the nature of an essence or extract, which, in combination with the genu-

ine Fruit Wild Cherry, makes the "Fruit Wild Cherry Compound." Of course, the purpose of the statute as to misbranding was to prevent deception of the public, and if it be shown that the dominant element in this compound is the imitation essence, and not the fruit, then it seems to me the statute has been violated.

In this count the statement is made that the article consists chiefly of an imitation "Wild Cherry essence artificially colored." When I use the expression "dominant," I do not mean that necessarily the Fruit Wild Cherry must be greater in volume than the imitation essence. Sometimes one element of combination, by reason of its character and strength, even if smaller in quantity than another element, may nevertheless control the character of the combination. This, and questions relevant to it, can best be developed on the trial, when the court and jury will have the benefit of expert explanation.

I think it unwise on demurrer to pass upon the question raised as to artificial coloring, and that a much more satisfactory result will be attained when the court is enlightened upon the trial upon this subject, and it is not necessary to pass upon this point, because I have already indicated that I shall disallow the demurrer to this count in any event.

For the reasons stated, the demurrer to the second count is disallowed.

In re GROSSMAN.

(District Court, S. D. New York. March, 1915.)

1. ACKNOWLEDGMENT ⟸20—BANKRUPTCY—POWER OF ATTORNEY TO REPRESENT CREDITOR.

A power of attorney to represent creditors in the election of a trustee cannot legally be acknowledged before the attorney to whom the power runs as a commissioner of deeds.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 104–111; Dec. Dig. ⟸20.]

2. BANKRUPTCY ⟸125—REVIEW OF ACTION OF REFEREE—WHO MAY MAINTAIN PROCEEDINGS.

A defeated candidate for trustee has no standing or interest which entitles him to maintain a proceeding to review the action of the referee in excluding votes, which can only be done by a creditor whose vote was excluded or by his representative.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 170, 180, 181, 183, 184; Dec. Dig. ⟸125.]

In Bankruptcy. In the matter of Isadore Grossman, bankrupt. On petition to review the action of the referee in excluding from consideration votes cast by a commissioner of deeds acting under a power of attorney acknowledged before himself. Affirmed.

Archibald Palmer, of New York City, for petitioner.

Joffe & Strausman, of New York City (Joseph Joffe, of New York City, of counsel), for respondent.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

HOUGH, District Judge. [1] The power is so drawn as to run to two persons—one, the attorney who brings on this proceeding; and the other, the commissioner of deeds, who is in the attorney's office.

I see no reason to disagree with the ruling of Brown, J., in the case relied upon by the referee, In re Sugenheimer (D. C., N. Y.) 1 Am. Bankr. Rep. 425, 91 Fed. 744; and Mr. Joffe has furnished a long and accurate list of decisions to the same effect in other states. I am content to follow, not only Judge Brown's ruling, but that of our state courts in Armstrong v. Combs, 15 App. Div. 246, 44 N. Y. Supp. 171. Apart from any technical reasons, it is obviously dangerous practice to permit a person authorized to take affidavits and acknowledgments to do so "before himself." Affidavit making is easy enough under any circumstances, but to permit a notary public or commissioner of deeds to solemnly attest to his own veracity or identity is going a great deal too far.

[2] There is another technical defect in this proceeding which should be pointed out in the interests of good practice. This petition for review is taken by the receiver, who was a candidate for the office of trustee, and was defeated by the rejection of the self-executed powers of attorney. I do not think that any right of Mr. Clark was violated by the referee's ruling. It is true that he was defeated for the office of trustee; but he had no interest in that office, nor any right to be trustee.

The only persons who could appeal by petition for review were those whose votes had been cast out. I think the commissioner of deeds could have appealed, but that would only have been by reason of his representation of the creditors, who were the real parties in interest.

The petition is dismissed, and the decision affirmed.

MEMORANDUM DECISIONS

GOODYEAR TIRE & RUBBER CO. v. HOOD RUBBER CO. (Circuit Court of Appeals, First Circuit. July 16, 1915.) No. 1108. Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge. H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for appellant. William F. Hall, of Washington, D. C. (Ellis Spear, Jr., of Boston, Mass., and James M. Spear, of Washington, D. C., on the brief), for appellee. Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. We have carefully examined and considered the record in this case, and the opinion of the District Court, together with the arguments before us. We are satisfied with the exhaustive reasoning of that court, and with the result reached, and we view the case as one so plainly against the complainant as to render further discussion unnecessary. The decree of the District Court (224 Fed. 978) is affirmed, with costs of this court.

INVESTMENT REGISTRY CO., Limited, v. CHICAGO & M. ELECTRIC R. CO. GRIFFITHS v. WESTERN TRUST & SAVINGS BANK et al. (Circuit Court of Appeals, Seventh Circuit. May 28, 1914.) No. 2124. Appeal from the District Court of the United States for the Eastern District of Wisconsin. For opinion below, see 213 Fed. 492. Julius Moses, of Chicago, Ill., for appellant. Levy Mayer and Lessing Rosenthal, both of Chicago, Ill., for appellees.

PER CURIAM. Motion to dismiss heard, and appeal dismissed.

INVESTMENT REGISTRY, LIMITED, OF LONDON, ENGLAND, v. CHICAGO & M. ELECTRIC R. CO. et al. (Circuit Court of Appeals, Seventh Circuit. January 8, 1915.) No. 2072. Appeal from the District Court of the United States for the Eastern District of Wisconsin. Lyman G. Wheeler, of Milwaukee, Wis., for appellant. I. A. Fish, of Milwaukee, Wis., for appellees.

PER CURIAM. Decree (204 Fed. 500) affirmed.

IRVING–PITT MFG. CO. v. TWINLOCK CO. (McMILLAN BOOK CO., Intervener). (Circuit Court of Appeals, Second Circuit. July 26, 1915.) No. 259. Appeal from the District Court of the United States for the Southern District of New York. William W. Dodge, of New York City (F. P. Fish, of New York City, of counsel), for appellant. John C. Pennie, of New York City, for appellee. Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed, with costs, on the opinion below (220 Fed. 325).

PALERMO LAND & WATER CO. v. RAILROAD COMMISSION OF CALIFORNIA et al. (Circuit Court of Appeals, Ninth Circuit. October 7, 1915.) No. 2666. Appeal from the District Court of the United States for the Second Division of the Northern District of California. McCutchen, Olney & Willard, of San Francisco, Cal., for appellant. Douglas Brookman, of San Francisco, Cal., for appellees.

For opinion below, see 227 Fed. 708.

PER CURIAM. Dismissed, without costs to either party, pursuant to stipulation of counsel for respective parties.

REXFORD v. SOUTHERN WOODLAND CO. et al. (Circuit Court of Appeals, Fourth Circuit. September 16, 1915.) No. 1313. Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry G. Connor, Judge. Benjamin F. Martin, and Joseph A. McCullough, both of Greenville, S. C., and Joseph F. Ford, of Asheville, N. C. (McCullough, Martin & Blythe, of Greenville, S. C., and Lee & Ford and James H. Merrimon, all of Asheville, N. C., on the brief), for appellant. Julian Mitchell, of Charleston, S. C. (Mitchell & Smith, of Charleston, S. C., on the brief), for appellees. Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. The opinion of the District Judge (208 Fed. 295) convincingly sustains the decree, and we think nothing of substance can be added. Affirmed.

STROUT v. UNITED SHOE MACHINERY CO. et al. (Circuit Court of Appeals, First Circuit. July 15, 1915.) No. 1100. In Error to the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge. Action at law by Charles A. Strout, trustee, against the United Shoe Machinery Company and others. Judgment for defendants (224 Fed. 1016), and plaintiff brings error. Affirmed. Alexander Lincoln, of Boston, Mass. (Whipple, Sears & Ogden and Sherman L. Whipple, all of Boston,

Mass., on the brief), for plaintiff in error. C. A. Hight, of Boston, Mass. (Coolidge & Hight, of Boston, Mass., on the brief), for defendants in error. Before PUTNAM and BINGHAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. This case was before the District Court on varying phases of pleadings arising out of the defense of the statute of limitations, with judgment for the defendants. The case was followed up by the plaintiff with much ingenuity and industry, but all the phases evoked by him were finally overruled by the District Court in several opinions dealing with each of them. The questions presented before us are questions of special pleading, which are not likely to be involved as a precedent of any consequence, and the opinions as to which fully dealt with, and clearly disposed of, the changing conditions of the case. Nothing would be gained by the parties or the public by enlarging on what was done by the District Court. Therefore we merely approve what it did, without further elaboration. The judgment of the District Court is affirmed, and the defendants below recover their costs of appeal.

W. J. VAN SCHUYVER & CO. v. BREEDMAN. (Circuit Court of Appeals, Ninth Circuit. October 2, 1915.) In Error to the District Court of the United States for the Third Division of the Territory of Alaska. Donohoe & Dimond, of Valdez, Alaska, for plaintiff in error. R. E. Capers, of Cordova, Alaska, for defendant in error.

PER CURIAM. Dismissed by the clerk under rule 20, pursuant to stipulation of counsel for respective parties, without costs to either party.

WONG BACK SUE v. CONNELL, Immigration Inspector. Ex parte WONG BACK SUE. No. 2611. (Circuit Court of Appeals, Ninth Circuit. October 5, 1915.) Appeal from the District Court of the United States for the Southern Division of the Southern District of California. W. W. Hyams, Thomas A. Sanson, and Duke Stone, all of Los Angeles, Cal., for appellant. Albert Schoonover, U. S. Atty., and Mansel G. Gallaher, Asst. U. S. Atty., both of Los Angeles, Cal., and M. A. Thomas, Asst. U. S. Atty., of San Francisco, Cal., for appellee.

PER CURIAM. Dismissed for noncompliance by appellant with rules 23 and 24 (failure of appellant to print record, under rule 23, and to file a printed brief, under rule 24).

END OF CASES IN VOL. 225